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In The

Supreme Court of the United States

October Term, 1964

No. 1 17 1 Original

STATE OF NEBRASKA, PLAINTIFF,

v.

STATE OF IOWA, DEFENDANT.

MOTION FOR LEAVE TO FILE BILL OF COMPLAINT, STATEMENT IN SUPPORT OF MOTION, AND COMPLAINT

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STATE OF IOWA, DEFENDANT.

MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

Now comes the State of Nebraska, by its Attorney General and moves the Court for leave to file the Bill of Complaint submitted herewith. The State of Nebraska seeks to bring this suit under the authority of Article III, Section 2, Clause 2 of The Constitution of the United States.

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STATEMENT IN SUPPORT OF MOTION

The purpose of this litigation is to resolve the controversy between the Plaintiff, The State of Nebraska, and the Defendant, The State of Iowa, growing out of the actions of the State of Iowa in attempting to unilaterally abrogate the Iowa-Nebraska Boundary Compact of 1943 and in attempting to assert title to lands which prior to 1943 had been within the jurisdiction of the State of Nebraska and title to which had been in citizens of the State of Nebraska.

Prior to the extensive work along the Missouri River's length by the U. S. Army Corps of Engineers and the construction of upstream control dams, the river comprising the boundary between these two states was a notoriously unpredictable and unreliable force. Through the years, islands have appeared and disappeared and the banks and channels have constantly shifted between the bluffs which are sometimes miles apart. The boundary between Iowa and Nebraska has therefore likewise been a constantly shifting thing.

Prior to 1943, as the river became more and more stable, much bottom land had avoided the periodic flooding and many large islands had formed and in many cases become attached to one bank or the other. Much of this land had been settled by citizens claiming Nebraska residence and The State of Nebraska had exercised its jurisdiction over the land and the residents without question or interference by the State of Iowa. Certain of these lands were found on the easterly side of the main channel or Thalweg after the more or less final stabilization of the channel by the work of the Engineers, however, the Iowa-Nebraska Compact of 1943, duly ratified by the two States and by the Con-

gress of the United States provided that although the boundary would thenceforth be the center line of the proposed stabilized channel of the Missouri River as established by the U. S. Engineers Office, Omaha, Nebraska, that nevertheless, "Titles, mortgages, and other liens good in Nebraska shall be good in Iowa as to any lands Nebraska may cede to Iowa and any pending suits or actions concerning said lands may be prosecuted to final judgment in Nebraska and such judgments shall be accorded full force and effect in Iowa."

The lands involved in this controversy are richly productive farm land in many cases and have been cleared of wild growth and improved at considerable expense by individuals claiming ownership and have been conveyed between private individuals under claim of title without notice of any claim or right in the State of Iowa. It is estimated (without actual knowledge of the extent of the ambition of Defendant) that there may be as much as 15,560 acres involved in this dispute having a value of several million dollars.

Because of the doctrine of Iowa law whereby the State is held to own from the high water mark to the center of the bed of the stream, the State of Iowa has laid claim to certain lands which were ceded by Nebraska in the Boundary Compact of 1943. A project has been launched to seize these lands for the State of Iowa, ostensibly for recreational development.

To the extent that this project seeks to quiet title in the State of Iowa to lands ceded by Nebraska in 1943, the action of the State of Iowa is a violation of the Iowa-Nebraska Boundary Compact of 1943 and Article IV, Section 1 of the Constitution of the United States.

The complaint seeks to restrain and permanently enjoin the State of Iowa from violating the Iowa-Nebraska Boundary Compact of 1943 and from interfering with the rights of citizens of either State which were secured to them by the laws of the State of Nebraska prior to 1943.

It is respectfully submitted that the motion for leave to file the Bill of Complaint should be granted.

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October Term, 1964

No. _____, Original

STATE OF NEBRASKA, PLAINTIFF

v.

STATE OF IOWA, DEFENDANT

COMPLAINT

The State of Nebraska, by its Attorney General, brings this suit against the defendant, the State of Iowa, and for its cause of action states:

I.

The original jurisdiction of this Court is invoked under Article III, Section 2, Clause 2, of the Constitution of the United States and 28 U.S.C., Sec. 1251(a)(1) (1948).

II.

The State of Iowa was admitted into the Union in 1846 with boundaries as follows:

> Beginning in the middle of the main channel of the Mississippi River, at a point due east of the middle of the mouth of the main channel of the Des Moines River; thence up the middle of the main channel of the said Des Moines River, to a point on said river where the northern boundary

line of the State of Missouri, as established by the constitution of that State, adopted June twelfth, eighteen hundred and twenty, crosses the said middle of the main channel of the said Des Moines River; thence, westwardly, along the said northern boundary line of the State of Missouri, as established at the time aforesaid, *until an extension of said line intersect the middle of the main channel of the Missouri River; thence, up the middle of the main channel of the said Missouri River, to a point opposite the middle of the main channel of the Big Sioux River, according to Nicollet's map;* thence, up the main channel of the said Big Sioux River, according to said map, until it is intersected by the parallel of forty-three degrees and thirty minutes north latitude; thence east, along said parallel of forty-three degrees and thirty minutes, until said parallel intersect the middle of the main channel of the Mississippi River; thence, down the middle of the main channel of said Mississippi River, to the place of beginning.

III.

The State of Nebraska was admitted into the Union in 1867 with boundaries as follows:

Commencing at a point formed by the intersection of the western boundary of the state of Missouri with the fortieth degree of north latitude; extending thence due west along said fortieth degree of north latitude to a point formed by its intersection with the twenty-fifth degree of longitude west from Washington; thence north along said twenty-fifth degree of longitude to a point formed by its intersection with the forty-first degree of north latitude; thence west along said forty-first degree of north latitude to a point formed by its intersection with the twenty-seventh degree of longitude west from Washington; thence north along said twenty-seventh degree of west longitude to a point formed

by its intersection with the forty-third degree of north latitude; thence east along said forty-third degree of north latitude to the Keya Paha river; thence down the middle of the channel of said river, with its meanderings, to its junction with the Niobrara river; thence down the middle of the channel of said Niobrara river, and following the meanderings thereof, *to its junction with the Missouri river; thence down the middle of the channel of the said Missouri river, and following the meanderings thereof, to the place of beginning.*

IV.

Controversy developed between Nebraska and Iowa concerning the boundary between the two states and on October 21, 1890, the State of Nebraska filed an action captioned "*Nebraska vs. Iowa,* No. 4 Original," in the Supreme Court of the United States requesting the Court to ascertain and establish the boundary between Nebraska and Iowa. This case resulted in the opinion found in *Nebraska v. Iowa,* 143 U.S. 359, 12 S.Ct. 396, 36 L. Ed. 186 (1892) in which the Court determined that the boundary between Iowa and Nebraska was the center of the main channel of the Missouri River and that boundary moved with the changes of the channel where the alteration was gradual or imperceptible by the process known as accretion, but, where the river suddenly abandoned its old bed and sought a new bed by the process known as avulsion, the boundary remained the center of the abandoned river channel. The case resulted in the Decree found at 145 U. S. 519, 12 S. Ct. 976, 36 L. Ed. 798 (1892) establishing the then boundary between Nebraska and Iowa.

V.

Because of the peculiar character of the Missouri River, the rapidity of the current, the course of the

river, and the soil through which it flows, many natural changes, by avulsion, accretion, and reliction, have occurred in the Missouri River since 1892. During the period of the 1930's the United States Army Corps of Engineers commenced a program of channel stabilization along the Missouri River, which program has continued up to the present time. Part of this program consisted of the construction of dikes and revetments and in dredging operations, all of which in many areas along the Missouri River diverted the Missouri River from its normal course into a new and stabilized channel. As a result of the natural and man-made changes, land belonging to Nebraska became situated on the easterly or Iowa side of the Missouri River and land belonging to Iowa became situated on the westerly or Nebraska side of the Missouri River, and it became almost impossible to determine the exact boundary between Iowa and Nebraska in many places at any given time in the past.

VI.

In 1943, Iowa and Nebraska entered into the Iowa-Nebraska Boundary Compact establishing the boundary line between Iowa and Nebraska by agreement which was approved by Act of Congress July 12, 1943, Ch. 220, 57 U. S. Stat. At Large 494. A copy of the Iowa Act which was ratified by the Iowa legislature and approved on April 15, 1943 is attached hereto and marked Exhibit "A". A copy of the Nebraska Act which was ratified by the Nebraska legislature and approved on May 7, 1943, is attached hereto and marked Exhibit "B".

VII.

The Iowa-Nebraska Boundary Compact redefined the boundary between Iowa and Nebraska as the middle of

the main channel of the Missouri River, being the center line of the proposed stabilized channel of the Missouri River as established by the United States Engineers' office, Omaha, Nebraska, and shown on the alluvial plain maps of the Missouri River from Sioux City, Iowa, to Rulo, Nebraska, and identified by file numbers AP-1 to 4, inclusive, dated January 30, 1940, and file numbers AP-5 to 10, inclusive, dated March 29, 1940, which maps are now on file in the United States Engineers' office at Omaha, Nebraska, and copies of which maps are now on file with the Secretary of State of the State of Iowa and with the Secretary of State of the State of Nebraska.

VIII.

In addition to establishing the boundary, the Compact as approved by the Iowa legislature contained the following provisions pertinent to this action:

> "Sec. 2. The State of Iowa hereby cedes to the State of Nebraska and relinquishes jurisdiction over all lands now in Iowa but lying westerly of said boundary line and contiguous to lands in Nebraska.
>
> Sec. 3. Titles, mortgages, and other liens good in Nebraska shall be good in Iowa as to any lands Nebraska may cede to Iowa and any pending suits or actions concerning said lands may be prosecuted to final judgment in Nebraska and such judgments shall be accorded full force and effect in Iowa.
>
> Sec. 4. Taxes for the current year may be levied and collected by Nebraska or its authorized governmental subdivisions and agencies on lands ceded to Iowa and any liens or other rights accrued or accruing, including the rights of collection, shall be fully recognized and the county treasurers of the counties affected shall act as agents in carrying out

the provisions of this section: Provided, that all liens or other rights accrued or accruing, as aforesaid, shall be claimed or asserted within five years after this act becomes effective, and if not so claimed or asserted, shall be forever barred."

IX.

Following the Iowa-Nebraska Boundary Compact, many Nebraska citizens possessing land on the easterly or Iowa side of the Missouri River continued in the peaceful use and enjoyment of their land without interference by Iowa governmental authorities during the 1940's and 1950's. Some of this land was placed on the tax rolls of counties in Iowa after the Iowa-Nebraska Boundary Compact. Much of such land had formerly been of little value, consisting of scrub timber, willows and heavy undergrowth and not immediately suited for farming or other productive use. A great deal of money and labor was spent by these owners in the clearing of this land and it has, through their efforts, become useful, productive land with values ranging from approximately $400 to $500 per acre. In January, 1961, the State Conservation Commission of the State of Iowa published a document entitled "Part 1 of the Missouri River Planning Report" introducing a plan by the State of Iowa to acquire "twenty-five potential recreation areas" along the Missouri River. This plan proposed that the State of Iowa institute quiet title actions in an attempt to prove state ownership of approximately twenty-five areas along the Missouri River containing an estimated 15,567 acres of water, land, marsh, and sand dunes. In pursuance of this plan, the Attorney General of the State of Iowa instituted various legal actions and intervened in other actions to attempt to quiet title in the State of Iowa to

much of this property. Some of these actions have been determined in the Supreme Court of Iowa and some are presently pending.

X.

The Supreme Court of the State of Iowa, beginning with the case of *McManus v. Carmichael*, 3 Iowa 1 (1856), has followed the principle of law that the state owns title to the beds of all navigable streams within the State of Iowa to the high water mark and that any islands arising out of the beds of navigable streams in the state belong to the State of Iowa. Chapter 568 of the Iowa Code provides for the disposition and sale by the State of Iowa of all land between high water mark and the center of the former channel of any navigable stream, where such channel has been abandoned so that it is no longer capable of use and is not likely again to be used for the purpose of navigation, and all bars or islands in the channels of navigable streams not previously surveyed or platted by the United States or the State of Iowa and within the jurisdiction of the State of Iowa. The Supreme Court of the State of Nebraska, beginning with the case of *Kinkead v. Turgeon*, 74 Neb. 580, 109 N. W. 744 (1906) reversing 74 Neb. 573, 104 N. W. 1061 (1905) has followed the doctrine that the riparian owner owns to the thread of the channel of navigable streams in Nebraska subject to the public easement of navigation. The State of Iowa, in prosecuting the previously mentioned quiet title actions, has proceeded under the Iowa common law principle of state ownership to the bed of the Missouri River from the high water mark to the thread of the stream and of state ownership of abandoned river channels of the Missouri River, in some cases in complete disregard of the provisions of the Iowa-Nebraska Boundary Compact

and without regard to the state in which such land was formed and the facts surrounding the formation and occupancy or control over said land.

XI.

On March 18, 1963, the State of Iowa filed a Petition in Equity in the District Court of Iowa in and for Mills County captioned "*State of Iowa, Plaintiff, vs Darwin Merrit Babbit, et al,* Equity No. 17433" a copy of which is attached hereto and marked Exhibit "C", attempting to quiet title to certain land in Mills County, Iowa, presently bordering the Missouri River on the eastern or Iowa side. On March 26, 1963, the State of Iowa filed a First Amendment to Plaintiff's Petition in said action, a copy of which is attached hereto and marked Exhibit "D". On April 18, 1963, certain of the defendants filed interrogatories, a copy of which is attached hereto and marked Exhibit "E". On January 14, 1964, the State of Iowa filed answers to interrogatories, a copy of which is attached hereto and marked Exhibit "F" in which the State of Iowa set forth its theory under which it was claiming title to the property, and the State of Iowa filed Plaintiff's Interrogatories, a copy of which is attached hereto and marked Exhibit "G". On January 14, 1964 the State of Iowa also filed a Second Amendment to Plaintiff's Petition, changing the description of the property claimed, a copy of which is attached hereto and marked Exhibit "H". On June 2, 1964, certain defendants in the above case filed Answers and Objections to Plaintiff's Interrogatories, a copy of which is attached hereto and marked Exhibit "I".

XII.

Land claimed by the State of Iowa in the case of *State of Iowa v. Babbit, et al,* had been surveyed by

the County Surveyor of Cass County, Nebraska, in August of 1933 and such survey was filed in the Office of the Register of Deeds of Cass County, Nebraska, on January 3, 1935, and recorded in Plat Book 2, Page 19, and the property had been on the tax rolls of Cass County, Nebraska, prior to the Iowa-Nebraska Boundary Compact. On April 4, 1940, an action to quiet title to some of the property was filed in the District Court of Cass County, Nebraska, and captioned "*Harvey Shipley, et al, v. Frank G. Hall, et al*, Doc. 9, No. 237". A copy of the Decree entered on August 1, 1940, as to part of the land is attached hereto and marked Exhibit "J" and a copy of the Decree entered on June 19, 1941, as to other of the land is attached hereto and marked Exhibit "K". Some of the individuals presently claiming ownership and possession of such land as against the State of Iowa obtained their titles through parties to whom title had been quieted in the case of *Shipley v. Hall.* Prior to the Iowa-Nebraska Boundary Compact, a portion of the property was sold by administrator's sale through proceedings in the District Court of Cass County, Nebraska. Prior to the Iowa-Nebraska Boundary Compact this property, which was surrounded by waters of the Missouri River, was inhabited by Nebraska residents who voted in Nebraska and were included within the census report to the County Superintendent of Cass County, Nebraska. Children living on this land went to school in Nebraska, the birth of a child born upon this land was recorded in the State of Nebraska, and the State of Nebraska at all times took and exercised jurisdiction over these inhabitants and the land involved. The inhabitants of the property at all times considered themselves residents and citizens of the State of Nebraska. The State

of Iowa acquiesced in the possession of said territory by the State of Nebraska and did not exercise or attempt to exercise sovereignty and dominion over this land.

XIII.

The land involved in *State of Iowa v. Babbit* formed as accretions to the Nebraska riparian land of the Missouri River or as an island commencing in the Missouri River on the Nebraska side of the thalweg or boundary, and from the time of such formation, continued under the jurisdiction and dominion of the State of Nebraska until the Iowa-Nebraska Boundary Compact. Action by the United States Army Corps of Engineers in stabilizing the channel of the Missouri River diverted the course of the river so that the thread of the stream following stabilization work and the construction of dikes and revetments clearly caused the land involved to become contiguous to the land on the eastern side of the Missouri River and this land was ceded to Iowa by virtue of the Iowa-Nebraska Boundary Compact, and following the Iowa-Nebraska Boundary Compact, the State of Nebraska continued to assess taxes in accordance with the provisions of Section 4 of the Compact.

XIV.

Approximately the westerly fifty feet of the land described in the second amendment to plaintiff's Petition in *State of Iowa v. Babbit* marked Exhibit "H" is presently in the State of Nebraska and is west of the center line of the proposed stabilized channel of the Missouri River as established by the alluvial plain maps referred to in the Iowa-Nebraska Boundary Compact. This land is not within the jurisdiction of the courts of the State of Iowa, is not owned by the State of Iowa, is

within the jurisdiction of the State of Nebraska, and Iowa's attempt to quiet title to this land constitutes an encroachment upon the sovereignty and territory of the State of Nebraska.

XV.

On March 26, 1963, the State of Iowa filed a Petition in the District Court of Iowa in and for Fremont County, captioned "*State of Iowa, Plaintiff vs. Henry E. Schemmel, et al, Defendants,* Equity No. 19765", a copy of which is attached hereto and marked Exhibit "L". On March 18, 1964, a Separate Answer of Henry E. Schemmel, et al, and Counterclaim was filed in said action, a copy of which is attached hereto and marked Exhibit "M", and on March 18, 1964, a Separate Answer of F. Pace Woods, et al, and Counterclaim was filed in said action, a copy of which is attached hereto and marked Exhibit "N". On April 7, 1964, the State of Iowa filed a Reply to Answer and Answer to Counterclaim of Henry E. Schemmel, et al, a copy of which is attached hereto and marked Exhibit "O" and on the same date the State of Iowa filed a Reply to Answer and Answer to Counterclaim of F. Pace Woods, et al, a copy of which is attached hereto and marked Exhibit "P". Plaintiff is informed and believes that the boundary line between Nebraska and Iowa at the time of the Iowa-Nebraska Boundary Compact was to the east of the land described in said Petition because of prior avulsive action by the Missouri River which resulted in a change in the channel, but not in a change of the boundary between the states. Plaintiff is informed and believes that the channel of the Missouri River as it existed in 1943 at the time of the effective date of the Iowa-Nebraska Boundary Compact was entirely within Nebraska at such place and that, under the terms of

the Iowa-Nebraska Boundary Compact, the State of Iowa recognized that it had relinquished all claim to the ownership of land located in the bed of the Missouri River at that place. In the 1930's the United States Army Corps of Engineers, by dredging and the construction of dikes and revetments, shifted the channel of the Missouri River in such manner that, if it should be determined that the then main channel of the Missouri River did in fact constitute the boundary between Iowa and Nebraska at that place, the boundary did not change, leaving land described in said Petition in the State of Nebraska, though located on the easterly side of the Missouri River. Such land was ceded to Iowa by Nebraska under the provisions of the Iowa-Nebraska Boundary Compact.

XVI.

Some of the defendants named in the action of *State of Iowa v. Schemmel* had paid taxes on the land in the State of Nebraska prior to the Iowa-Nebraska Boundary Compact and their chain of title is traced through previous quiet title actions in the courts of the State of Nebraska. Following the Iowa-Nebraska Boundary Compact, the lands had been placed on the tax rolls of Fremont County, Iowa, and taxes had been paid by said owners to the State of Iowa, and title to some of the property can be traced through a tax sale and deed from the County Treasurer of Fremont County, Iowa.

XVII.

A great deal of time, money and effort has been expended by the defendants in the cases of *State of Iowa v. Schemmel, et al,* and *State of Iowa v. Babbit, et al,* in the clearing of land and cultivation, fertiliza-

tion, and improvement in order to make it productive. In the case of *State of Iowa v. Schemmel, et al,* there are approximately 660 acres of land involved which has a value of $400 to $500 per acre, and in the case of *State of Iowa v. Babbit, et al,* there are approximately 1,990 acres of land involved of the value of approximately $400 to $500 per acre. There are several thousands of other acres along the Missouri River in similar circumstances, the titles to which are being questioned by the State of Iowa and the legal principles determined by the Court in this action should operate to clarify and make more certain the status of this additional land. Unless this matter is determined, the State of Iowa threatens to attempt to obtain title in similar fashion to such other land as evidenced by its Missouri River Planning Report.

XVIII.

Plaintiff alleges that Section 3 of the Iowa-Nebraska Boundary Compact as ratified by the Iowa legislature which provides: "Section 3. Titles, mortgages and other liens good in Nebraska shall be good in Iowa as to any lands Nebraska may cede to Iowa and any pending suits or actions concerning said lands may be prosecuted to final judgment in Nebraska and such judgments shall be accorded full force and effect in Iowa." is applicable to the land involved in the cases of *State of Iowa v. Babbit,* and *State of Iowa v. Schemmel,* and that Iowa, in attempting to obtain title to said land, is in violation of the Iowa-Nebraska Boundary Compact.

XIX.

Prior to and at the time of the adoption of the Iowa-Nebraska Boundary Compact, the boundary line between Iowa and Nebraska had not been determined in

many places and was almost impossible of exact determination without tremendous expense and considerable litigation because of the movements of the Missouri River and the action of the United States Army Corps of Engineers in diverting and changing the channel of the Missouri River in connection with its channel stabilization program. At the time of adoption of the Compact, no procedure was established to identify specific land which was ceded by one state to the other and no procedure was established to identify land transferred from one state to the other by new legal descriptions and section numbers using the designation points of the state to which such land had been ceded, and no machinery was established to place such land of record in the other state. It was the purpose of the Iowa-Nebraska Boundary Compact to establish the boundary line as the center of the stabilized channel of the Missouri River and Sections 3 and 4 were included in the Iowa-Nebraska Boundary Compact in order to protect the titles of individual citizens of both Iowa and Nebraska who claimed title to land along the Missouri River. Both states were aware of the problems of definitely identifying lands which were ceded by one state to the other and a purpose of the Compact was to settle and eliminate controversy. Those claiming title to lands along or in proximity to the Missouri River or its abandoned channels and those claiming title through such persons should not be subject to having their titles questioned by either state. The State of Iowa, by its course of action herein alleged, is thereby attempting to unilaterally abrogate the Iowa-Nebraska Boundary Compact, and Iowa is violating the provisions of Article IV, Section 1 of the Constitution of the United States which provides that "Full faith and credit shall be given

in each State to the Public Acts, Records and judicial Proceedings of every other State."

XX.

The aggressive policies of the State of Iowa have caused great consternation to the State of Nebraska and its citizens and have threatened to result in armed conflict on the part of landowners and the State of Iowa and its representatives. In recognition of the gravity of the problem, the Seventy-third Legislature of the State of Nebraska passed Legislative Resolution 47 on May 28, 1963, a copy of which is attached hereto and marked Exhibit "Q". The problems in connection with the determination of the Iowa-Nebraska boundary have been, and are, of great concern to both states. The problem is compounded by the fact that the alluvial plain maps referred to in the Iowa-Nebraska Boundary Compact are of too small a scale (1″ equals 2,640′) and do not contain sufficient detail for a surveyor to accurately locate the boundary on the ground. At one time it was possible to locate the state boundary from the United States Army Corps of Engineers construction maps (1″ equals 400′) because the river alignment shown on those maps conformed to the alignment as shown on the alluvial plain maps. However, since the Iowa-Nebraska Boundary Compact was ratified, numerous channel re-alignments have been made and the basic 1″ equals 400′ tracings have been revised to show these alignments. Plaintiff has been informed and believes that copies of the 1″ equals 400′ maps which showed the alignment in accordance with the alignment shown on the alluvial plain maps were not retained and it is not possible in many areas to locate the center line of the "proposed stabilized channel" of the Mis-

souri River (within the meaning of the 1943 Compact) on the ground from maps presently on file in the office of the United States Army Corps of Engineers.

XXI.

The State of Nebraska is not, and should not be, required to submit to the jurisdiction of the state courts of Iowa to determine the proper construction of the Iowa-Nebraska Boundary Compact nor to decide its effect as between the two states or the effect upon titles to lands bordering the Missouri River. The State of Nebraska also should not be bound by any determination by the state courts of Iowa as to the location of the Iowa-Nebraska boundary as of any given date. The jurisdiction of the Supreme Court of the United States in boundary disputes between states is exclusive and original, and the jurisdiction of the Supreme Court of the United States in actions between states to construe a boundary compact is exclusive and original.

WHEREFORE, plaintiff prays:

I.

That the Court adjudge and decree that the Iowa-Nebraska Boundary Compact of 1943 settled not only the issue of the sovereignty of the respective states over the lands along the Missouri River bordering the two states but also settled any issues of private ownership of said lands as between the State of Iowa and private citizens with respect to property which has been settled and occupied or as to which the incidents of ownership had been exercised all prior to the ratification and approval of the Iowa-Nebraska Boundary Compact of 1943.

II.

That the Court adjudge and decree that the State of Iowa is bound to recognize the validity of titles, mortgages and other liens to lands lying easterly of the boundary line as established by the Iowa-Nebraska Boundary Compact of 1943 as such titles, mortgages and other liens were recognized in Nebraska prior to the ratification and approval of the said Compact.

III.

That the Court further adjudge and decree that the State of Iowa, by the ratification and approval of the Iowa-Nebraska Boundary Compact of 1943, waived and relinquished any right to claim ownership over lands which prior to 1943 had been on the tax rolls of the State of Nebraska or its authorized governmental subdivisions on lands which had been subject to change by action of the Missouri River and which had been subject to taxation and on which taxes had been levied and collected by Nebraska for the year 1943 and years prior thereto.

IV.

That the Court adjudge and decree that the State of Iowa, in attempting to presently establish ownership over certain lands along the Missouri River by the application of legal principles recognized by the State of Iowa, and particularly with reference to lands which at any time had been governed by the Nebraska principles of law, is in violation of the Iowa-Nebraska Boundary Compact of 1943 and in violation of Article IV, Section 1 of the Constitution of The United States which provides that "Full faith and credit shall be given in each State to the Public Acts, Records and Judicial Proceedings of every other State."

V.

That the Court enforce the Iowa-Nebraska Boundary Compact of 1943 so as to give full effect to its intention to settle completely ownership rights to land along or in proximity to the Missouri River and its abandoned river channels.

VI.

To adjudge and decree that in those places where the boundary between the States of Nebraska and Iowa was a varying line so far as affected by the changes of diminution and accretion in the mere washings of the waters of the Missouri River, and particularly with reference to the period preceding the ratification and approval of the Iowa-Nebraska Boundary Compact of 1943, the State of Iowa could not and did not acquire title or ownership over any lands between the eastern high water mark and the center of the main channel, ownership of which had ever been in private individuals particularly the residents of Nebraska, notwithstanding any principle of Iowa law reserving ownership in the State.

VII.

For an injunction restraining the State of Iowa, its officers, agents and servants from any further prosecution in the cases of *State of Iowa v. Schemmel* and *State of Iowa v. Babbitt* pending the outcome of this proceeding or until further order of this court.

VIII.

That a special master be appointed to take evidence to the extent deemed necessary and report to the Court as to whether the lands involved in the case of *State of*

Iowa v. Babbitt and *State of Iowa v. Schemmel* referred to hereinabove, in whole or in part were formed in and were a part of the State of Nebraska and as Nebraska lands were ceded to the State of Iowa by the Iowa-Nebraska Compact of 1943 and upon the taking of such report that the Court find the State of Iowa did not acquire any claim of ownership or title in such lands.

IX.

That all matters at issue between these two States, pertinent to said Compact, may be heard and determined in such manner as the Court may direct and that all proper inquiries may be had, and decrees and orders entered.

X.

That the Court may retain jurisdiction of this matter, to make such further orders as may be necessary to enforce its decrees; and that Plaintiff may have such other and further relief as to which in equity and good conscience it may be entitled.

CLARENCE A. H. MEYER
Attorney General of Nebraska

JOSEPH R. MOORE
Special Assistant Attorney
General of Nebraska

HOWARD H. MOLDENHAUER
Special Assistant Attorney
General of Nebraska

EXHIBIT "A"

IOWA-NEBRASKA BOUNDARY COMPACT

Ratification by Iowa Legislature

AN ACT

To Establish the Boundary Line Between Iowa and Nebraska by Agreement; to Cede to Nebraska and to Relinquish Jurisdiction Over Lands Now in Iowa but Lying Westerly of Said Boundary Line and Contiguous to Lands in Nebraska; to Provide that the Provisions of this Act Become Effective Upon the Enactment of a Similar and Reciprocal Law by Nebraska and the Approval of and Consent to the Compact Thereby Effected by the Congress of the United States of America and to Declare an Emergency.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF IOWA:

Section 1. That on and after the enactment of a similar and reciprocal law by the State of Nebraska, and the approval and consent of the Congress of the United States of America, as hereinafter provided, the boundary line between the States of Iowa and Nebraska shall be described as follows:

Commencing at a point on the south line of section 20, in township 75 N., range 44 W. of the fifth principal meridian, produced 861½ feet west of the S. E. corner of said section, and running thence northwesterly to a point on the south line of lot 4 of section 10, in township 15 N., of range 13 E. of the sixth principal meridian 2,275 feet east of the S. W. corner of the N. W. ¼ of the S. E. ¼ of said section 10, thence northerly, to a point on the north line of lot 4 aforesaid, 2,068 feet east of the center line of said section 10; thence north, to a

point on the north line of section 10, 2,068 feet east of the quarter section corner on the north line of said section 10; thence northerly, to a point 312 feet west of the S. E. corner of lot 1, in section 3, township 15 N., range 13 E., aforesaid; thence northerly, to a point on the section line between sections 2 and 3, 358 feet south of the quarter section corner on said line; thence northeasterly, to the center of the S. E. ¼ of the N. W. ¼ of section 2 aforesaid; thence east, to the center of the W. ½ of lot 5, otherwise described as the S. W. ¼ of the N. W. ¼ of section 1, in township 15, range 13, aforesaid; thence southeasterly, to a point on the south line of lot 5 aforesaid, 1,540 feet west of the center of section 1, last aforesaid; thence south 2,050 feet, to a point 1,540 feet west of the north and south open line through said section 1; thence southwesterly, to the S. W. corner of the N. E. ¼ of the S. W. ¼ of section 21, in township 75 N., range 44 W. of the fifth principal meridian; thence southeasterly, to a point 660 feet south of the N. E. corner of the N. W. ¼ of the N. E. ¼ of section 28, in township 75 N., range 44 W., aforesaid; and said line produced to the center of the channel of the Missouri river; thence up the middle of the main channel of the Missouri river to a point opposite the middle of the main channel of the Big Sioux river.

Commencing again at the point of beginning first named, namely, a point on the south line of section 20, in township 75 N., range 44 W. of the fifth principal meridian, produced 861½ feet west of S. E. corner of said section, and running thence southeasterly to a point 660 feet east of the S. W. corner of the N. W. ¼ of the N. W. ¼ of section 28, in township 75 N., range 44 W. of the fifth principal meridian, and said line produced to the center of the channel of the Missouri river; thence down the middle of the main channel of

Exhibit

the Missouri river to the northern boundary of the State of Missouri.

The said middle of the main channel of the Missouri river referred to in this act shall be the center line of the proposed stabilized channel of the Missouri river as established by the United States engineers' office, Omaha, Nebraska, and shown on the alluvial plain maps of the Missouri river from Sioux City, Iowa, to Rulo, Nebraska, and identified by file numbers AP-1 to 4 inclusive, dated January 30, 1940, and file numbers AP-5 to 10 inclusive, dated March 29, 1940, which maps are now on file in the United States engineers' office at Omaha, Nebraska, and copies of which maps are now on file with the secretary of state of the State of Iowa and with the secretary of state of the State of Nebraska.

Sec. 2. The State of Iowa hereby cedes to the State of Nebraska and relinquishes jurisdiction over all lands now in Iowa but lying westerly of said boundary line and contiguous to lands in Nebraska.

Sec. 3. Titles, mortgages, and other liens good in Nebraska shall be good in Iowa as to any lands Nebraska may cede to Iowa and any pending suits or actions concerning said lands may be prosecuted to final judgment in Nebraska and such judgments shall be accorded full force and effect in Iowa.

Sec. 4. Taxes for the current year may be levied and collected by Nebraska or its authorized governmental subdivisions and agencies on lands ceded to Iowa and any liens or other rights accrued or accruing, including the right of collection, shall be fully recognized and the county treasurers of the counties affected shall act as agents in carrying out the provisions of this section: *Provided,* that all liens or other rights accrued or accruing, as aforesaid, shall be claimed or

asserted within five years after this act becomes effective, and if not so claimed or asserted, shall be forever barred.

Sec. 5. The provisions of this act shall become effective only upon the enactment of a similar and reciprocal law by the State of Nebraska and the approval of and consent to the compact thereby effected by the Congress of the United States of America. Said similar and reciprocal law shall contain provisions identical with those contained herein for the cession to Iowa of all lands now in Nebraska but lying easterly of said boundary line described in section 1 of this act and contiguous to lands in Iowa and also contain provisions identical with those contained in sections 3 and 4 of this act but applying to lands ceded to Nebraska.

Sec. 6. Whereas an emergency exists, this act shall be in full force and effect, subject to conditions as hereinabove expressed from and after its publication in the Sioux City Journal, a newspaper published at Sioux City, Iowa, and in the Nonpareil, a newspaper published at Council Bluffs, Iowa.

(Signed) Henry W. Burma
Speaker of the House.
(Signed) Robert D. Blue
President of the Senate.

I hereby certify that this Bill originated in the House and is known as House File 437, Fiftieth General Assembly.

(Signed) A. C. Gustafson
Chief Clerk of the House.

Approved April 15th, 1943.
(Signed) Bourke B. Hickenlooper
Governor. (Laws 1943, p. 797.)

Exhibit

EXHIBIT "B"

Ratification by Nebraska Legislature

AN ACT to establish the boundary line between Iowa and Nebraska by agreement; to cede to Iowa and to relinquish jurisdiction over lands now in Nebraska but lying easterly of said boundary line and contiguous to lands in Iowa; to provide that the provisions of this act shall become effective upon the approval of and consent of the Congress of the United States of America to the compact effected by this act and House File 437 of the 1943 Session of the Iowa Legislature; to repeal Chapter 121, Session Laws of Nebraska, 1941; and to declare an emergency.

Be it enacted by the people of the State of Nebraska,

Section 1. That on and after the approval and consent of the Congress of the United States of America to this act and a similar and reciprocal act enacted by the Legislature of the State of Iowa, as hereinafter provided, the boundary line between the States of Iowa and Nebraska shall be described as follows:

Commencing at a point on the south line of section 20, in township 75 N., range 44 W. of the fifth principal meridian, produced 861½ feet west of the S. E. corner of said section, and running thence northwesterly to a point on the south line of lot 4 of section 10, in township 15 N., of range 13 E. of the sixth principal meridian, 2,275 feet east of the S. W. corner of the N. W. ¼ of the S. E. ¼ of said section 10; thence northerly, to a point on the north line of lot 4 aforesaid, 2,068 feet east of the center line of said section 10; thence north, to a point on the north line of section 10, 2,068 feet east of the quarter section corner on the north line of said sec-

tion 10; thence northerly, to a point 312 feet west of the S.E. corner of lot 1, in section 3, township 15 N., range 13 E., aforesaid; thence northerly, to a point on the section line between sections 2 and 3, 358 feet south of the quarter section corner on said line; thence northeasterly, to the center of the S. E. ¼ of the N. W. ¼ of section 2 aforesaid; thence east, to the center of the W. ½ of lot 5, otherwise described as the S. W. ¼ of the N. W. ¼ of section 1, in township 15, range 13, aforesaid; thence southeasterly, to a point on the south line of lot 5 aforesaid, 1,540 feet west of the center of section 1, last aforesaid; thence south 2,050 feet, to a point 1,540 feet west of the north and south open line through said section 1; thence southwesterly, to the S. W. corner of the N. E. ¼ of the S. W. ¼ of section 21, in township 75 N., range 44 W. of the fifth principal meridian; thence southeasterly, to a point 660 feet south of the N. E. corner of the N. W. ¼ of the N. E. ¼ of section 28, in township 75 N., range 44 W., aforesaid; and said line produced to the center of the channel of the Missouri river; thence up the middle of the main channel of the Missouri river to a point opposite the middle of the main channel of the Big Sioux river.

Commencing again at the point of beginning first named, namely, a point on the south line of section 20, in township 75 N., range 44 W. of the fifth principal meridian, produced 861½ feet west of S. E. corner of said section, and running thence southeasterly to a point 660 feet east of the S. W. corner of the N. W. ¼ of the N. W. ¼ of section 28, in township 75 N., range 44 W. of the fifth principal meridian, and said line produced to the center of the channel of the Missouri river; thence down the middle of the main channel of the Missouri river to the northern boundary of the State of Missouri.

Exhibit

The said middle of the main channel of the Missouri river referred to in this act shall be the center line of the proposed stabilized channel of the Missouri river as established by the United States engineers' office, Omaha, Nebraska, and shown on the alluvial plain maps of the Missouri river from Sioux City, Iowa, to Rulo, Nebraska, and identified by file numbers AP-1 to 4 inclusive, dated January 30, 1940, and file numbers AP-5 to 10 inclusive, dated March 29, 1940, which maps are now on file in the United States engineers' office at Omaha, Nebraska, and copies of which maps are now on file with the Secretary of State of the State of Iowa and with the Secretary of State of the State of Nebraska.

Sec. 2. The State of Nebraska hereby cedes to the State of Iowa and relinquishes jurisdiction over all lands now in Nebraska but lying easterly of said boundary line and contiguous to lands in Iowa.

Sec. 3. Titles, mortgages, and other liens good in Iowa shall be good in Nebraska as to any lands Iowa may cede to Nebraska, and any pending suits or actions concerning said lands may be prosecuted to final judgment in Iowa and such judgment shall be accorded full force and effect in Nebraska.

Sec. 4. Taxes for the current year may be levied and collected by Iowa, or its authorized governmental subdivisions and agencies, on lands ceded to Nebraska and any liens or other rights accrued or accruing, including the right of collection, shall be fully recognized and the county treasurers of the counties affected shall act as agents in carrying out the provisions of this section; Provided, that all liens or other rights accrued or accruing, as aforesaid, shall be claimed or asserted within five years after this act becomes effective, and if not so claimed or asserted, shall be forever barred.

Sec. 5. The provisions of this act shall become effective only upon the approval and consent of the Congress of the United States of America to the compact effected by this act and the similar and reciprocal act enacted by the 1943 Session of the Legislature of Iowa as House File 437 of that body.

Sec. 6. That Chapter 121, Session Laws of Nebraska, 1941, is repealed.

Sec. 7. Since an emergency exists, this act shall be in full force and take effect, from and after its passage and approval, according to law.

Approved May 7, 1943. (Laws 1943, c. 130, p. 434.)

EXHIBIT "C"

IN THE DISTRICT COURT OF IOWA, IN AND FOR MILLS COUNTY.

Equity No. 17433

STATE OF IOWA, Plaintiff,

vs.

Darwin Merrit Babbit, Frances Babbit, Ernest Barker, Edna Barker, William Watts, Mason Watts, Mrs. Mason Watts, Eugene W. Burdic, Dixie Burdic, Margaret T. O'Brien, Charles E. O'Brien, Bert Colwell, Helen Colwell, Harry Schroeder, Amanda Schroeder, Metropolitan Life Insurance Company, Merrill Sargent, Elva Sargent, Darrell Sargent, Carol Sargent, R. C. Good, Laura C. Good, All Unknown Heirs, Devisees, Grantees, Assignees, Successors in Interest and Unknown Spouses of the Above Named Defendants or any of them, Mills

Exhibit

County, Iowa, and All Unknown Claimants and all Persons, Firms, or Corporations Unknown Claiming any Right, Title or Interest in or to the Following Described Real Estate Situated in Mills County, State of Iowa, To-wit:

Commencing at the east ordinary high water mark of the east channel of the Missouri River at or near the section corner common to Sections 29, 30, 31, and 32, Township 67 North, Range 43 West of the 5th P. M., in Mills County, Iowa, thence northeasterly along said east ordinary high water mark of said east channel of the Missouri River to a point at or near the northwest corner of the Northeast Quarter of the Southwest Quarter of said Section 29, thence northerly along said ordinary high water mark to a point at or near the northwest corner of the Northeast Quarter of the Northwest Quarter of said Section 29, thence northeasterly along said ordinary high water mark to a point at or near 500 feet west of the center of Section 20, Township 67 North, Range 43 West of the 5th P. M., thence along said ordinary high water mark to a point approximately 1000 feet west of the north quarter corner of said Section 20, thence northwesterly along said ordinary high water mark to a point at or near 1500 feet west of the center of Section 17, Township 67 North, Range 43 West of the 5th P. M., thence northwesterly along said ordinary high water mark to a point at or near 500 feet south of the northwest corner of said Section 17, thence northwesterly along said ordinary high water mark to the point where same intersects the east ordinary high water mark of the main channel of the Missouri River, said point being approximately one quarter mile west of the east quarter corner of Section 7,

Township 67 North, Range 43 West of the 5th P. M., thence west along the East-West center line of said Section 7 to the Iowa-Nebraska State boundary line, thence southerly along said Iowa-Nebraska State boundary line to the point where it intersects the east section line of Section 31, Township 67 North, Range 43 West of the 5th P. M., thence north along said east section line of said Section 31 to the east ordinary high water mark of the main channel of the Missouri River, thence northwesterly along said east ordinary high water mark of the main channel of the Missouri River to the point where it intersects the east ordinary high water mark of the east channel of the Missouri River, thence northeasterly to point of beginning, containing altogether 1960 acres, more or less, Defendants.

PETITION IN EQUITY

Comes now the plaintiff and for cause of action against the defendants and each and all of them, states as follows:

1. That the plaintiff is the absolute and unqualified owner in fee simple of the real estate hereinabove described in the caption of this case, which said real estate description is hereby made a part hereof by reference.

2. That the plaintiff is credibly informed and believes that the defendants, or some of them, make claim to said real estate, or claim some interest therein, said claims being adverse to plaintiff's title, but plaintiff alleges that all such claims are spurious and wholly without right.

Exhibit

3. That plaintiff is credibly informed and believes that unknown persons make claim to said real estate or claim some interest therein, said claims being adverse to plaintiff's title and that said unknown persons are made parties hereto as "unknown claimants"; that plaintiff has used all reasonable means to ascertain the nature and extent of said claims and the identity of said claimants, but has been unable to do so; that all of said claims are wholly without merit or right; that the names and addresses of said unknown claimants are unknown to plaintiff despite diligent effort to ascertain the same.

4. That the plaintiff has been credibly informed and believes and hereby alleges that one or more of the defendants have stated or published remarks to the effect that any attempt by any agents or employees of plaintiff to view, inspect or survey the subject real estate of this case, such agents and employees would be physically and violently stopped and prevented from so doing. That in order to ascertain the precise boundaries of the subject real estate of this case, a survey will be necessary; that an order of this court should issue pursuant to Iowa Rule of Civil Procedure No. 131 permitting plaintiff by its officers, agents, and employees to enter on the subject real estate and on lands adjacent thereto if necessary for the purpose of inspecting, viewing, measuring, surveying, photographing, locating section corners and locating monuments as may be necessary in order for plaintiff to make and file herein an exact legal description of the subject real estate and in order for plaintiff to prepare for trial of this case.

WHEREFORE plaintiff prays that its title to and estate in the real estate hereinabove described be

quieted and confirmed as an absolute title in fee simple; that all named defendants and unknown claimants be forever barred and estopped from having or claiming any right, title or interest in or to said real estate adverse to the plaintiff's said fee simple title; that plaintiff have and be awarded all such other and further general equitable relief as the court may deem right and proper in the premises, including judgment for costs.

PLAINTIFF FURTHER PRAYS that this Court issue its order directing that plaintiff by its officers, agents, and employees be allowed to enter the described property and properties adjacent thereto as necessary for the purpose of inspecting, viewing, measuring, surveying, photographing, and locating section corners and monuments, without hindrance or interference by the defendants or any of them or any persons acting for or on behalf of said defendants or any of them.

EVAN HULTMAN
Attorney General of Iowa,
WILLIAM J. YOST
Assistant Attorney General of Iowa,
(s) *Michael Murray*
Attorney at Law, Logan, Iowa,
Attorneys for the State of Iowa.

State of Iowa)
) ss.
Mills County)

I, Michael Murray, being first duly sworn on oath depose and state that I am one of the attorneys for the plaintiff in the above entitled action; that I have personal knowledge of the facts alleged in the foregoing petition and that the statements contained in said petition are true and correct as I verily believe.

(s) *Michael Murray*

Exhibit

Subscribed in my presence and sworn to before me by the said Michael Murray this 18 day of March, 1963.

(s) *I. L. Donner*
Clerk of Court in and for
Mills County, Iowa.

EXHIBIT "D"

IN THE DISTRICT COURT OF IOWA, IN AND FOR MILLS COUNTY.

Equity No. 17433

STATE OF IOWA, Plaintiff,

vs.

DARWIN MERRIT BABBIT, ET AL, Defendants.

FIRST AMENDMENT TO PLAINTIFF'S PETITION

Comes now the plaintiff State of Iowa and for its First Amendment to its Petition in Equity heretofore filed, states to the Court the following:

1. That it hereby amends the caption of said case and particularly the metes and bounds description of real estate contained and set forth in said caption by striking from said caption the words and figures "Township 67 North", wherever said words and figures appear and by substituting in lieu of said stricken words and figures the following words and figures "Township 71 North".

2. For further amendment to said Petition, plaintiff hereby states that jurisdiction of the parties and subject matter of this case cannot be obtained in this Court in sufficient time for hearing on plaintiff's ap-

plication for inspection and survey of the real estate involved in this case to be held on April 25, 1963, as heretofore ordered by this Court. That therefore, said prior Order of this Court setting hearing of said matter for April 25, 1963, should be cancelled and annulled and hearing of said matter should be set by order of Court for a later date.

WHEREFORE plaintiff prays as in its original Petition and further prays for a new Order for Hearing as to the matter of an inspection and survey of the real estate involved herein.

EVAN HULTMAN
Attorney General of Iowa
WILLIAM J. YOST
Assistant Attorney General of Iowa
(s) *Michael Murray*
Attorney at Law, Logan, Iowa
Attorneys for Plaintiff

State of Iowa)
) ss.
Mills County)

I, Michael Murray, being first duly sworn on oath depose and state that I am one of the attorneys for the plaintiff in the above entitled case; that I have prepared the foregoing Amendment to Plaintiff's Petition and know its contents and that the statements therein contained are true as I verily believe.

(s) *Michael Murray*

Subscribed in my presence and sworn to before me by the said Michael Murray this 26 day of March, 1963.

(s) *I. L. Donner*
Clerk of Court in and for
Mills County, Iowa.

Exhibit

EXHIBIT "E"

IN THE DISTRICT COURT OF IOWA, IN AND FOR MILLS COUNTY

No. 17433

State of Iowa, Plaintiff,

vs.

Darwin Merrit Babbit, et al., Defendants.

Interrogatories.

Defendants William Watts, Mason Watts, Mrs. Mason Watts, Eugene W. Burdic, Dixie Burdic, Margaret T. O'Brien, Charles E. O'Brien, Bert Colwell, Helen Colwell, Harry Schroeder, Amanda Schroeder, Metropolitan Life Insurance Company, Merrill Sargent, Elva Sargent, Darrell Sargent, and Carol Sargent respectfully submit the following interrogatories pursuant to Rules 121 to 126 inclusive of the Iowa Rules of Civil Procedure, which interrogatories are deemed continuing so as to require further answers as to any further information obtained before the trial:

Interrogatory 1. Describe specifically by what acts or instruments plaintiff claims ownership of the land described in plaintiff's petition.

Interrogatory 2. Describe what event, instrument or act commenced plaintiff's claim of ownership to the land described in plaintiff's petition and the date of said event, instrument or act.

Interrogatory 3. State whether plaintiff has continuously claimed ownership of the property described in plaintiff's petition since the time of the event under which plaintiff now claims ownership.

Interrogatory 4. State whether plaintiff is now in possession of the land described in plaintiff's petition and, if so, describe the extent and nature of such possession.

Interrogatory 5. State whether plaintiff has ever been in possession of the land described in plaintiff's petition and, if so, describe the period of time involved and the extent and nature of such possession in plaintiff.

Interrogatory 6. State whether or not the defendants are in complete, actual and sole possession of the land described in plaintiff's petition and, if not, state who is now in actual possession of said land.

Interrogatory 7. State whether plaintiff has in its possession any deed, abstract of title or other instrument tending to establish in the plaintiff ownership of the land described in plaintiff's petition, and, if so, give a specific description of the same.

Interrogatory 8. If plaintiff claims a portion of the land described in its petition was an island in the Missouri River state at what time did said island first rise above the ordinary high water mark, and in which state did said island form, and who owned the bed upon which said island formed.

Interrogatory 9. State whether or not plaintiff has ever filed in the office of the Mills County Recorder of deeds any statement in writing duly acknowledged describing the real estate involved in plaintiff's petition or any part of it, the nature and extent of the right or interest therein claimed by plaintiff, and stating the facts upon which the same is based, or has any other instrument of any nature been filed by plaintiff.

Exhibit

Interrogatory 10. Has the plaintiff, State of Iowa, any contract, agreement or understanding with any commission or political subdivision of the State of Iowa in connection with the filing and prosecution of this suit in the name of the State of Iowa as plaintiff? If so, state whether such contract, agreement or understanding is oral or written, and identify the same and state the substance of the same.

Interrogatory 11. Is the State Conservation Commission of the State of Iowa a party of interest in any capacity in this litigation?

Interrogatory 12. What is the interest, if any, of the Iowa State Conservation Commission in this litigation?

Interrogatory 13. Has the State Conservation Commission of the State of Iowa ever relinquished claim to the land described in plaintiff's petition or any part of it?

Interrogatory 14. Is the land described in plaintiff's petition or any part of it generally known as Nottleman's Island? If so, how long has it been so known?

Interrogatory 15. Was the land described in plaintiff's petition or any part of it at any time in the State of Nebraska? If so, during what period of time?

Interrogatory 16. Was any part of the land described in plaintiff's petition in the State of Nebraska in 1941? If so, what part?

Interrogatory 17. Was any part of the land described in plaintiff's petition subject in 1943 to the provisions of the Iowa-Nebraska Boundary Compromise, Chapter 306 H.F. 437 Acts 50th General Assembly, effective April 21, 1943? If so, what part?

Interrogatory 18. Has the plaintiff, State of Iowa, and the defendant Mills County, Iowa, collected taxes on the land described in plaintiff's petition for more than fourteen years last past? Have the defendants and their predecessors in title paid such taxes?

Interrogatory 19. Does plaintiff claim that any part of the land described in plaintiff's petition was formed by accretion? If so, state when said accretion or accretions occurred, in which state said accretion or accretions ocurred, and who was the owner of the lands to which said land accreted.

Interrogatory 20. Does plaintiff claim that any of said land originated with an avulsion? If so, state when avulsion occurred, in which state said land was located at the time said avulsion occurred, and who was the owner of said land before said avulsion occurred.

Interrogatory 21. State the names, addresses and present employers of all persons who are known to have information or knowledge concerning the formation of said land and the possession of said land since its formation and at the present time.

Interrogatory 22. State who now has record title to said land and which persons have record title as to which parts.

Interrogatory 23. State how long each of the persons referred to in the answer to Interrogatory No. 22 and their immediate and remote grantors have continuously been shown by the record of title to have held chain of title to said land.

Interrogatory 24. State on which side of said land the main channel of the Missouri River now flows.

Exhibit

Interrogatory 25. Did the main channel of the Missouri River ever flow on the other side of said land? If so, state when said change occurred and over what period of time said change took place.

Respectfully submitted,

(s) *Thomas & McGee*
Thomas & McGee, Glenwood, Iowa.

EXHIBIT "F"

IN THE DISTRICT COURT OF IOWA, IN AND FOR MILLS COUNTY.

Equity No. 17433

STATE OF IOWA, Plaintiff,
vs.
DARWIN MERRIT BABBIT, ET AL, Defendants.

ANSWERS TO INTERROGATORIES FILED APRIL 18, 1963.

Answer 1. Plaintiff's claim of ownership of the land described in plaintiff's Petition as Amended is not based on any acts or instruments.

Answer 2. Plaintiff acquired its ownership of that part of the bed of the Missouri River which then lay within the State of Iowa when the State of Iowa was admitted to the Union in 1846. As the Missouri River changed its bed after 1846, plaintiff acquired title to all beds which the river occupied from time to time within the State. This principal of law was first announced by the Iowa Supreme Court in the case of

McManus vs. Carmichael in 1856, 3 Iowa 1, and this legal principal has been continuously applied by the Iowa Supreme Court down to the present date in all cases involving ownership of the beds of navigable streams within the State of Iowa. Insofar as the description of real estate contained in plaintiff's Petition as amended constitutes a description of river bed (areas below ordinary high water mark), the above constitutes its answer to Interrogatory 2. The land contained within the real estate described in plaintiff's Petition as Amended formed as accretion to the State-owned bed of the river. State ownership of it never ceased. The State continued ownership of said land even after it arose above ordinary high water mark because the land formed as an accretion to the State-owned bed of the river. No exact date when this land arose above ordinary high water mark can be given because the process was gradual and occupied a period of several years. For answer to Interrogatory 2, plaintiff states that the first portion of this land to arise from the river bed above ordinary high water mark so arose within ten years prior to 1923.

Answer 3. Yes

Answer 4. (Plaintiff objects to Interrogatory 4 on the ground that it inquires into matters which are irrelevant and immaterial to any issue in this case, it not being legally or equitably possible for any claim of ownership adverse to plaintiff to be based or founded on adverse possession as against plaintiff. For this reason, plaintiff has made no investigation concerning exactly who is or may be in possession of parts or portions of the disputed area adversely to plaintiff and plaintiff should not be required to make an investiga-

Exhibit

tion concerning possession merely for the purpose of answering interrogatories. The matter of possession is irrelevant and immaterial for the further reason that mere possession cannot have any significance in law or equity unless the same, from its inception, be coupled with color of title, and in this case, none of defendants have ever had any color of title. Interrogatory 4 is objected to for the further reason adverse possession is not at present an issue in this case, and if the same is to become an issue, it can only do so by means of defendants raising the same as an affirmative defense. That therefore, before plaintiff should be required to answer any interrogatories or present any proof concerning possession of the area in controversy, defendants, or some of them, must plead and offer some proof of adverse possession. That the burden of pleading and proving adverse possession rests with the defendants in this case, and Interrogatory 4 is an improper attempt under IRCP to shift the burden of research and investigation on said issue to the plaintiff.)

Subject to the Court's rulings on the foregoing objections, plaintiff's answer to Interrogatory 4 is that plaintiff is now in possession of that part of the area in controversy which presently constitutes Missouri River bed; that is to say, that part of the area which is presently below ordinary high water mark of the river. Plaintiff is also in possession of all parts of the area which are above ordinary high water mark and which have not been taken under possession by private parties or persons. The extent and nature of plaintiff's possession is that all portions possessed by it are in the public domain and not adversely possessed by private parties or persons.

Answer 5. (Same objections as noted to Interrogatory 4.) Subject to the Court's rulings on the foregoing objections, plaintiff's answer to Interrogatory 5 is that plaintiff is now in possession of all that part of the described area which is presently below ordinary high water mark and therefore presently constitutes Missouri River bed. As various portions of the described area arose above ordinary high water mark, plaintiff continued in possession of them until the defendants and their immediate and remote grantors illegally, improperly and without any right to do so, took possession of various portions from time to time. The extent and nature of plaintiff's possession was and is that all portions possessed by it from time to time were in the public domain and not possessed by any private parties.

Answer 6. (Same objections as noted to Interrogatory 4.) Subject to the Court's rulings on the foregoing objections, plaintiff's answer to Interrogatory 6 is "No". For further particulars, plaintiff refers to Answer 4. Concerning portions of the area which are not presently in plaintiff's possession, plaintiff hereby states that some portions of the area have been cultivated and farmed for several years last past. Plaintiff, deeming the entire matter of possession to be irrelevant and immaterial, has no information as to how long the various tracts in the area have been cultivated or by whom this has been done, nor any exact descriptions of the tracts cultivated by different parties.

Answer 7. No.

Answer 8. As stated heretofore, plaintiff claims all parts of the described area which are now above ordinary high water mark because the same formed as an

Exhibit

island in the Missouri River, and plaintiff claims other portions of the described area as accretions to said island. The island first arose above ordinary high water mark between 1913 and 1923 in the State of Iowa. The State of Iowa owned the bed upon which said island formed. The formation of accretions to said island has continued since the original formation of the island down to the present time, and accretions are still forming to the island.

Answer 9. (Plaintiff objects to Interrogatory 9 on the ground that it inquires into matters which are irrelevant and immateral to any issue in this case, plaintiff's claim to the area involved in this case being bottomed on the law of the State of Iowa which all parties to this case were and are presumed to know and to have known.) Subject to the Court's ruling on the foregoing objection, plaintiff's answer to Interrogatory 9 is "No".

Answer 10. (Plaintiff objects to Interrogatory 10 on the ground that it inquires into matters which are irrelevant and immaterial to any issue in this case.) Subject to the Court's ruling on the foregoing objection, plaintiff's answer to Interrogatory 10 is "No".

Answer 11. (Plaintiff objects to Interrogatory 11 on the ground that it inquires into matters which are irrelevant and immaterial to any issue in this case.) Subject to the Court's ruling on the foregoing objection, plaintiff's answer to Interrogatory 11 is "No".

Answer 12. (Plaintiff objects to Interrogatory 12 on the ground that it inquires into matters which are irrelevant and immaterial to any issue in this case.) Subject to the Court's ruling on the foregoing objection, plaintiff's answer to Interrogatory 12 is that the

Iowa State Conservation Commission is a political subdivision or department of plaintiff, possessing the power, authority, and duty of managing and controlling the area involved in this litigation if it be determined that same is owned by plaintiff.

Answer 13. No.

Answer 14. Yes, for approximately 26 years.

Answer 15. No.

Answer 16. No.

Answer 17. No.

Answer 18. (Plaintiff objects to Interrogatory 18 on the ground that it inquires into matters which are irrelevant and immaterial to any issue in this case, because any taxes which any of the defendants may have paid to plaintiff on the land involved in this case were infinitesimal. Interrogatory 18 is objected to for the further reason that the matter of payment of taxes can only become material in this case if the defendants or some of them elect to plead some affirmative defense based thereon, and no such affirmative defense has been pleaded by any defendant at the present time; therefore, at present, the matter of taxes is irrelevant and immaterial. That Interrogatory 18 is an illegal, improper and unauthorized attempt by defendants to shift the burden of proof from themselves to plaintiff on an issue which is not now an issue in the case and on which, if it becomes an issue, the burden of proof will be on them. That plaintiff should not be subjected to the burden of researching, investigating and proving the facts concerning said issue unless and until some burden is cast upon it by reason of the de-

fendants or some of them having pleaded and offered sufficient proof on said issue to shift some burden to plaintiff. That any facts concerning taxes are either already in the possession of defendants or are as readily available to defendants as to plaintiff and therefore, Interrogatory 18 is not for discovery purposes and is not authorized by IRCP). Subject to the Court's ruling on the foregoing objection, plaintiff's answer to Interrogatory 18 is that taxes have or have not been paid on the land involved in this case as shown by the books and records of the County Treasurer of Mills County, Iowa. Therefore, for particulars as to Interrogatory 18, plaintiff incorporates into this Answer said books and records of the Mills County Treasurer and makes the same a part of this Answer by reference.

Answer 19. Yes. The accretions to the bed of the river started forming between 1913 and 1923 and have continued forming continuously until the present time and are still forming. All said accretions have formed and are forming in the State of Iowa and to the bed of the Missouri River which has been at all times owned by plaintiff.

Answer 20. No.

Answer 21. Plaintiff at the time of answering these Interrogatories does not know of any persons who have personal eyewitness knowledge concerning the formation of said land. R. L. Huber, formerly employed by the U. S. Army Corps of Engineers, now retired, of Omaha, Nebraska, possesses knowledge and information concerning the formation of said land by reason of having studied books, records, maps, photographs, and other data in the possession of the U. S. Army Corps of Engineers office at Omaha, Nebraska. He also pos-

sesses eyewitness knowledge concerning formation of that part of the land which was formed since about 1936. Gerald J. Jauron, Earling, Iowa, an employee of plaintiff, possesses knowledge by reason of extensive investigation and study of records, maps, pictures and data of numerous government agencies, including U. S. Army Corps of Engineers and by reason of on-site studies and investigation. Ivan Windenberg, Des Moines, Iowa, an employee of plaintiff, has surveyed the area and made a study and investigation of the area and possesses information gained thereby. Plaintiff presumes that there are perhaps some residents of the vicinity of said land who possess information and knowledge concerning the formation of said land and the possession of it since its formation, but interviewing of such possible persons has not been accomplished at this time and therefore names, addresses, and present employers cannot be furnished at this time.

Answer 22. (Plaintiff objects to Interrogatory 22 because it calls for information irrelevant and immaterial to any issue in this case. Also, because it does not call for the best evidence of who now has record title to the land involved herein and which persons have record title to which parts, the best evidence of said matters being the records in the various county offices of Mills County, Iowa.) Subject to the Court's ruling on the foregoing objection, plaintiff for answer to Interrogatory 22 states that it is informed and believes that some of the defendants and immediate or remote grantors of the defendants attempted in about 1946 to record various spurious, fictitious instruments in Mills County, Iowa, which purported to establish that they had been the owners of various portions of the land involved herein when said land had been lo-

Exhibit

cated in Nebraska and under and by virtue of the laws of the State of Nebraska, but plaintiff hereby states that said purported instruments of title were and are spurious and fictitious and of no force or effect to serve as the commencement of any record title in Iowa because no part or portion of the land involved herein was ever in the State of Nebraska or subject to the laws of the State of Nebraska or subject to jurisdiction of the courts of the State of Nebraska. Plaintiff is informed and believes that the county recorder and other county officials of Mills County, Iowa, refused to accept said spurious and fictitious instruments for recording in said county and that thereupon the persons seeking to record said instruments commenced an equity action against said county officials to force them to so do. Plaintiff was not a party to said action and had no notice or knowledge thereof and therefore is not bound by any decision rendered therein. Plaintiff is informed and believes that this Court ordered the county officials of Mills County to accept said spurious and fictitious instruments for record and said county officials have complied with said Court Order. Plaintiff in answering Interrogatory 22 hereby states that the recording of said spurious and fictitious instruments in Mills County, Iowa, did not commence any lawful record title to any of said land, and if it be claimed by defendants that they now have record title in Mills County, Iowa, to any of the land involved in this case, based upon the recording of said spurious and fictitious instruments of title in about 1946, such record title is also spurious, fictitious, and of no legal force or effect.

Answer 23. Same answer as to Interrogatory 22.

Answer 24. West.

Answer 25. Plaintiff's opinion is negative.

EVAN HULTMAN,
Attorney General of Iowa

WILLIAM J. YOST,
Assistant Attorney General of Iowa

(s) *Michael Murray*
Attorney at Law, Logan, Iowa

Attorneys for the State of Iowa

EXHIBIT "G"

IN THE DISTRICT COURT OF IOWA, IN AND FOR MILLS COUNTY.

Equity No. 17433

STATE OF IOWA, Plaintiff,

vs.

DARWIN MERRIT BABBIT, ET AL, Defendants.

PLAINTIFF'S INTERROGATORIES

The plaintiff hereby propounds the following Interrogatories to each and all of the following named defendants: Darwin Merrit Babbit, Frances Babbit, Ernest Barker, Edna Barker, William Watts, Mason Watts, Mrs. Mason Watts, Eugene W. Burdic, Dixie Burdic, Margaret T. O'Brien, Charles E. O'Brien, Bert Colwell, Helen Colwell, Harry Schroeder, Amanda Schroeder, Metropolitan Life Insurance Company, Merrill Sargent, Elva Sargent, Darrell Sargent, Carol Sargent, R. C. Good, Laura C. Good:

Interrogatory 1. Do you claim to own any of the area described in plaintiff's Second Amendment to Peti-

Exhibit

tion, and if so, specifically describe that part which you claim to own.

Interrogatory 2. Is that part of the area which you claim to own presently situated in the State of Iowa, and if so, for what period of time last past has the same been continuously in the State of Iowa?

Interrogatory 3. Do you claim to own and hold record title in Iowa to that part of the area which you claim to own? If so, list and describe the instruments, documents, court records or other muniments of title which constitute your record title in Iowa and locate where the same are found in the records of Mills County, Iowa.

Interrogatory 4. Is your claim of title and ownership based to any extent on a claim that you or your immediate or remote grantors owned said land and held title thereto under the laws of the State of Nebraska, and if so, list and describe the instruments, documents, court records, or other muniments of title evidencing such ownership or title under the laws of the State of Nebraska, and locate where same are found of record in Cass County, Nebraska.

Interrogatory 5. If you claim that any part of the same identical land you now claim to own was ever situated within the State of Nebraska, state for what period or periods of time same was situated in the State of Nebraska, and state in what State said land which you claim to own was at all other times.

Interrogatory 6. Is any part of the area which you claim to own presently below the ordinary high water mark of the Missouri River? If so, what part?

Interrogatory 7. Is any part of the area you claim to own presently above the ordinary high water mark of the Missouri River? If so, when did such part first arise above said ordinary high water mark?

Interrogatory 8. Was the thalweg of the Missouri River running on the east side or the west side of the land which you claim to own at the time said land first arose above ordinary high water mark?

Interrogatory 9. Describe as accurately as possible where the State boundary line between the States of Iowa and Nebraska in the vicinity of this land was when the land claimed by you first arose above ordinary high water mark.

Interrogatory 10. If you claim that the State boundary line was any different from the thalweg of the Missouri River at the time the land claimed by you first arose above ordinary high water mark, state why, when and by what method or means the State boundary line had become separated from the thalweg of the river.

Interrogatory 11. Was any part of the land above ordinary high water mark and contained within plaintiff's metes and bounds description in plaintiff's Second Amendment to Petition formed by accretion? If so, when did such accretions first arise above ordinary high water mark, and in what State did the same first arise above ordinary high water mark?

Interrogatory 12. Is any part of the land in controversy the same original identical land which was included in either the original Iowa survey of the area made in 1851 and 1852, or in the original Nebraska territorial survey made of the area in 1856? If so,

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which survey included it and what part of the land in controversy was so included?

Interrogatory 13. Did any part of the land in controversy come into existence by accretion? If so, when did such accretions form? In what State did they form, and to what did they accrete?

Interrogatory 14. If you have answered the preceding Interrogatory in the affirmative, state who was the owner or who were the owners of the river bed or riparian lands to which the land in controversy accreted?

Interrogatory 15. If you have stated in answer to any foregoing Interrogatories that any part of the land in controversy in this case was in existence prior to 1920, state by what means or method you now identify that part of the land in controversy as being the same identical land.

Interrogatory 16. Give the names, addresses, and present employers of all persons who have any knowledge or information concerning the formation of the land in controversy.

Interrogatory 17. Has the thalweg of the Missouri River ever flowed to the east of the area described in plaintiff's Second Amendment to Petition, or to the east of any part thereof, or to the east of any of the same identical land which now exists in the area above ordinary high water mark, and if so, when did the thalweg of the Missouri River so flow, and for what period of time or periods of time?

Interrogatory 18. Did any part of the land in controversy in this case form as an island in the Missouri River? If so, when did such island start to form and

on what side of the thalweg of the Missouri River did it start to form and if such part ever ceased to be an island, when did it so cease to be an island, and to which riparian shore did it make connection?

Interrogatory 19. Was any part of the land in controversy ever situated in the State of Nebraska, and if so, when and for what period of time?

Interrogatory 20. Is your claim of ownership based in any degree or in any manner on any patent, deed, or conveyance from the plaintiff, or on any judgments or decrees of any court in any case or cases to which the plaintiff was a party, or on any conduct or lack of conduct on the part of plaintiff by which you claim plaintiff released or relinquished its ownership and title to you or your immediate or remote grantors? If so, describe such patents, deeds, conveyances, judgments, decrees, conduct or lack of conduct, and if any of same are of record, state where the same are found of record.

Interrogatory 21. Do you claim any right, title or interest in or to the area in controversy or do you claim any estoppel against the plaintiff arising out of the payment of any taxes to the plaintiff, and if so, state the dates and amounts of such payments of taxes by you or your immediate or remote grantors which are the basis for your said claim.

Interrogatory 22. Do you claim any right, title or interest in or to the area in controversy or do you claim any estoppel against the plaintiff arising out of the payment of any taxes to Mills County, Iowa, and if so, state the dates and amounts of such payments of taxes by you or your immediate or remote grantors which are the basis for your said claim.

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Interrogatory 23. Do you claim any right, title or interest in or to the area in controversy or do you claim any estoppel against the plaintiff arising out of the payment of any taxes to the State of Nebraska, or any political subdivision thereof, and if so, state the dates and amounts of such payments of taxes by you or your immediate or remote grantors which are the basis for your said claim.

Interrogatory 24. Do you claim by, through or under John Nottleman or Harvey Shipley, either directly, or that the land claimed by you formed as accretions to land formerly claimed by them? If so, how did John Nottleman or Harvey Shipley acquire any title or ownership to any part or parts of the area in controversy and what part or parts of the area in controversy do you claim they owned?

Interrogatory 25. If any part of your answer to the preceding Interrogatory was in the affirmative, and you have answered that John Nottleman or Harvey Shipley acquired ownership or title by adverse possession, coupled with color of title, state what period of time they, or either of them, were in possession, and describe the instruments or records which constituted their color of title.

EVAN HULTMAN
Attorney General of Iowa

WILLIAM J. YOST
Assistant Attorney General of Iowa

(s) *Michael Murray*
Attorney at Law, Logan, Iowa

Attorneys for the State of Iowa

EXHIBIT "H"

IN THE DISTRICT COURT OF IOWA, IN AND FOR MILLS COUNTY.

Equity No. 17433

STATE OF IOWA, Plaintiff,

vs.

DARWIN MERRIT BABBIT, ET AL, Defendants.

Second Amendment to Plaintiff's Petition

Comes now the plaintiff, State of Iowa, and for its Second Amendment to its Petition in Equity heretofore filed, states to the Court the following:

1. That the plaintiff does hereby amend the caption of its Petition in Equity filed March 18, 1963, by striking from said caption all of the real estate description from and after the following: "The following described real estate situated in Mills County, State of Iowa, to-wit:", and by substituting in lieu of said stricken portion of said caption the following real estate description, to-wit:

> Beginning at station 16+41 of the Corps of U. S. Army Engineers, Cutoff Dike Number 629.9, which lies 2717.31 feet North, and 7063.24 feet West of the East one-quarter corner of Section seventeen (E ¼ Cor. Sec. 17), Township Seventy-one North (T 71N), Range Forty-three West (R 43W), of the Fifth P. M., in Mills County, Iowa, Thence along said dike 629.9, South 69° 05′ West 377.00 feet to station 20+18, which lies on left bank of the designed channel of the Missouri River, Thence North 60° 04½′ West, 300.00 feet, to the center of the designed channel of the Missouri River, said point being on the boundary line between the State of Iowa and the State of Nebraska, as established by the State

Exhibit

of Iowa and Nebraska and approved by the 78th Congress in 1943, Thence along the Iowa-Nebraska Boundary Line, South 31° 06½′ West 690.18 feet, Thence South 31° 02′ West 584.79 feet, Thence South 30° 56′ West 495.09 feet, Thence South 29° 04′ West 489.87 feet, Thence South 27° 04′ West 490.84 feet, Thence South 25° 34′ West 489.61 feet, Thence South 24° 07½′ West 487.71 feet, Thence South 20° 18′ West 582.69 feet, Thence South 15° 11½′ West 488.35 feet, Thence South 13° 37½′ West 488.40 feet, Thence South 10° 46′ West 484.50 feet, Thence South 8° 21′ West 872.13 feet, Thence South 9° 32½′ West 314.24 feet, Thence South 4° 09′ West 421.39 feet, Thence South 1° 38½′ West 489.00 feet, Thence South 0° 08′ West 581.07 feet, Thence South 4° 57½′ East 475.78 feet, Thence South 6° 50′ East 1251.76 feet, Thence South 6° 03′ East 532.90 feet, Thence South 8° 21½′ East 991.40 feet, Thence South 9° 18½′ East 488.68 feet, Thence South 11° 35′ East 386.94 feet, Thence South 14° 16′ East 593.92 feet, Thence South 14° 38′ East 495.73 feet, Thence South 16° 28′ East 486.37 feet, Thence South 20° 23½′ East 482.27 feet, Thence South 21° 55′ East 479.82 feet, Thence South 26° 44′ East 475.72 feet, Thence South 31° 09½′ East 482.76 feet, Thence South 33° 21′ East 485.58 feet, Thence South 37° 26′ East 488.97 feet, Thence South 38° 54½′ East 479.18 feet, Thence South 40° 48′ East 500.34 feet, Thence South 44° 33½′ East 467.57 feet, Thence South 50° 46′ East 670.86 feet, Thence South 56° 24′ East 883.96 feet, Thence North 2° 13½′ West 346.26 feet to Station 6 +40 of the Corps of U. S. Army Engineers Dike Number 626.3. Said Station 6+40 lies on the left

Exhibit

bank of the designed channel of the Missouri River. Thence North 1° 46′ West 252.26 feet to a point which lies at the present ordinary high water line on the left bank of the abandoned channel of the Missouri River, said point being 1553.08 feet South, and 5752.45 feet West of the Southeast corner of Section 29 (SE cor 29) Township 71 North, (T 71N), Range Forty-three West (R 43W), of the Fifth P. M., Thence along the present ordinary high water line of said abandoned channel left bank. North 5° 59′ East 155.86 feet,
Thence North 15° 15½′ West 151.20 feet,
Thence North 7° 23′ East 149.61 feet,
Thence North 14° 50½′ West 72.34 feet,
Thence North 32° 34½′ West 72.45 feet,
Thence North 44° 16½′ West 192.03 feet,
Thence North 2° 01½′ West 59.84 feet,
Thence North 34° 29′ East 146.48 feet,
Thence North 15° 55′ East 86.14 feet,
Thence North 18° 54½′ West 163.15 feet,
Thence North 30° 06′ East 113.05 feet,
Thence North 24° 26½′ East 104.56 feet,
Thence North 40° 25½′ East 125.37 feet,
Thence North 29° 26½′ East 239.84 feet,
Thence North 26° 22½′ East 219.23 feet,
Thence North 19° 04½′ East 137.90 feet,
Thence North 21° 40′ East 269.51 feet,
Thence North 35° 08½′ East 260.26 feet,
Thence North 45° 07½′ East 159.57 feet,
Thence North 30° 02′ East 366.11 feet,
Thence North 52° 08′ East 751.77 feet,
Thence North 22° 42½′ East 400.05 feet,
Thence North 19° 45½′ East 302.30 feet,
Thence North 12° 30½′ East 320.55 feet,
Thence North 0° 34′ East 242.92 feet,
Thence North 16° 04′ West 426.27 feet,
Thence North 13° 44½′ West 351.75 feet,
Thence North 7° 35½′ West 365.27 feet,
Thence North 12° 04½′ West 262.51 feet,
Thence North 0° 59½′ West 625.10 feet,

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Thence North 14° 23′ East 975.92 feet,
Thence North 19° 19½′ East 779.71 feet,
Thence North 59° 55′ East 134.60 feet,
Thence North 10° 44½′ East 716.46 feet,
Thence North 29° 16′ East 168.96 feet,
Thence North 2° 21′ East 943.69 feet,
Thence North 3° 25½′ West 296.25 feet,
Thence North 4° 38½′ West 257.84 feet,
Thence North 24° 30′ West 347.76 feet,
Thence North 1° 47½′ East 851.14 feet,
Thence North 2° 03½′ West 348.37 feet,
Thence North 2° 07½′ East 426.77 feet,
Thence North 0° 53½′ West 235.27 feet,
Thence North 20° 09½′ West 148.89 feet,
Thence North 18° 55′ West 1304.56 feet,
Thence North 19° 34½′ West 1048.26 feet,
Thence North 28° 02½′ West 585.56 feet,
Thence North 32° 02½′ West 330.22 feet,
Thence North 37° 08½′ West 604.16 feet,
Thence North 55° 48½′ West 467.18 feet,
Thence North 50° 11½′ West 404.60 feet,
Thence South 68° 28′ West 230.78 feet,
Thence North 31° 49′ West 167.05 feet,
Thence North 66° 02′ West 300.70 feet,
Thence North 64° 38′ West 679.66 feet to the point of beginning. The area of the tract thus described comprises 1990.289 Acres.

WHEREFORE plaintiff prays as in its original Petition that its title to and estate in the real estate hereinabove described be quieted and confirmed as an absolute title in fee simple; that all named defendants and unknown claimants be forever barred and estopped from having or claiming any right, title or interest in or to said real estate adverse to the plaintiff's said fee simple title; that plaintiff have and be awarded all such other and further general equitable relief as the Court may deem right and proper in the premises, including judgment for costs.

Exhibit

EVAN HULTMAN,
Attorney General of Iowa

WILLIAM J. YOST,
Assistant Attorney General of Iowa

(s) *Michael Murray*
Attorney at Law, Logan, Iowa

Attorneys for the State of Iowa

EXHIBIT "T"

IN THE DISTRICT COURT OF IOWA, IN AND FOR MILLS COUNTY.

No. 17433

STATE OF IOWA, Plaintiff,

vs.

DARWIN MERRIT BABBIT, et als., Defendants.

Answers and Objections to Plaintiff's Interrogatories.

Come now the defendants Darwin Merrit Babbit, Frances Babbit, Ernest Barker, Edna Barker, William Watts, Mason Watts, Mrs. Mason Watts, Eugene W. Burdic, Dixie Burdic, Margaret T. O'Brien, Bert Colwell, Helen Colwell, Merrill Sargent, Elva Sargent, Darrell Sargent, Carol Sargent, R. C. Good, Laura C. Good, and The Travelers Insurance Company, and, by their Attorneys, make the following answers and objections to plaintiff's interrogatories filed herein:

Answer to Interrogatory 1. Yes. All of the lands apparently claimed by the plaintiff.

Answer to Interrogatory 2. Yes. Since the Iowa-Nebraska Boundary Compromise of 1943.

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Answer to Interrogatory 3. Yes. For further answer to this interrogatory, reference is made to case No. 15525 in the District Court of Iowa in and for Mills County, which shows the claimed derivation of title in the defendants.

Answer to Interrogatory 4. See answer to interrogatory 3.

Answer to Interrogatory 5. The lands in question were lands located at all times in the State of Nebraska until the time of the Iowa-Nebraska Boundary Compromise of 1943.

Answer to Interrogatory 6. Objection is made to interrogatory No. 6 for the reason that the information sought to be obtained thereby is equally within the knowledge or ability of plaintiff to determine as to these defendants, and calls for an opinion and conclusion.

Answer to Interrogatory 7. Objection is made to interrogatory No. 7 for the reason that the information sought to be obtained thereby is equally within the knowledge or ability of plaintiff to determine as to these defendants, and calls for an opinion and conclusion.

Answer to Interrogatory 8. East.

Answer to Interrogatory 9. East.

Answer to Interrogatory 10. See answer to interrogatory 9.

Answer to Interrogatory 11. Answering interrogatory 11, these defendants state that it is impossible at this time to determine the answer to this question for the reason that these defendants have not been fur-

nished with a proper map, plat or survey showing the area contained within plaintiff's metes and bounds description in plaintiff's second amendment to petition.

Answer to Interrogatory 12. See answer to interrogatory 11.

Answer to Interrogatory 13. See answer to interrogatory 11.

Answer to Interrogatory 14. See answer to interrogatory 11.

Answer to Interrogatory 15. See answer to interrogatory 11.

Answer to Interrogatory 16. The defendant Mason Watts, the defendant Darwin M. Babbit, the defendants Merrill Sargent and Darrell Sargent, State Surveyor of the State of Nebraska, and other persons whose identity may become known upon further investigation.

Answer to Interrogatory 17. See answer to interrogatory 11.

Answer to Interrogatory 18. Yes. It is not exactly known when such island started to form, but it was sometime shortly after the turn of the century and long prior to 1943, and said island formed on the then Nebraska side of the thalweg of the Missouri River and, in fact, never ceased to be an island.

Answer to Interrogatory 19. The land claimed by these answering defendants was at all times situated in the State of Nebraska prior to the Iowa-Nebraska Boundary Compromise of 1943.

Answer to Interrogatory 20. Yes; see answers to interrogatories 3 and 4. Further answering interrogatory

Exhibit

No. 20 with respect to the conduct or lack of conduct on the part of the plaintiff, the State of Iowa through the Conservation Commission of the State of Iowa, under date of April, 1950, disclaimed any ownership of the lands claimed by these defendants, and stated in writing:

> "Pease be advised that the island you refer to is not state property. The information we have is that this island belongs to four parties as follows:
>
> Wm. Watts — N. Babbitt
> Margaret O'Brien — Jones & Babbit"

That these answering defendants are the successors in title to said parties. That these answering defendants have been the parties in possession of the lands claimed by them as shown in the affidavits of possession filed by them under the provisions of Section 614.17 I. C. A. That no claim has ever been filed by the State of Iowa in the office of the Recorder of Mills County, Iowa, as required by said Section 614.17, and that the State of Iowa has never had possession of said land nor has it ever made any indication of claim of ownership or possession prior to the filing of the within action.

Answer to Interrogatory 21. Yes. That information is equally available to the plaintiff as it is to the defendants as shown by the records in the custody of the County Treasurer of Mills County, Iowa, and the County Assessor of Mills County, Iowa.

Answer to Interrogatory 22. Yes. See answer to interrogatory 21.

Answer to Interrogatory 23. Yes. Records as to taxes paid prior to the Iowa-Nebraska Boundary Compromise of 1943 are as readily available to the plaintiff as they are to the defendant in Cass County, State of Nebraska.

Answer to Interrogatory 24. The land claimed to be owned by the answering defendants, as described in their affidavits of possession on file, are claimed through John Nottleman and Harvey Shipley, and that said interrogatory cannot be further answered as to area in controversy for the reasons set out in the answer to interrogatory 11.

Answer to Interrogatory 25. These answering defendants object to interrogatory 25 for the reason that it is immaterial.

For the defendant Margaret T. O'Brien,
Smith, Peterson, Beckman & Willson
Council Bluffs, Iowa
By *Raymond A. Smith*
Raymond A. Smith

For the defendants William Watts, Mason Watts, Mrs. Mason Watts, Ernest Barker and Edna Barker, L. T. Genung, Glenwood, Iowa, and Thomas & McGee, Glenwood, Iowa
By *Eliot Thomas*
Eliot Thomas

For the defendants Bert Colwell and Helen Colwell,
(s) *L. T. Genung*
L. T. Genung, Glenwood, Iowa

For the defendants Eugene W. Burdic, Dixie Burdic, Merrill Sargent, Elva Sargent, Darrell Sargent, Carol Sargent, and The Travelers Insurance Co.,
Thomas & McGee, Glenwood, Iowa
By *Eliot Thomas*
Eliot Thomas

For the defendants Darwin Merrit Babbit, Frances Babbit, R. C. Good and Laura C. Good,
Cook & Drake, Glenwood, Iowa
By *William B. Drake*
William B. Drake

Exhibit

EXHIBIT "J"

IN THE DISTRICT COURT OF CASS COUNTY, NEBRASKA

Doc. 9 No. 237

Case 9924

Harvey Shipley, William Watts, Mason Watts and Katherine Julia O'Brien, Plaintiffs,

-vs-

Frank G. Hull, et al, Defendants.

DECREE

This matter came on for hearing this 1 day of August, 1940, upon the petition of the plaintiffs and the evidence, and it appearing to the court that the defendants Frank G. Hull and Gertha Hull, his wife, and John Nottelmann Jr. have voluntarily appeared and defendants Mrs. Jno. A. Donelan, Jesse M. Fitchhorn, single, Virgie A. McCarrol, and ..... McCarrol, Her Husband, Ira L. Fitchhorn and ..... Fitchhorn, His Wife, Elmer R. Fitchhorn and ..... Fitchhorn, His Wife, ~~Letha M. Fitchhorn, minor under 14, Glen Fitchhorn, minor under 14, John Fitchhorn, minor under 14 Wanda Fitchhorn, minor under 14,~~ Mildred Fitchhorn, guardian of Letha M., Glen, John, and Wanda Fitchhorn, James Warga and Irene Warga, His Wife, Plattsmouth State Bank, a corporation, Charles Warga and ..... Warga, His Wife, Albert J. Godwin and ..... Godwin, His Wife, Herbert Church and Pearl Church, His Wife, and each of them, have been duly served with process herein, but that they and each of them failed to appear, plead or answer, and the above named defendants, and each of them are hereby found and adjudged to be in default.

Exhibit

Thereafter on the same day, this cause was submitted to the Court upon the Petition and the evidence, and the Court being fully advised in the premises finds generally in favor of the plaintiffs and against the defendants and each of them who have been adjudged in default, more particularly finding that the plaintiffs are the owners in fee of the following described real estate and all accrued and accruing accretion and accretions, to wit: Beginning at a point 2074.0 feet North 9 degrees and 31 minutes West and 4667.88 feet due East of the section corner common to Sections 8, 9, 16, and 17, Township 11 North, Range 14, Cass County, Nebraska, thence 386 feet North 9 degrees and 31 minutes West, thence 940 feet North 26 degrees and 21 minutes East, thence 4002 feet North 12 degrees and 10 minutes East, thence 2180 feet North 39 degrees and 40 minutes East, thence 1600 feet South 56 degrees and 48 minutes East, thence 380 feet South 28 degrees and 05 minutes East, thence 1500 feet South 22 degrees and 13 minutes East, thence 2060 feet South 19 degrees and 58 minutes East, thence 900 feet South 3 degrees and 55 minutes West, thence 225 feet South 7 degrees and 47 minutes West, thence 960 feet South 18 degrees and 00 minutes West, thence due West to the point of beginning, and all accrued and accruing accretion and accretions, otherwise known as the North half of Nottleman's Island which was surveyed in August of 1933 by R. D. Fitch Jr. and filed in the office of the Register of Deeds of Cass County, Nebraska, on January 3, 1935 and recorded in Plat Book 2 Page 19; that in November 1928, Herbert Church and his grantors had been in actual, uninterrupted, continuous, notorious, peaceable, adverse and exclusive possession for at least two years; that in November of 1928 Herbert Church, single, sold

Exhibit

said tract of land to Harvey Shipley, single; that Harvey Shipley and his subsequent grantees have been in actual, uninterrupted, continuous, notorious, peaceable, adverse and exclusive possession of said tract of land and every part of it since November, 1928 to the present time and for more than ten years next preceding the bringing of this action.

The Court further finds that in April of 1937 Harvey Shipley, single, sold and conveyed by deed to William Watts and Mason Watts, as joint tenants, the following described real estate, to wit: Beginning at a point 4939 feet due North and 7764.2 feet due East of the section corner common to Sections 8, 9, 16, and 17, Township 11, Range 14, Cass County, Nebraska, thence 361 feet North 70 degrees and 26 minutes East to Station 14, thence due East to center of chute on East side of the island, thence Northwest upstream along center of said chute to a point due North of the point of beginning, thence due South to point of beginning; that this deed was filed on April 10, 1937 in the office of the Register of Deeds in Cass County, Nebraska, and recorded in book 73 of deeds on page 626, and the land is now made into tax lot 2 in Section 10 and tax lot 2 of Section 3, all in Township 11, Range 14, Cass County, Nebraska; that since the above conveyance William Watts and Mason Watts have been in actual, uninterrupted, continuous, notorious, peaceable, adverse and exclusive possession of said tract or tracts of land and that said tract or tracts of land have been in the actual, uninterrupted, continuous, notorious, peaceable, adverse and exclusive possession of Harvey Shipley and his immediate grantees, William Watts and Mason Watts, for more than ten years next preceding the bringing of this action.

Exhibit

The Court further finds that on the 4th day of December, 1939, Harvey Shipley, single, sold and conveyed by warranty deed to Katherine Julia O'Brien, single, the following described real estate, to wit: Beginning at a point 4939 feet due North and 7764.2 feet due East of the section corner common to Sections 8, 9, 16, and 17, Township 11, Range 14, Cass County, Nebraska, thence due South 365 feet, thence due West to the Missouri River, thence Northerly and Northeasterly along the Missouri River to a point due North of the point of beginning, thence due South to the point of beginning; that the deed conveying said land described it as beginning at Station 13 of the survey made in August, 1933, by R. D. Fitch, Jr. and filed in the Register of Deeds of Cass County, Nebraska, in Plat Book 2 at page 19, on January 3, 1935, thence 365 feet South, thence West to the Missouri River, thence along the Missouri River in a Northerly and Northeasterly direction to a point made by crossing a line running due North from said Station 13, thence South to Station 13, and the deed was filed on December 4, 1939 in the office of the Register of Deeds in Cass County, Nebraska, and recorded in Book 77 of Deeds on page 690, and the land is now made into tax lot 1 in Section 10 and tax lot 1 of Section 3 and tax lot 18 of Section 4 and tax lot 13 of Section 9, All in Township 11, Range 14, Cass County, Nebraska; that since December 4, 1939, Katherine Julia O'Brien has been in actual, uninterrupted, continuous, notorious, peaceable, adverse and exclusive possession of said tract or tracts of land, and that said tract or tracts of land have been in the actual, uninterrupted, continuous, notorious, peaceable, adverse and exclusive possession of Harvey Shipley and his immediate grantee, Katherine Julia O'Brien, for more than ten years next preceding the bringing of this action.

Exhibit

The Court further finds that the plaintiff, Harvey Shipley, has been in the actual, uninterrupted, continuous, notorious, peaceable, adverse and exclusive possession of the following tract of land for more than ten years next preceding the bringing of this action: Beginning at a point 4939 feet due North and 7764.2 feet due East of the section corner common to Sections 8, 9, 16, and 17, Township 11, Range 14, Cass County, Nebraska, thence 365 feet due South, thence due West to the Missouri River, thence Southerly down the Missouri River to a point 2047.5 feet North of the section line between Sections 9 and 16, Township 11, Range 14, thence due East across island to center line of chute on East side of said island, thence northerly up the chute to a point due East of a point 361 feet North 70 degrees and 26 minutes East of the point of beginning, thence South 70 degrees and 26 minutes West to the point of beginning, and said land is now made into tax lot 3 of Section 10 and tax lot 14 of Section 9, All in Township 11, Range 14, Cass County, Nebraska.

IT IS THEREFORE ORDERED, adjudged and decreed that fee simple title to the following described real estate, to wit: Beginning at a point 4939 feet due North and 7764.2 feet due East of the section corner common to Sections 8, 9, 16, and 17, Township 11, Range 14, Cass County, Nebraska, thence due South 365 feet, thence due West to the Missouri River, thence Northerly and Northeasterly along the Missouri River to a point due North of the point of beginning, thence due South to the point of beginning, otherwise known as tax lot 1 in Section 10 and tax lot 1 of Section 3 and tax lot 18 of Section 4 and tax lot 13 of Section 9, All in Township 11, Range 14, Cass County, Nebraska, be quieted, established and confirmed in the plaintiff,

Exhibit

Katherine Julia O'Brien, and that the defendants adjudged to be in default under this decree and each of them be and they hereby are perpetually enjoined from claiming, or asserting any right, title, or interest in and to said real estate or any part thereof against the plaintiff, Katherine Julia O'Brien, or anyone claiming by, through or under her.

IT IS FURTHER ORDERED, adjudged and decreed that fee simple title to the following described real estate, to wit: Beginning at a point 4939 feet due North and 7764.2 feet due East of the section corner common to Sections 8, 9, 16, and 17, Township 11, Range 14, Cass County, Nebraska, thence 361 feet North 70 degrees and 26 minutes East to Station 14, thence due East to center of chute on East side of the island, thence Northwest upstream along center of said chute to a point due North of the point of beginning, thence due South to point of beginning, otherwise known as tax lot 2 in Section 10 and tax lot 2 of Section 3, All in Township 11, Range 14, Cass County, Nebraska, be quieted, established and confirmed in the plaintiffs, William Watts and Mason Watts, as joint tenants, and that the defendants adjudged to be in default under this decree and each of them be and they hereby are perpetually enjoined from claiming, or asserting any right, title, or interest in and to said real estate or any part thereof against the plaintiffs, William Watts and Mason Watts, or anyone claiming by, through or under them.

IT IS FURTHER ORDERED, adjudged and decreed that fee simple title to the following described real estate, to wit: Beginning at a point 4939 feet due North and 7764.2 feet due East of the section corner common to Sections 8, 9, 16, and 17, Township 11, Range 14, Cass County, Nebraska, thence 365 feet due South, thence

Exhibit

due West to the Missouri River, thence Southerly down the Missouri River to a point 2047.5 feet North of the section line between sections 9 and 16, Township 11, Range 14, thence due East across island to center line of chute on East side of said island, thence northerly up the chute to a point due East of a point 361 feet North 70 degrees and 26 minutes East of the point of beginning, thence South 70 degrees and 26 minutes West to the point of beginning, otherwise known as tax lot 3 of Section 10 and tax lot 14 of Section 9, All in Township 11, Range 14, Cass County, Nebraska, be quieted, established and confirmed in the plaintiff, Harvey Shipley, and that the defendants adjudged to be in default under this decree and each of them be and they hereby are perpetually enjoined from claiming, or asserting any right, title, or interest in an to said real estate or any part thereof against the plaintiff, Harvey Shipley, or anyone claiming by, through or under him.

IT IS FURTHER ORDERED that the action shall be continued as to all defendants not adjudged to have been in default under this decree.

By the Court,

W. W. Wilson
Judge

Exhibit

EXHIBIT "K"

IN THE DISTRICT COURT OF CASS COUNTY, NEBRASKA

Doc. 9 No. 237

Case 9924

HARVEY SHIPLEY, WILLIAM WATTS, MASON WATTS, KATHERINE JULIA O'BRIEN, Plaintiffs,

-vs-

FRANK G. HULL, et al, Defendants.

DECREE

This matter came on for hearing on the 1st day of August, 1940 upon the petition of the plaintiffs and the evidence and the defendants Frank G. Hull and Gertha Hull, his wife, John Nottlemann Jr., Mrs. Jno. A. Donelan, Jesse M. Fitchhorn, single, Virgie A. McCarrol, and ____ McCarrol, her husband, Ira L. Fitchhorn and ____ Fitchhorn, his wife, Elmer R. Fitchhorn and ____ Fitchhorn, his wife, Mildred Fitchhorn, guardian of Letha M., Glen, John, and Wanda Fitchhorn, James Warga and Irene Warga, his wife, Plattsmouth State Bank, a corporation, Charles Warga and ____ Warga, his wife, Albert J. Godwin and ____ Godwin, his wife, Herbert Church and Pearl Church, his wife, and each of them were found to have voluntarily appeared or to have been duly served with process and were adjudged to be in default and the cause was submitted to the court upon the basis of the petition and the evidence and the Court found generally in favor of the plaintiffs and against said defendants and more particularly found that the plaintiffs were the owners in fee of the real estate described in the petition with all accrued

Exhibit

and accruing accretion and accretions and the Court ordered said action continued as to all defendants not adjudged to have been in default.

Now, therefore, this matter came on for hearing on the 8th day of May, 1941 at the hour of 9:30 A.M., as to all other defendants including Walter Gochenour and upon the pleadings and the evidence and it appearing to the Court that all defendants except Walter Gochenour are in default and that they and each of them were duly served with process herein but they and each of them except Walter Gochenour, have failed to appear, plead or answer, the defendants and each of them except Walter Gochenour are hereby found and adjudged to be in default.

Thereafter on the 8th day of May, 1941 this cause came on for hearing on the petition of the plaintiffs and the answer and cross-petition of Walter Gochenour and the evidence, Walter Gochenour being present at the hearing, and the Court being fully advised in the premises finds generally in favor of the plaintiffs and against the defendants and each of them, more particularly finding that the plaintiffs are the owners in fee simple of the land described in the caption of the petition and set out in the petition with all accrued and accruing accretion and accretions and that they and their immediate grantors have been in actual, open, notorious, peaceable, continuous, exclusive and adverse possession as against all defendants and each of them, both named and unnamed, for more than ten years next preceeding the beginning of this action, and that all defendants and each of them, whether named or unnamed, have no right, title or interest in and to said land and should be barred and precluded from asserting

or claiming any right, title or interest in and to said land.

IT IS THEREFORE ORDERED, adjudged and decreed that fee simple title to the following described real estate, to wit: Beginning at a point 4939 feet due North and 7764.2 feet due East of the section corner common to Sections 8, 9, 16 and 17, Township 11, Range 14, Cass County, Nebraska, thence due South 365 feet, thence due West to the Missouri River, thence Northerly and Northeasterly along the Missouri River to a point due North of the point of beginning, thence due South to the point of beginning, otherwise known as tax lot 1 in Section 10 and tax lot 1 of Section 3 and tax lot 18 of Section 4 and tax lot 13 of Section 9, All in Township 11, Range 14, Cass County, Nebraska, and all accrued and accruing accretion and accretions be quieted, established and confirmed in the plaintiff, Katherine Julia O'Brien, and that the defendants and each of them be and they hereby are perpetually enjoined from claiming, or asserting any right, title or interest in and to said real estate or any part thereof against the plaintiff, Katherine Julia O'Brien, or anyone claiming by, through or under her.

IT IS FURTHER ORDERED, adjudged and decreed that fee simple title to the following described real estate, to wit: Beginning at a point 4939 feet due North and 7764.2 feet due East of the section corner common to Sections 8, 9, 16 and 17, Township 11, Range 14, Cass County, Nebraska, thence 361 feet North 70 degrees and 26 minutes East to Station 14, thence due East to center of chute on East side of the island, thence Northwest upstream along center of said chute to a point due North of the point of beginning, thence due South to point of beginning, otherwise known as tax lot 2 in

Exhibit

Section 10 and tax lot 2 of Section 3, All in Township 11, Range 14, Cass County, Nebraska, and all accrued and accruing accretion and accretions, be quieted, established and confirmed in the plaintiffs, William Watts and Mason Watts, as joint tenants, and that the defendants and each of them be and they hereby are perpetually enjoined from claiming or asserting any right, title, or interest in and to said real estate or any part thereof against the plaintiffs, William Watts and Mason Watts, or anyone claiming by, through or under them.

IT IS FURTHER ORDERED, adjudged and decreed that fee simple title to the following described real estate, to wit: Beginning at a point 4939 feet due North and 7764.2 feet due East of the section corner common to Sections 8, 9, 16 and 17, Township 11, Range 14, Cass County, Nebraska, thence 365 feet due South, thence due West to the Missouri River, thence Southerly down the Missouri River to a point 2047.5 feet North of the section line between Sections 9 and 16, Township 11, Range 14, thence due East across island to center line of chute on East side of said island, thence northerly up the chute to a point due East of a point 361 feet North 70 degrees and 26 minutes East of the point of beginning, thence South 70 degrees and 26 minutes West to the point of beginning, otherwise known as tax lot 3 of Section 10 and tax lot 14 of Section 9, All in Township 11, Range 14, Cass County, Nebraska, and all accrued and accruing accretion and accretions, be quieted, established and confirmed in the plaintiff, Harvey Shipley, and that the defendants and each of them be and they hereby are perpetually enjoined from claiming or asserting any right, title or interest in and to said real estate or any part thereof against the plaintiff, Harvey Shipley, or anyone claiming by, through or under him.

Exhibit

IT IS FURTHER ORDERED that the answer and cross petition of the defendant Walter Gochenour be dismissed at Walter Gochenour's costs, taxed in the sum of $15.00.

Dated, June 19, 1941.

By the Court,

W. W. Wilson
Judge

EXHIBIT "L"

IN THE DISTRICT COURT OF IOWA IN AND FOR FREMONT COUNTY

Equity No. 19765

STATE OF IOWA, Plaintiff,

vs.

Henry E. Schemmel and Lucille Schemmel, husband and wife, Douglas Henry Schemmel, Robert Edgar Schemmel and Mary Schemmel, husband and wife, Mary Leak Persons, Cecil McAlexander, Le Roy McAlexander, Ben E. Givens and Sally D. Givens, husband and wife, James E. Givens and Helen Givens, husband and wife, Frances Givens Taylor and Clarence Taylor, wife and husband, Ruth M. Givens Thiessen Lehr and John L. Lehr, wife and husband, Boyd Richardson and Velma Richardson, husband and wife, Sterling McLaren, Eugene Tiemeyer, Frank H. Schwake and Unknown Spouse, William H. Schwake and Unknown Spouse, Henry H. Schwake and Unknown Spouse, First Trust Company, Lincoln, Nebraska, as Trustee for Schwake Estate, Thurman Hukill and Dor-

Exhibit

othy Hukill, husband and wife, Glen E. Mitchell and Alice Mitchell, husband and wife, F. Pace Woods and Olive Black Woods, husband and wife, Harold Mitchell and Verona Mitchell, husband and wife, John Hancock Mutual Life Insurance Company of Boston, Massachusetts, Arlene Ritchie, William Stenzel, All Unknown Heirs, Devisees, Grantees, Assignees, Successors in Interest and Unknown Spouses of the Above Named Defendants or any of them, Fremont County, Iowa, and All Unknown Claimants and All Persons, Firms, or Corporations Unknown Claiming any Right, Title or Interest in or to the Following Described Real Estate Situated in Fremont County, State of Iowa, To-wit:

Commencing at the section corner common to Sections 10, 11, 14, and 15, Twp. 67 North, Range 43 West of the 5th P. M., thence north 89° 37′ west 1192.26 feet to the ordinary high water line on the east bank of the abandoned channel of the Missouri River, which is the point of beginning, thence along said ordinary high water line north 45° 21′ west 283.28 feet, thence north 70° 04′ west 177.25 feet,
thence north 89° 00′ west 478.25 feet,
thence north 57° 46′ west 434.10 feet,
thence north 69° 20½′ west 615.80 feet,
thence north 55° 37½′ west 316.40 feet,
thence south 73° 36½′ west 313.70 feet,
thence north 37° 56½′ west 378.80 feet,
thence south 64° 44½′ west 111.75 feet,
thence south 12° 03′ west 254.20 feet,
thence south 58° 55′ west 44.40 feet to a point on the east bank of the main channel of the Missouri River, thence north 88° 49½′ west 350.00 feet to the Iowa-Nebraska boundary as established by the States of Iowa and Nebraska and approved by the 78th Congress in 1943, thence along said boundary line south 0° 15′ west 755.50 feet,
thence south 0° 50′ west 643.20 feet,

Exhibit

thence south 0° 56′ west 129.10 feet,
thence south 2° 00′ east 493.65 feet,
thence south 4° 52′ east 482.65 feet,
thence south 7° 37′ east 478.50 feet,
thence south 11° 55′ east 470.25 feet,
thence south 17° 20′ east 459.60 feet,
thence south 25° 10½′ east 453.75 feet,
thence south 32° 33½′ east 458.40 feet,
thence south 38° 47′ east 465.30 feet,
thence south 43° 55′ east 471.80 feet,
thence south 48° 00′ east 475.25 feet,
thence south 52° 01½′ east 480.20 feet,
thence south 54° 28½′ east 487.10 feet,
thence south 55° 40½′ east 1584.75 feet,
thence south 50° 03′ east 1015.30 feet,
thence south 42° 00′ east 489.90 feet,
thence south 38° 22′ east 479.80 feet,
thence south 34° 54½′ east 420.80 feet,
thence south 32° 00′ east 300.80 feet,
thence south 26° 20½′ east 287.90 feet,
thence south 22° 28′ east 292.50 feet,
thence south 18° 33½′ east 289.70 feet,
thence south 14° 39′ east 293.30 feet,
thence south 10° 30½′ east 430.90 feet,
thence leaving the Iowa-Nebraska boundary line north 82° 07½′ east 325.00 feet to the left or east bank of the designed channel of the Missouri River, thence north 34° 28′ east 245.95 feet to the ordinary high water line along the east bank of the abandoned channel, thence north 24° 08½′ east 311.45 feet, thence north 5° 38½′ west 625.60 feet,
thence north 24° 59′ west 417.90 feet,
thence north 19° 26½′ west 267.90 feet,
thence north 71° 06′ west 204.55 feet,
thence north 38° 01½′ west 378.05 feet,
thence north 37° 48′ west 582.00 feet,
thence north 14° 06½′ west 123.45 feet,
thence north 5° 28′ west 685.80 feet,
thence north 14° 36′ east 336.15 feet,
thence north 22° 12′ east 159.20 feet,

Exhibit

thence north 6° 20½′ east 1,024.00 feet,
thence north 2° 33′ west 489.70 feet,
thence north 9° 31′ west 295.80 feet,
thence north 25° 09′ west 494.00 feet,
thence north 72° 30½′ west 502.15 feet,
thence north 48° 44′ west 323.65 feet,
thence north 42° 17½′ west 421.00 feet,
thence north 26° 48½′ west 806.15 feet,
thence north 23° 12′ west 592.30 feet,
thence north 22° 04′ west 480.25 feet,
thence north 0° 12½′ west 268.10 feet,
thence north 6° 54½′ west 232.55 feet,
thence north 7° 51½′ west 278.80 feet,
thence north 34° 03½′ west 323.95 feet,
thence north 45° 21′ west 452.67 feet to the place of beginning; containing in all 660.944 acres, Defendants.

PETITION IN EQUITY

Comes now the plaintiff, and for cause of action against the defendants and each of them respectfully states:

1. That plaintiff is the absolute and unqualified owner in fee simple of the real estate hereinabove described.

2. That plaintiff is credibly informed and believes that the defendants, or some of them, make claim to said real estate or claim some interest therein, said claims being adverse to plaintiff's title, but plaintiff alleges that all said claims are wholly without right.

3. That plaintiff is credibly informed and believes that unknown persons make claim to said real estate or claim some interest therein, said claims being adverse to plaintiff's title, and that said unknown persons are made parties hereto as Unknown Claimants; that plaintiff has used all reasonable means to ascertain the na-

ture and

Exhibit

claimant extent of said claims and the identity of said claims as, but has been unable to do so; that all of said names are wholly without merit or right; that the unknown nd addresses of said Unknown Claimants are the same to plaintiff despite diligent effort to ascertain

4. Th

hereof ar at the real estate described in the caption Section 1 nd involved herein is part of the South half of 5th P. M. 10, Township 67 North, Range 43 West of the Township ; Part of the Southwest Quarter of Section 14, Part of S 67 North, Range 43 West of the 5th P. M.; of the 5th ection 15, Township 67 North, Range 43 West tion 22, T h P. M.; Part of the Northeast Quarter of Sec- P. M. and ownship 67 North, Range 43 West of the 5th 67 North, Part of the West Half of Section 23, Township mont Cou Range 43 West of the 5th P. M., all in Fre- hereto at nty, Iowa. That a Plat of said real estate is of this Pe tached, marked "Exhibit 1" and made a part tition by reference.

WHER

estate in

confirmed EFORE, plaintiff prays that its title to and fendants the above described property be quieted and claim any as an absolute title in fee simple; that de- other and be forever barred and estopped to have or deem just right, title or interest thereto; and for such further equitable relief as the Court may

EVAN HULTMAN
Attorney General of Iowa

WILLIAM J. YOST
Assistant Attorney General of Iowa

(s) *Michael Murray*
Attorney at Law, Logan, Iowa

Attorneys for Plaintiff

Exhibit

State of Iowa)
) ss.
Fremont County)

I, Michael Murray, being first duly sworn on oath depose and state that I am one of the attorneys for the plaintiff in the above case; that I have prepared the foregoing Petition and know its contents and that the statements therein contained are true as I verily believe.

(s) *Michael Murray*

Subscribed in my presence and sworn to before me by the said Michael Murray this 26 day of March, 1963.

(s) *Olive Van Sant*
Clerk of Court in and for
Fremont County, Iowa.

EXHIBIT "M"

IN THE DISTRICT COURT OF THE STATE OF IOWA, IN AND FOR FREMONT COUNTY

THE STATE OF IOWA, PLAINTIFF
VS.
HENRY E. SCHEMMEL AND LUCILLE SCHEMMEL, husband and wife, DOUGLAS HENRY SCHEMMEL, ROBERT EDGAR SCHEMMEL AND MARY SCHEMMEL, husband and wife, MARY LEAH PERSONS AND ROBERT H. PERSONS, HER HUSBAND, et al, DEFENDANTS

SEPARATE ANSWER OF HENRY E. SCHEMMEL, et al. AND COUNTERCLAIM

Exhibit

ANSWER

Come now the Defendants, Henry E. Schemmel and Lucille Schemmel, husband and wife, Douglas Henry Schemmel, Robert Edgar Schemmel, and Mary Schemmel, husband and wife, Mary Leah Persons and Robert H. Persons, wife and husband and for ANSWER to plaintiff's petition, state to the Court:

1. They specifically deny paragraph 1 thereof.

2. Answering paragraph 2 thereof, they admit that they make claim to the real estate in the petition, adverse to plaintiff's alleged title, and deny all other allegations thereof.

3. They deny paragraph 3 thereof for lack of information.

4. Answering paragraph 4 thereof, defendants deny that the land described in the caption and involved in this case is a part of the various sections and tracts described therein by refering to government survey and plat, but allege that the land herein involved may be located by reference to and extensions of the Iowa survey.

Further answering the said paragraph 4, defendants allege that the said land is now located on the Iowa side of the Missouri river, by reason of the Iowa-Nebraska Boundary Pact of 1943, but that prior to such boundary pact it was located within the State of Nebraska and a part of Sections 29, 30, 31 and 32, Township 8, Range 15 East of the 6th P. M. in Otoe County, State of Nebraska and accretions thereto.

Defendants admit that the Plat Exhibit 1 locates and describes the land in controversy.

Exhibit

5. Further answering plaintiff's petition, defendants deny land formed within the State of Iowa, and deny that the plaintiff has any claim to the said land, and allege that its pretended claims are wholly without right.

6. That plaintiff's claim in contrary to and in violation of the said Iowa-Nebraska Boundary pact of 1943, in that it fails to recognize and give effect to defendant's title and rights to the said land under Nebraska law; that the defendants and their grantors, and predecessors in interest are the riparian owners of the lands bordering on the main channel on the West, or Nebraska side of the Missouri River; that as such riparian owners, under the Nebraska common law, as such riparian owners, they owned and held the title of the land to the middle or thread of the main channel subject only to the rights of the public to use the stream for navigation, or other proper public use. Among the authorities so holding are *Kinkead* v. *Turgeon,* 74 Nebraska 587, 109 N. W. 746, 13 Ann. Cas. 43; *Whitaker* v. *McBride,* 197 U. S. 510, 25 S. Ct. 530; *Independent Stock Farm* v. *Stevens, et al,* 259 N. W. 647, 128 Nebraska 619. That the land involved herein is a part of the said riparian land and accretions thereto and that the defendants have title, good in Nebraska to such land.

7. That the within action and claims on the part of the State of Iowa, invades and violates the constitutional rights of the defendants, and is an attempt to appropriate, and to deprive them of their property for public use, without just compensation, and without due process of law, without just compensation, and without due process of law, in violation of Article 9 of Section 1

Exhibit

of the Constitution of the State of Iowa, and the 14th Amendment to the Constitution of the United States.

8. That defendants and their grantors and predecessors in interest for more than ten years before this suit was begun, and for more than ten years before the boundary pact above referred to, continuously been in the actual, open nortorious, exclusive and uninterrupted possession of said real estate under color of title and claim of rightful ownership, in fee simple and adverse to the claim herein made by the plaintiff.

9. That the possession of the defendants has been in good faith under color of title and claim of rightful title and ownership and relying thereon, the defendants have made valuable improvements on the said land, clearing, and levelling the same, and rendering the same tillable for general farming purposes, all at a cost of many thousands of dollars, with the result that the same is now valuable farm land; that they have paid the taxes thereon, both in Nebraska, and in Iowa after it was ceded to Iowa and under the boundary pact and placed on the tax rolls. That the State of Iowa has never been in possession of the said real estate, nor asserted any claim to it prior to the commencement of this action; that by reason of the lapse of time and failure of the State of Iowa, to allege or assert a pretended claim to the said premises, the plaintiff is now estopped from asserting any right, title or claim adverse to the defendants.

WHEREFORE, defendants pray that plaintiff's petition be dismissed at plaintiff's costs.

(s) *John S. Redd*
John S. Redd
Attorney for Defendants
Address: Sidney, Iowa

Exhibit

COUNTERCLAIM

Come now the defendants, Henry E. Schemmel and Lucille Schemmel, husband and wife, Douglas Henry Schemmel, Robert Edgar Schemmel and Mary Schemmel, husband and wife, Mary Leah Persons and Robert H. Persons, her husband, et al., and for Counterclaim against the plaintiff state:

DIVISION I.

1. Defendants adopt and replead paragraphs 4 to 9, inclusive of their foregoing Answer and make the same a part hereof by this reference.

2. That these defendants, in the aggregate are the absolute owners in fee simple of the land described in plaintiff's petition and all accretions thereto, except for such portions thereof as may be accretions to the riparian land of other owners to the East and subject to the rights of the public as to such portions thereof as is now within the stabilized channel of the present Missouri River.

3. That plaintiffs pretended claims in and to such lands of the defendants are wholly without right, and cloud the title of these defendants.

4. That the defendants, their grantors and predecessors in interest were at all time material herein the riparian owners of the highbank land, bordering on the West Bank of the Missouri River, in Sections 29, 30, 31 and 32, Township 8, Range 15 East of the 6th P.M. in Otoe County, State of Nebraska and accretions thereto.

5. That at all time material herein, it was and still is the law of Nebraska that the riparian owner of the high bank on the Nebraska or West side of the Mis-

Exhibit

souri River, own the fee title to the bed of said river, to the thread of the Main Channel, or the boundary of the said state. Authorities so holding are cited in the foregoing Answer.

6. That the defendants or their predecessors in interest, were the owners and holders of the said riparian land, and the owners of the bed of the Missouri River to the thread on the main channel immediately prior to and at the time the Corps of Engineers, U. S. Army, commenced its work to place the main channel of the river in its present designed channel.

7. That in about the year of 1934, the U. S. Army Engineers by means of dredging, revetments, pile dikes and other devices, cut and moved to the West into land within the State of Nebraska, the new designed channel of the Missouri River, and in so doing, such channel was cut through the riparian lands of these defendants within the State of Nebraska, above described, leaving a portion thereof on the East or Iowa side of the new designed channel that such sudden artificial change of the prior channel to the new designed channel was an avulsive change of the course of the main channel of the Missouri River, and that title ownership of the defendant in the said riparian lands was not affected thereby; that the lands in controversy herein are such riparian lands together with accretions thereto.

DIVISION II

For Division II of their Counterclaim, these defendants allege and state:

1. That the defendants and Counterclaimants, are individually or in the aggregate, the absolute owners in fee simple of the following described and identified real estate, situated in Fremont County to wit:

Exhibit

All that portion of the East Half (E½) of Section 15, Township 67, North, Range 43, West of the 5th P.M. lying East of the former East bank of the Missouri River set out and described in the Plat Exhibit I attached to in plaintiff's petition, together with all accretions thereto.

2. That at all times material herein, these defendants, their grantors, and predecessors in interest, were the owners of said riparian high bank land, bordering on the East bank of the said Missouri River.

3. That the said Missouri river, moved and receded to the West from the defendant's said high bank land, and as it so receded, the lands involved in this case formed and accreted thereto, that the portion thereof which formed and accreted to defendant's, lying between the said high bank lands and the present channel of the Missouri River, is the property of these defendants, and that these defendants are the absolute and unqualified owners thereof, as against the plaintiff.

4. That the plaintiff's pretended claims in and to such lands of the defendants are wholly without right, and cloud defendants title.

5. Defendants adopt and replead paragraphs 7 and 8 of the foregoing Answer and make the same a part hereof by this reference.

WHEREFORE these defendants pray that their title and estate in and to the property described in paragraph 2 hereof be quieted, established and confirmed as an absolute title in fee simple; that the plaintiff and all parties claiming by through or under it, be forever barred and estopped from having or claiming any right, title and interest thereto.

Exhibit

Defendants further pray that if necessary as between the parties to establish and more particularly describe the boundaries of the said lands of the defendants, a commissioner be appointed so to do, and defendants pray for all such other and further equitable relief as the Court may deem just.

(s) *John S. Redd*
John S. Redd
Attorney for Defendants
Address: Sidney, Iowa

STATE OF IOWA :
: SS.
FREMONT COUNTY :

I, John S. Redd, being first duly sworn on oath depose and say that I am the Attorney for the defendants in the above and foregoing Answer to Petition and Counterclaim; that the Counterclaim is plead in two divisions, depending upon the proof, that I have prepared the same and know the contents thereof and that the statements therein contained are true and correct as I verily believe.

(s) *John S. Redd*

Subscribed in my presence and sworn to before me by the said John S. Redd this 18 day of March 1964.

(s) *Olive Van Sant*
Clerk of the District Court in and
for Fremont County.

Exhibit

EXHIBIT "N"

IN THE DISTRICT COURT OF THE STATE OF IOWA, IN AND FOR FREMONT COUNTY

Equity No. 19765

THE STATE OF IOWA, Plaintiff
VS.
HENRY E. SCHEMMEL et al, GLEN E. MITCHELL AND ALICE MITCHELL, husband and wife, F. PACE WOODS AND OLIVE BLACK WOODS, husband and wife, HAROLD MITCHELL AND VERONA MITCHELL, husband and wife, et al, Defendants.

SEPARATE ANSWER OF F. PACE WOODS, et al AND COUNTERCLAIM

ANSWER

Come now the Defendants, F. Pace Woods and Olive Black Woods, husband and wife, Glen E. Mitchell and Alice Mitchell, husband and wife, and Harold E. Mitchell and Verona Mitchell, husband and wife and for ANSWER to plaintiff's petition, state to the Court:

1. They specifically deny paragraph I thereof.

2. Answering paragraph 2 thereof, they admit that they make claim to a portion of the real estate described in the caption of the petition, adverse to plaintiff's alleged title, and deny all other allegations thereof.

3. They deny paragraph 3 thereof for lack of information.

4. Answering paragraph 4 thereof, defendants deny that the land described in the caption and in-

volved in this case is a part of the various sections and tracts described therein by reference to government survey and plat, except that the land herein involved may for convenience be located by reference to and extensions of, the Iowa survey, and that the Plat Exhibit I locates and describes the land in controversy, for the purposes of this action.

5. These answering defendants, deny each and every allegation of plaintiff's petition, not herein admitted, deny that the plaintiff has any right title or interest in the said land, except such rights as it may have for navigation, or other appropriate purposes to the portion of the stream within the present stabilized main channel of the Missouri, exclusive of the land formation to the East thereof, and allege that it's pretended claim is wholly without right.

6. Defendants adopt and plead as a part of this Answer, their Counterclaim hereinafter set out.

WHEREFORE, defendants pray the plaintiff's petition be dismissed at plaintiff's cost.

(s) *John S. Redd*
John S. Redd
Attorney for Defendants
Address: Sidney, Iowa

COUNTERCLAIM

Come now the defendants, F. Pace Woods and Olive Black Woods, husband and wife, Glen E. Mitchell and Alice Mitchell, husband and wife, and Harold E. Mitchell and Verona Mitchell, husband and wife, and for Counterclaim against the plaintiff state:

1. Defendants adopt and replead paragraphs 1 to 5, inclusive, of their foregoing Answer and make the same a part hereof by this reference.

Exhibit

2. That these answering defendants are in the aggregate the absolute owners in fee simple of the following described real estate situated in Fremont County, Iowa, to wit:

> All that portion of the Southwest Quarter (SW¼), of Section 14, Township 67 North, Range 43, West of the 5th P.M. lying East of the Missouri River, and also, all that part of the West Half (W½) of Section 23, Township 67 North, Range 43, West of the 5th P.M., lying East of the Missouri River, together with all accretions thereto.

3. That the answering defendants, their grantors and predecessors in interest were at all time material herein the riparian owners of the said highbank land, bordering on the East Bank of the Missouri River, in said Sections 14 and 23, Township 67, Range 43, West of the 5th P.M. in Fremont County, State of Iowa.

4. That the Missouri River formerly ran along and was immediately adjacent on the West to the said high bank land of these defendants. That as the said river receded to the West the land involved in this case was formed and accreted to defendants riparian lands; that the portion thereof which formed and accreted to defendants lands, and between the said lands of the defendants and the present Missouri River, is the property of defendants, and that the defendants are the absolute and unqualified owners thereof, as against the plaintiff.

5. That plaintiffs pretended claims in and to such lands of the defendants are wholly without right, and cloud the title of these defendants.

WHEREFORE, these defendants pray that their title and estate in and to the property described in paragraph

Exhibit

2 hereof be quieted, established and confirmed as an absolute title in fee simple, including all accretions; that the plaintiff and all parties claiming by through or under it, be forever barred and estopped from having or claiming any right, title and interest thereto.

Defendants further pray that if necessary to apportion such accretion and establish more particularly the boundaries of the said lands of these defendants, that a commissioner be appointed so to do, and defendants pray for all such other and further equitable relief as the Court may deem just.

(s) *John S. Redd*
John S. Redd
Attorney for Defendants
Address: Sidney, Iowa

STATE OF IOWA :
: SS.
FREMONT COUNTY :

I, John S. Redd, being first duly sworn on oath depose and say that I am the Attorney for the defendants in the above and foregoing ANSWER to Petition and Counterclaim; that I have prepared the same, and know the contents thereof and that the statements therein contained are true and correct as I verily believe.

Subscribed in my presence and sworn to before me by the said John S. Redd this 18 day of March 1964.

(s) *Olive Van Sant*
Clerk of the District Court in and
for Fremont County, Iowa.

Exhibit

EXHIBIT "O"

IN THE DISTRICT COURT OF THE STATE OF IOWA IN AND FOR FREMONT COUNTY

STATE OF IOWA, Plaintiff,
VS.
HENRY E. SCHEMMEL, ET AL, Defendants.

REPLY TO ANSWER AND ANSWER TO COUNTER CLAIM OF HENRY E. SCHEMMEL, ET AL

REPLY

Comes now the plaintiff and for reply to the separate answer of Henry E. Schemmel et al states to the Court the following:

1. For reply to Paragraph 4 of said answer, plaintiff denies that the location of the land in controversy on the Iowa side of the Missouri River was caused or in any manner affected by the Iowa-Nebraska boundary pact of 1943. Plaintiff denies that the land in controversy, or any part thereof, was ever located within the State of Nebraska.

2. For reply to Paragraph 6 of said answer, plaintiff denies that its claim is contrary to or in violation of the Iowa-Nebraska boundary pact of 1943, and hereby alleges that the land in controversy in this case has been located within the State of Iowa continuously since it came into existence, and the Iowa-Nebraska boundary pact of 1943 had no effect and did not change the ownership of said land or the sovereignty of the State of Iowa over it. Plaintiff denies that the defendants or any of them have any right, title or interest or to the land in controversy under Nebraska law, because said land has never been within the State of Nebraska or subject to Nebraska law.

Further replying to Paragraph 6, plaintiff admits for purposes of this case that defendants and their grantors and predecessors in interest are the riparian owners of lands bordering on the main channel of the Missouri River on the west, or Nebraska, side thereof, but plaintiff hereby states and alleges that the ownership of said lands on the west or Nebraska side of said main channel is irrelevant and immaterial to any issue in this case because the land in controversy herein did not form as accretions to said Nebraska lands nor as accretion to that part of the bed of the Missouri River which was in the State of Nebraska at the time of its formation, nor was the land in controversy or any portion thereof any part of the riparian lands or accretions thereto lying on the west or Nebraska side of the river. Plaintiff hereby alleges that the land in controversy formed as an island upon and over that part of the bed of the Missouri River which lay within the State of Iowa at the time of such formation.

Further replying to Paragraph 6, plaintiff admits that under the common law of Nebraska, a riparian landowner owns to the middle or thread of the stream, but plaintiff hereby alleges that said common law of Nebraska is irrelevant and immaterial to any issue of this case.

3. Plaintiff denies Paragraph 7 of said answer.

4. Plaintiff denies each and every allegation made and contained in Paragraph 8 of said answer.

5. Plaintiff denies each and every allegation made and contained in Paragraph 9 of said answer, and for further reply to Paragraph 9, hereby states that the allegations of Paragraph 9 are irrelevant and immaterial to any issue in this case.

Exhibit

WHEREFORE plaintiff prays as in its original petition.

ANSWER TO DIVISION I OF COUNTER CLAIM

Comes now the plaintiff and for answer to the counter claim of Henry E. Schemmel, et al, states to the Court as follows:

1. Plaintiff adopts its foregoing reply as and for its answer to Paragraph I, Division I of said counter claim.

2. Plaintiff denies Paragraph 2, Division I, of said counter claim.

3. Plaintiff denies Paragraph 3, Division I of said counter claim.

4. Plaintiff admits Paragraph 4, Division I, but for further answer states that the allegations of said paragraph are irrelevant and immaterial.

5. Plaintiff admits Paragraph 5, Division I, but for further answer states that the allegations of said paragraph are irrelevant and immaterial.

6. For answer to Paragraph 6 plaintiff states that it has hereinabove admitted that defendants were the riparian owners of the high bank land bordering on the west bank of the Missouri River at all times material herein and that they were the owners of the bed of the Missouri River lying adjacent thereto to the thread or thalweg of the stream, such part of the bed being that part which was situated in the State of Nebraska. If Paragraph 6 is an attempt by defendants to allege and claim any land other than above described, plaintiff to such extent denies Paragraph 6.

7. Plaintiff denies each and every allegation made and contained in Paragraph 7.

Exhibit

ANSWER TO DIVISION II OF COUNTER CLAIM

1. Plaintiff denies Paragraph 1 of Division II.

2. Plaintiff denies Paragraph 2 of Division II.

3. Plaintiff denies each and every allegation made and contained in Paragraph 3 of Division II, and for further answer to said paragraph states and alleges that the land in controversy formed as an island and as accretion to the State-owned bed of the Missouri River.

4. Plaintiff denies Paragraph 4, Division II.

5. For answer to Paragraph 5, plaintiff re-pleads its reply to Paragraphs 7 and 8 of defendants' answer.

WHEREFORE plaintiff prays that defendants' counter claim and each and every part thereof be dismissed and denied at defendants' cost.

EVAN HULTMAN
Attorney General of Iowa

WILLIAM J. YOST
Assistant Attorney General of Iowa

(s) *Michael Murray*
Address: Logan, Iowa

Attorneys for Plaintiff

Exhibit

EXHIBIT "P"

IN THE DISTRICT COURT OF THE STATE OF IOWA, IN AND FOR FREMONT COUNTY

STATE OF IOWA, Plaintiff,
VS.
HENRY E. SCHEMMEL, ET AL, Defendants.

REPLY TO ANSWER AND ANSWER TO COUNTER CLAIM OF F. PACE WOODS, ET AL

REPLY

Comes now the plaintiff and for its reply to the answer of F. Pace Woods et al, states to the Court as follows:

1. So far as applicable, plaintiff adopts the following answer to counter claim for its reply to the answer of F. Pace Woods, et al:

WHEREFORE plaintiff prays as in its original petition.

ANSWER TO COUNTER CLAIM

Comes now the plaintiff and for answer to the counter claim of F. Pace Woods, et al, states to the Court as follows:

1. Insofar as it be deemed that said defendants have made any affirmative allegations in Paragraph 1 of said counter claim, plaintiff denies the same.

2. Plaintiff denies Paragraph 2.

3. Plaintiff denies Paragraph 3.

4. Plaintiff denies Paragraph 4, and for further answer to Paragraph 4, states and alleges that the land in controversy in this case formed as an island over and

above the portion of the bed of the Missouri River owned by the State of Iowa.

5. Plaintiff denies Paragraph 5.

WHEREFORE plaintiff prays that the counter claim of F. Pace Woods, et al, be dismissed and denied at the cost of the defendants.

EVAN HULTMAN
Attorney General of Iowa

WILLIAM J. YOST
Assistant Attorney General of Iowa

(s) *Michael Murray*
Address: Logan, Iowa

Attorneys for Plaintiff

EXHIBIT "Q"

RESOLUTIONS

LEGISLATIVE RESOLUTION 47. Re: Nebraska-Iowa Boundary Dispute.

Introduced by William B. Brandt, Legislative District 2.

WHEREAS, the State of Iowa is being most aggressive in asserting ownership of lands lying east of the stabilized channel of the Missouri River, many of which lands are owned by residents of the State of Nebraska; and

WHEREAS, the State of Iowa in pursuit of this policy has initiated action in its own courts against at least one resident of Nebraska, and in statements by its of-

Exhibit

ficers has indicated that further similar actions are contemplated against Nebraska residents and against lands which are a part of the State of Nebraska; and

WHEREAS, in certain instances this aggressive policy by officers of the State of Iowa may be in conflict with the solemn agreement of the State of Iowa on April 15, 1943, to recognize Nebraska titles; and

WHEREAS, individual owners of Nebraska lands and individual Nebraska citizens in defending their ownership of such lands cannot be in a position to match the financial and legal resources available to officers of the State of Iowa in the pursuit of their present policies in attempting to acquire title to the lands involved.

NOW, THEREFORE, BE IT RESOLVED BY THE MEMBERS OF THE NEBRASKA LEGISLATURE IN SEVENTY-THIRD SESSION ASSEMBLED:

1. That the State of Nebraska is deeply concerned on behalf of its citizens with the aggressive policies pursued by officers of the State of Iowa in the acquisition by that State of certain lands along the Missouri River.

2. That within the limits of appropriations specifically made for that purpose, the Attorney General of the State of Nebraska be directed to employ special counsel or assistant Attorneys General to examine into all such actions initiated or contemplated by the State of Iowa, and where such action appears to be justified to protect the legitimate interests of Nebraska citizens or the titles to Nebraska lands, or to assure compliance by Iowa officials with the 1943 Boundary Compact with the State of Iowa, that he intervene on behalf of the State of Nebraska in any such actions or proceedings

initiated by officials of the State of Iowa, or that he initiate any and all necessary original actions in the Supreme Court of the United States to accomplish the objectives outlined herein.

UNANIMOUS CONSENT—Add Co-introducers

Mr. Brandt requested unanimous consent to add the following names as co-introducers of LR 47: Messrs. Bahensky, Claussen, Syas, Ruhnke, Erlewine, Moulton, E. Rasmussen, R. Rasmussen, Stalder, Wylie, Bridenbaugh, Stryker, Lysinger, Hasebroock, Mahony, Gerdes, Stromer and Burbach. No objections. So ordered.

MOTION—Suspend Rules

Mr. Brandt moved that the rules be suspended and that LR 47 be adopted today. The motion prevailed with 36 ayes, 0 nays, and 7 not voting, and LR 47 was adopted.

Exhibit

PROOF OF SERVICE

I, Clarence A. H. Meyer, Attorney General of the State of Nebraska, and a member of the Bar of the Supreme Court of the United States, hereby certify that on July ....., 1964, I served a copy of the foregoing Motion for Leave to File Bill of Complaint, Statement in support of Motion, and Complaint by depositing same in a United States Post Office, with first class postage prepaid, addressed to:

HONORABLE HAROLD E. HUGHES,
Governor of the State of Iowa
State Capitol
Des Moines, Iowa

HONORABLE EVAN L. HULTMAN
Attorney General of the State of Iowa
State Capitol
Des Moines, Iowa

such being their post office addresses.

Clarence A. H. Meyer
Attorney General,
State of Nebraska
State Capitol Building
Lincoln, Nebraska

Office-Supreme Court, U.S.
FILED
JUL 20 1964
JOHN F. DAVIS, CLERK

In The

Supreme Court of the United States

October Term, 1964

No. 17 Original

STATE OF NEBRASKA, PLAINTIFF,

v.

STATE OF IOWA, DEFENDANT.

BRIEF OF THE STATE OF NEBRASKA IN SUPPORT OF ITS MOTION FOR LEAVE TO FILE ORIGINAL BILL OF COMPLAINT

CLARENCE A. H. MEYER
Attorney General of Nebraska
State Capitol Building
Lincoln Nebraska

JOSEPH R. MOORE
Special Assistant Attorney General of Nebraska
1028 City National Bank Building
Omaha Nebraska

HOWARD H. MOLDENHAUER
Special Assistant Attorney General of Nebraska
1100 First National Bank Building
Omaha Nebraska

JOE CHRISTENSEN PRINTING, 1521 O Street, Lincoln 8, Nebr.

In The

Supreme Court of the United States

October Term, 1964

No. _____, Original

STATE OF NEBRASKA, PLAINTIFF,

V.

STATE OF IOWA, DEFENDANT.

BRIEF OF THE STATE OF NEBRASKA IN SUPPORT OF ITS MOTION FOR LEAVE TO FILE ORIGINAL BILL OF COMPLAINT

I.

Basis of Original Jurisdiction

The Constitution of the United States, Article III, Section 2, Clause 2, provides:

> "In all cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the Supreme Court shall have original Jurisdiction."

Title 28, U. S. C. Section 1251, provides:

> "(a) The Supreme Court shall have original and exclusive jurisdiction of:
>
> (1) All controversies between two or more States:"

II.

Determination of Boundaries Between States

This Court has repeatedly accepted original jurisdiction in matters involving disputes as to the location of the boundary between two States and the matter is so well settled that the jurisdictional question, if one can be said to exist, is seldom discussed in the Court's opinions. *Nebraska v. Iowa,* 143 U. S. 359, 12 S. Ct. 396, 36 L. Ed. 186 (1892); decree at 145 U. S. 519, 12 S. Ct. 976, 36 L. Ed. 798 (1892); *Indiana v. Kentucky,* 136 U. S. 479, 10 S. Ct. 1051, 34 L. Ed. 329 (1890); *Arkansas v. Tennessee,* 310 U. S. 563, 60 S. Ct. 1026, 84 L. Ed. 1362 (1940); *Michigan v. Wisconsin,* 270 U. S. 295, 46 S. Ct. 290, 70 L. Ed. 595 (1926).

III.

Acceptance of Cases Interpreting Compact

This Court accepted jurisdiction of *Georgia v. South Carolina,* 257 U. S. 516, 42 S. Ct. 173, 66 L. Ed. 347 (1922) involving an interpretation of the Beaufort convention establishing the boundary between those two States; *Massachusetts v. New York,* 271 U. S. 65, 46 S. Ct. 357, 70 L. Ed. 838 (1926) involving the Treaty of Hartford; and of *Kentucky v. Indiana,* 281 U. S. 163, 50 S. Ct. 275, 74 L. Ed. 784 (1930) involving interpretation of a contract between those States to build a bridge.

Respectfully submitted,

CLARENCE A. H. MEYER
Attorney General of Nebraska

JOSEPH R. MOORE
Special Assistant Attorney
General of Nebraska

HOWARD H. MOLDENHAUER
Special Assistant Attorney
General of Nebraska

PROOF OF SERVICE

I, Clarence A. H. Meyer, Attorney General of the State of Nebraska, and a member of the Bar of the Supreme Court of the United States, hereby certify that on July ...., 1964, I served a copy of the foregoing Brief of the State of Nebraska in Support of Its Motion for Leave to File Original Bill of Complaint by depositing same in a United States Post Office, with first class postage prepaid, addressed to:

HONORABLE HAROLD E. HUGHES,
Governor of the State of Iowa
State Capitol
Des Moines, Iowa

HONORABLE EVAN L. HULTMAN
Attorney General of the State of Iowa
State Capitol
Des Moines, Iowa

such being their post office addresses.

CLARENCE A. H. MEYER
Attorney General, State of Nebraska
State Capitol Building
Lincoln, Nebraska

Office-Supreme Court, U.S.
FILED
AUG 5 1964
JOHN F. DAVIS, CLERK

In The

Supreme Court of the United States

October Term, 1964

No. 17, Original

STATE OF NEBRASKA, PLAINTIFF,

v.

STATE OF IOWA, DEFENDANT,

MOTION FOR TEMPORARY RESTRAINING ORDER AND AFFIDAVIT AND STATEMENT IN SUPPORT OF MOTION

CLARENCE A. H. MEYER
Attorney General of Nebraska
State Capitol Building
Lincoln Nebraska

JOSEPH R. MOORE
Special Assistant Attorney General
of Nebraska
1028 City National Bank Building
Omaha Nebraska

HOWARD H. MOLDENHAUER
Special Assistant Attorney General
of Nebraska
1100 First National Bank Building
Omaha Nebraska

Attorneys for Plaintiff

JOE CHRISTENSEN PRINTING, 1521 O Street, Lincoln 8, Nebr.

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In The

Supreme Court of the United States

October Term, 1964

No. 17, Original

STATE OF NEBRASKA, PLAINTIFF,

v.

STATE OF IOWA, DEFENDANT.

MOTION FOR TEMPORARY RESTRAINING ORDER

To the Honorable Byron R. White, Justice for the Eighth Judicial Circuit:

Now comes the Plaintiff in the above entitled matter and respectfully moves the Court and the single Justice to whom this motion is presented that a temporary restraining order be issued directed to the State of Iowa and its officers, agents, and employees, restraining them from further pursuance or prosecution of proceedings in the presently pending litigated cases known and styled as "In the District Court of Iowa in and for Mills County, State of Iowa, Plaintiff, vs. Darwin Merrit Babbitt, et al, Defendants, Equity No 17433" and "In the District Court of Iowa in and for Fremont County, State of Iowa, Plaintiff vs. Henry E. Schemmel, et al, Defendants Equity No. 19765" pending the out-

come of these proceedings or until further order of this Court, and further enjoining the said State of Iowa, its officers, agents and employees from instituting any other such similar proceedings or interfering with the quiet enjoyment of individuals owning or occupying lands ceded to Iowa by the State of Nebraska under the Iowa-Nebraska Boundary Compact of 1943; or, in the alternative, Plaintiff moves for an order staying proceedings in the Iowa courts.

This motion is based upon the Complaint attached to the Motion for Leave to File said Bill of Complaint, and the affidavit attached of John S. Redd, attorney for Henry E. Schemmel, and the Exhibits attached thereto, and is requested pending the Ruling of this Honorable Court on the Motion for leave to file the Bill of Complaint and, should such Motion be granted, until such time as the controversies set forth in said Complaint are decided and the rights of the parties adjudicated.

CLARENCE A. H. MEYER
Attorney General of Nebraska
State Capitol Building
Lincoln Nebraska

JOSEPH R. MOORE
Special Assistant Attorney General
of Nebraska
1028 City National Bank Building
Omaha Nebraska

HOWARD H. MOLDENHAUER
Special Assistant Attorney General
of Nebraska
1100 First National Bank Building
Omaha Nebraska

Attorneys for Plaintiff

In The

Supreme Court of the United States

October Term, 1964

No. 17, Original

STATE OF NEBRASKA, PLAINTIFF,

v.

STATE OF IOWA, DEFENDANT,

AFFIDAVIT

State of Iowa)
) ss.
County of Fremont)

JOHN S. REDD, being first duly sworn, on oath deposes and says:

That he is a resident of Sidney, County of Fremont, State of Iowa, is a member of the bar of the Courts of Iowa and is a duly licensed and practicing attorney in said State;

That he is attorney of record and actively in charge of the defense in the case captioned "In the District Court of Iowa in and for Fremont County, State of Iowa, Plaintiff vs. Henry E. Schemmel, et al., Defendants, Equity No. 19765" presently pending in that court;

That on the 25th day of July, 1964, upon learning of the institution of the proceedings first captioned above the affiant prepared and filed in the Fremont County, Iowa, District Court in the case of Iowa vs. Schemmel a Motion for Continuance, copy of which is attached hereto as *Exhibit A*, setting forth the reasons for such Motion for Continuance;

That thereafter, on the 27th day of July, in the same proceedings the State of Iowa by and through its Attorney General and its counsel of record filed Objections to Motion for Continuance, copy of which is attached hereto marked *Exhibit B*, setting forth the reasons for such objections;

That thereafter, the Motion for Continuance, and Objections thereto were presented to a Judge of said Court, the Honorable R. Kent Martin and said Motion for Continuance was overruled, "at this time with leave retained to re-consider the same after receiving evidence of first witness.";

That the first witness for the Plaintiff State of Iowa was one Raymond Huber a former employee of the U. S. Army Corps of Engineers, and his testimony was taken and heard pursuant to agreement of the parties based on the fact that said witness would be in the State of California for a period of about four months after the first day of August, 1964;

That the agreement to take the testimony of the Plaintiff's first witness was for the purpose of having such testimony before the Court in the event trial was undertaken at a later date but before the return of said witness and was not a waiver of the Motion for Continuance but an aid in the orderly administration of justice;

That attached hereto are the minutes of the Court proceedings showing that the testimony was taken on July 30 and 31, 1964, and that such proceedings continued until 11:35 p. m. on July 31. Such minutes are marked *Exhibit C;*

That upon adjournment on July 31, 1964, the Honorable R. Kent Martin gave indication that the trial of the cause would proceed to the taking of further evidence by other witnesses for the State of Iowa when the Court reconvened on August 4, 1964, and to the date hereof the ruling of the Court in overruling the Motion for Continuance has not been modified:

That Judge Martin further indicated that he had not modified his view that the trial of the cause should proceed without regard to the pending case in the Supreme Court of the United States between the State of Nebraska and the State of Iowa and that he intended to proceed with trial to the conclusion of the case;

That said trial did proceed on August 4th, 1964, and is still in process at the date of this affidavit.

Further affiant saith not.

_____

John S. Redd

Subscribed and sworn to before me this __ day of August, 1964.

_____

Notary Public

EXHIBIT A

CERTIFICATE OF TRANSCRIPT

THE STATE OF IOWA, Fremont COUNTY, ss.

I, Olive Van Sant , Clerk of the District Court in and for said County, do certify that the foregoing is a full, true and correct copy of

Motion for Continuance

STATE OF IOWA

vs.

HENRY E. SCHEMMEL, ET AL

Case No. 19765

as the same appears of record in my office, and is still in full force and effect.

WITNESS my hand and the seal of said Court hereto affixed, at my office in Sidney, Iowa in said County, on this 3rd day of August, 1964

Olive Van Sant
Clerk

IN THE DISTRICT COURT OF THE STATE OF IOWA, IN AND FOR FREMONT COUNTY

The State of Iowa, Plaintiff

vs.

Henry E. Schemmel and Lucille Schemmel, husband and wife, Douglas Henry Schemmel, Robert Edgar Schemmel and Mary Schemmel, husband and wife, Mary Leah Persons and Robert H. Persons, her husband, et al, and Glen E. Mitchell and Alice Mitchell, husband and wife, F. Pace Woods and Olive Black

Exhibit

Woods, husband and wife, Harold Mitchell and Verona Mitchell, husband and wife, et al,

MOTION FOR CONTINUANCE

Defendants respectfully move the Court for a continuance of the trial of this case over the term, or for such time, or to such time, including a time certain, as the Court may determine to be proper, and as grounds for, and in support of, such motion states:

1. That by reason of the matters hereinafter stated, and the facts stated in the affidavit in support hereof, substantial justice will be more nearly obtained, by such continuance.

2. That the trial of this case was set, for this summer period, by the Court with the consent of the parties, in order that the eventual final and just determination of the cause could be made with reasonable dispatch; that the same was done in good faith, on the part of the defendants, and that this motion is not made for the purpose of hindering or delaying the just and proper determination thereof.

That under the conditions now existing the eventual final and just determination of this cause, will be more effectively obtained by the requested continuance.

3. That on the 20th day of July 1964, there was commenced in the Supreme Court of the United States of America, by the filing of a Motion for Leave to File Bill of Complaint, Statement in Support of Motion, and Complaint, an original action by the State of Nebraska, against the State of Iowa, the plaintiff herein. That filed herewith, Marked Exhibit "A", and by this reference made a part of this motion, is a true printed copy of said Motion, Statement and Complaint.

Exhibit

4. That said Motion, Statement and Complaint, was duly served upon the State of Iowa, the plaintiff herein by the State of Nebraska, by mailing a true printed copy of same, to the Governor of Iowa, and the Attorney General of Iowa, on July 20, 1964.

5. That the said action is pending in the said Supreme Court of the United States.

6. That the State of Iowa, in addition to the within case, has filed or contemplates the filing of numerous actions against many individual owners or claimants to land formed in or near the Missouri River.

That the said case now pending in the Supreme Court of the United States, raises for determination by the highest Court of the land, and the Court of last resort, issues which are common to all cases claimed by the State of Iowa, as to lands, now in Iowa, including the within action.

7. That among these issues, are the alleged violations, on the part of the plaintiff herein, of the Boundary Pact of 1943, between the State of Iowa, and the State of Nebraska, the proper application of the provisions of the said pact to the lands disputed, including particularly the lands which are the subject matter of this case; the proper application of the Nebraska Common law, as contrasted to Iowa law, relating to the ownership of the bed of the stream, and as affects the ownership of lands in disputes arising from the meandering of the stream, and changes of the boundaries between the two states, and the effect to be given to Nebraska titles, payment of taxes, and the extent to which full faith and credit must be given to the Public Acts, Records and Judicial proceedings of the State of Nebraska with reference to the lands in question.

8. That the within action is set out in full, and made an integral part of the action in the Supreme Court, and direct issues raised therein.

9. That among other things the plaintiff, the State of Nebraska prays in the said action:

I.

That the Court adjudge and decree that the Iowa-Nebraska Boundary Compact of 1943 settled not only the issue of the sovereignty of the respective states over the lands along the Missouri River bordering the two states but also settled any issues of private ownership of said lands as between the State of Iowa and private citizens with respect to property which has been settled and occupied or to which the incidents of ownership had been exercised all prior to the ratification and approval of the Iowa-Nebraska Boundary Compact of 1943.

II.

That the Court adjudge and decree that the State of Iowa is bound to recognize the validity of titles, mortgages and other liens to lands lying easterly of the boundary line as established by the Iowa-Nebraska Boundary Compact of 1943 as such titles, mortgages and other liens were recognized in Nebraska prior to the ratification and approval of the said Compact.

III.

That the Court further adjudge and decree that the State of Iowa, by the ratification and approval of the Iowa-Nebraska Boundary Compact of 1943, waived and relinquished any right to claim ownership over lands which prior to 1943 had been on the tax rolls of the State of Nebraska or its authorized governmental subdivisions on lands which had been subject to change by action of the Missouri River and which had been subject to taxation and on which

Exhibit

taxes had been levied and collected by Nebraska for the year 1943 and years prior thereto.

IV.

That the Court adjudge and decree that the State of Iowa, in attempting to presently establish ownership over certain lands along the Missouri River by the application of legal principles recognized by the State of Iowa, and particularly with reference to lands which at any time had been governed by the Nebraska principles of law, is in violation of the Iowa-Nebraska Boundary Compact of 1943 and in violation of Article IV, Section 1 of the Constitution of the United States which provides that "Full faith and credit shall be given in each State to the Public Acts, Records and Judicial Proceedings of every other State."

V.

That the Court enforce the Iowa-Nebraska Boundary Compact of 1943 so as to give full effect to its intention to settle completely ownership rights to land along or in proximity to the Missouri River and its abandoned river channels.

VI.

To adjudge and decree that in those places where the boundary between the States of Nebraska and Iowa was a varying line so far as affected by the changes of diminution and accretion in the mere washings of the waters of the Missouri River, and particularly with reference to the period preceding the ratification and approval of the Iowa-Nebraska Boundary Compact of 1943, the State of Iowa could not and did not acquire title or ownership over any lands between the eastern high water mark and the center of the main channel, ownership of which had ever been in private individuals particularly the residents of Nebraska, notwithstanding any principle of Iowa law reserving ownership in the State.

VII.

For an injunction restraining the State of Iowa, its officers, agents and servants from any further prosecution in the cases of *State of Iowa* v. *Schemmel* and *State of Iowa* v. *Babbitt* pending the outcome of this proceeding or until further order of this court.

VIII.

That a special master be appointed to take evidence to the extent deemed necessary and report to the Court as to whether the lands involved in the case of *State of Iowa* v. *Babbitt* and *State of Iowa* v. *Schemmel,* referred to hereinabove, in whole or in part were formed in and were a part of the State of Nebraska and as Nebraska lands were ceded to the State of Iowa by the Iowa-Nebraska Compact of 1943 and upon the taking of such report that the Court find the State of Iowa did not acquire any claim of ownership or title in such lands.

IX.

That all matters at issue between these two States, pertinent to said Compact, may be heard and determined in such manner as the Court may direct and that all proper inquiries may be had, and decrees and orders entered.

X.

That the Court may retain jurisdiction of this matter, to make such further orders as may be necessary to enforce its decrees; and that Plaintiff may have such other and further relief as to which in equity and good conscience it may be entitled.

10. That the settling by the Supreme Court of the United States of the various issues raised by the said action, will provide guidelines and competent authority for the determination of the same or similar issues of law in the within case. That the action may well deter-

Exhibit

mine and complete adjudicate the issues in the within case, or in any event will be helpful in the proper determination of the same in this Court.

11. That among the objectives of the said suit, is the avoiding of the multiciplicity of actions, between the State of Iowa, various individuals, owning or claiming land on the Iowa side of the present Missouri River channel. That in such separate actions, individuals are faced with the vast resources of the State of Iowa, in man power, and in financial resources, in the investigation and determination of disputed facts and difficult disputed questions of applicable law; that the determinations sought, will limit or reduce the issues in such cases, eliminating the difficult questions of fact and law, and enable the private citizens, with limited resources to present their just grievances to the Court, on a more equal basis, as against the sovereign State of Iowa, and its unlimited resources.

12. That what action the Court shall take, and what issues the Court shall consider is the province of the Supreme Court of the United States. That this District Court of Iowa should take cognizance of the said case pending therein, and should voluntarily suspend further proceeding in this case pending further proceedings in the said Supreme Court.

13. That the trial of the within case may well require some three weeks to a month of trial on difficult and complicated issues of fact and law and at great expenses and inconvenience to the defendants—all of which will be lost, in the event the issues are fully determined by the Supreme Court of the United States; or much of which may be rendered unnecessary by the decision in said case, in any event. That any decision

this Court might make upon any issue later adjudicated in the Supreme Court of the United States, will be dependent upon the eventual ruling of that Court.

That the interests of justice will be served by continuing the within case, at least, until it is determined what course the Supreme Court of the United States takes with reference to it.

That the rights of either party will not be prejudiced thereby.

JOHN S. REDD
Attorney for Defendants
Address: Sidney, Iowa

STATE OF IOWA)
) ss.
COUNTY OF FREMONT)

I, John S. Redd, being first duly sworn on oath depose and say, that I am the Attorney for the defendants, and as such Attorney have investigated, and am familiar with the facts recited in the foregoing motion; that I have prepared and read the same and that the statements therein contained are true as I verily believe.

John S. Redd

Subscribed and sworn to before me by the said John S. Redd this 25th day of July A. D. 1964.

(s) *Darlene Younts*
Notary Public in and for
Fremont County.

Exhibit

AFFIDAVIT

STATE OF IOWA,)
) ss.
FREMONT COUNTY,)

I, John S. Redd, being first duly sworn, state that I am the attorney for the defendants in the above entitled action and that this Affidavit is made in support of the Motion for Continuance to which it is attached.

That on July 20, 1964, after wire services had reported the filing of an action in the Supreme Court of the United States between the State of Nebraska, and the State of Iowa, Counsel for the plaintiff, Michael Murray, called me with reference to the possible effect of such case upon the trial of the Schimmel case, which was set for the following Monday. I reported that I was not familiar with the issues raised in the Supreme Court, but understood that it involved the Schemmel case or issues affecting it, and I thought the trial of the Schemmel case probably should be postponed; but that I would contact him further after I was more fully advised; That on Tuesday, July 21, 1964, after I had reviewed a copy of the action in the U. S. Supreme Court, I called Mr. Murray, reporting in some detail, the issues tendered in that case, and proposed that the within case be continued by agreement, at least until such time, as the Supreme Court took some action in the matter. He stated that the matter would be up to the decision of the Attorney General's office, that he doubted they would want to continue the case by agreement, but that he would advise me of the decision.

That on Thursday morning, I called the Court to advise him of the pendency of the Supreme Court case,

Exhibit

it's possible effect upon the Schemmel trial, that discussions between counsel were being had with reference to continuance by agreement, but that in any event, the defendants would move for a continuance, predicated upon the pending case in the Supreme Court and the issues tendered thereby;

That also on Thursday when plaintiff's counsel reported that the plaintiff would not be agreeable to a continuance of the trial by agreement, and I then gave oral notice that a formal motion would be filed, and urged; and that same has been done, with all reasonable dispatch, in view of the absence of my regular secretary due to illness.

John S. Redd

SUBSCRIBED and sworn to before me by the said John S. Redd this 25th day of July A. D. 1964.

(Seal)

(s) *Darlene Younts*
Notary Public in and for
Fremont County.

EXHIBIT B

IN THE DISTRICT COURT OF IOWA IN AND FOR FREMONT COUNTY

THE STATE OF IOWA, Plaintiff

vs.

HENRY E. SCHEMMEL, et al, Defendants.

PLAINTIFF'S OBJECTIONS TO MOTION FOR CONTINUANCE.

Comes now the Plaintiff, The State of Iowa, and for its objections to Defendants' Motion for Continuance filed herein on or about July 25, 1964, states to the Court the following:

1. That it denies Paragraph 1 of said Motion.

2. That it admits the first paragraph of Paragraph 2; that it denies the second paragraph of Paragraph 2.

3. That it admits Paragraph 3.

4. That it admits Paragraph 4.

5. That it admits Paragraph 5.

6. That it admits the first paragraph of Paragraph 6; that it denies the second paragraph of Paragraph 6.

7. For its objection to Paragraph 7, plaintiff admits that it is the claim of the State of Nebraska before the United States Supreme Court that plaintiff is violating the 1943 Boundary Compact between Iowa and Nebraska; however, plaintiff denies that there is any such issue involved in the case at bar. It is the position of plaintiff in the case at bar that the tract of land and water involved herein was not ceded by Nebraska to Iowa by said Compact because said tract was within the

boundaries of Iowa even before 1943. If this Court determines that plaintiff's position in this respect is supported by a preponderance of evidence and therefore correct, it must necessarily follow that the 1943 compact is not an issue in this case in any manner whatsoever. Plaintiff submits that the correct and proper forum for the determination of the aforementioned question is this Court, it being admitted in the pleadings in this case that the tract in controversy is within the boundaries of the State of Iowa and therefore subject to the jurisdiction of the Courts of the State of Iowa. Also, plaintiff submits that if it be found that the tract in controversy has always been in Iowa, continuously since it came into existence, there can be no question as to any effect to be given to Nebraska titles, taxes paid in Nebraska, or full faith and credit to be given Public Acts, Records and Judicial proceedings of the State of Nebraska.

8. That it admits Paragraph 8, except insofar as said Paragraph may be deemed denied in Paragraph 14 hereafter set forth.

9. That it admits Paragraph 9.

10. That it denies Paragraph 10, excepting only it admits that if the prayer of the State of Nebraska to the United States Supreme Court set forth in Sub-Paragraph VIII of Paragraph 9 were to be granted, then and in that event, a guideline for the case at bar would be provided. However, further objecting to Paragraph 10, plaintiff states that there is no indication or reason to believe that the United States Supreme Court will grant Paragraph VIII of said prayer.

11. That it admits that it may be an objective of the State of Nebraska to avoid multiplicity of actions as

Exhibit

alleged in Paragraph 11. However, plaintiff hereby alleges and submits that no Judgment or Decree of the United States Supreme Court will or can have such effect, because each and all of the pending cases in state courts and in the lower federal courts involve different facts, and the determination of each case is dependent upon its own particular facts.

12. That it admits the first sentence of Paragraph 12; that it denies the second sentence of Paragraph 12.

13. For objections to Paragraph 13, plaintiff states that defendants' statements concerning difficulty, complication, expense and inconvenience are irrelevant, particularly in the face of the necessity for orderly and prompt judicial determination of this case and the other pending case involving similar facts and issues. Plaintiff therefore denies the second paragraph of Paragraph 13.

Also, plaintiff denies the third paragraph of Paragraph 13 for the following specific reasons, to-wit:

(a) The tract in controversy in this case is largely valuable farm land. Whoever is the owner thereof is entitled to the rents and income therefrom. Therefore, if defendants' Motion of Continuance be granted, plaintiff will suffer serious financial loss of such rents and income.

(b) Plaintiff has gone to much expense and has devoted much time and effort for the purpose of preparing for trial of this case at this time. Much of said expense, time and effort will be lost a continuance is granted.

14. For its further objection to said Motion for Continuance, Plaintiff hereby states and alleges that, at the

present time, the United States Supreme Court has not granted the Motion of the State of Nebraska for Leave to file any Bill of Complaint, nor assumed jurisdiction over any issues having any remote or close connection with the issues in the case at bar, nor has said Supreme Court issued any Temporary Injunction or Stay Order which would require any continuance of the case at bar. Plaintiff submits That the Courts of Iowa, including this Court, would be in grievous error to interrupt its orderly and normal judicial processes merely upon the contingency that the United States Supreme Court may, at some future time, allow the filing of a Bill of Complaint in a case which might furnish some guide lines for litigation already pending and ready for trial in state courts.

WHEREFORE, plaintiff respectfully requests that defendants' Motion for Continuance be overruled.

Evan Hultman; Attorney General of Iowa,

William J. Yost, Assistant Attorney General of Iowa,

(s) Michael Murray
Michael Murray, Attorney at Law, Logan, Iowa

Attorneys for the Plaintiff.

Exhibit

CERTIFICATE OF TRANSCRIPT

THE STATE OF IOWA, Fremont COUNTY, ss.

I, Olive Van Sant , Clerk of the District Court in and for said County, do certify that the foregoing is a full, true and correct copy of PLAINTIFF'S OBJECTIONS TO MOTION FOR CONTINUANCE.

Case No. 19765

STATE OF IOWA
VS.
HENRY E. SCHEMMEL, et al

as the same appears of record in my office, and is still in full force and effect.

WITNESS my hand and the seal of said Court hereto affixed, at my office in Sidney in said County, on this 3rd day of August, 1964

Olive Van Sant
Clerk

By *Lois Y. Lynn*
Deputy

EXHIBIT C

District Court Calendar, Fremont County, Iowa

Equity

Docket No. 24 Page No. 265

Case No. 19765

STATE OF IOWA
VS.
HENRY E. SCHEMMEL, et al

Attorney for State of Iowa
Michael Murray,
Logan, Iowa

Attorneys for Henry E. Schemmel, et al
Eaton & Eaton, Nichols & Thornell,
and John S. Redd,

July 27, 1964 Motion for continuance heard and overruled at this time with leave retained to re-consider the same after receiving evidence of first witness—Hearing continued to 9:30 A. M. July 30, 1964.

(s) R. Kent Martin, Judge

July 30, 1964 Trial opened at 10:30 A. M.—At 12 noon an adjournment taken to 1 P. M. Court reconvened at 1 P. M. At 5:30 P. M. an adjournment taken to 9:30 A. M. July 31, 1964.

(s) R. Kent Martin, Judge

July 31, 1964 Trial resumed at 9:30 A. M. At 12 noon an adjournment taken to 1 P. M. Court reconvened at 1 P. M. At 5:20 adjournment taken to 7 P. M.

Exhibit

Court reconvened at 7:00 P. M. At 11:35 P. M. an adjournment taken to Tuesday Aug. 4, 1964, at 9:30 A. M.

(s) R. Kent Martin, Judge

CERTIFICATE OF TRANSCRIPT

THE STATE OF IOWA, Fremont County, ss.

I, Olive Van Sant , Clerk of the District Court in and for said County, do certify that the foregoing is a full, true and correct copy of

JUDGES ENTRY

DISTRICT COURT CALENDAR

Case No. 19765

STATE OF IOWA
VS.
HENRY E. SCHEMMEL, et. al

as the same appears of record in my office, and is still in full force and effect.

WITNESS my hand and the seal of said Court hereto affixed, at my office in Sidney in said County, on this 3rd day of August, 1964

Olive Van Sant
Clerk

By *Lois Y. Lynn*
Deputy

In The

Supreme Court of the United States

October Term, 1964

No. 17, Original

STATE OF NEBRASKA, PLAINTIFF,

v.

STATE OF IOWA, DEFENDANT,

STATEMENT IN SUPPORT OF MOTION FOR TEMPORARY RESTRAINING ORDER

On or about the 20th day of July, 1964, the Plaintiff herein filed its Motion for Leave to File Bill of Complaint, Statement in Support of Motion, and Complaint, together with a Brief in Support of Motion for Leave to File Original Complaint. As stated therein, there are presently two cases pending in Iowa state courts involving lands to which the State of Iowa claims title and it is this claim which forms in part the basis for your Plaintiff's allegations of violation of the Iowa-Nebraska Boundary Compact of 1943.

There was reason to believe that the state officials of Iowa and the Honorable Judges of the Iowa trial courts before which these cases were pending would forego further proceedings pending a determination by

this Court on the question of jurisdiction, and if leave were granted to file Plaintiff's Complaint, that those Iowa cases would remain pending until a final determination in this case could be had, the issues before this Court being considered controlling as to the issues raised in the Iowa state courts.

It now appears that such cases will proceed to determination unless this Court restrain and enjoin further prosecution by Defendant State of Iowa, or in the alternative, stay the pending proceedings.

The Plaintiff, State of Nebraska, is not a party to either of the pending cases referred to above, and it is deemed by the State of Nebraska to be contrary to the intent of Art. III, Sec. 2, Clause 2 of the Constitution of the United States and Title 28, U. S. C. Section 1251 to require the sovereign State of Nebraska to submit to the jurisdiction of the Iowa courts either by intervention in the pending proceedings or by filing an action to restrain and enjoin Iowa or its agents from proceeding further.

Titles to certain lands here involved were quieted in Nebraska Courts prior to the 1943 agreement. These decrees found the land to be within the jurisdiction of Nebraska and under the 1943 treaty, Iowa was bound to the provision that, "Titles, mortgages, and other liens good in Nebraska shall be good in Iowa as to any lands Nebraska may cede to Iowa and any pending suits or actions concerning said lands may be prosecuted to final judgment in Nebraska and such judgments shall be afforded full force and effect in Iowa". So as to those lands which had been the subject of Nebraska quiet title actions, Iowa was forever barred from asserting any claim. However, present jurisdiction over

those lands has been transferred to Iowa, the Iowa participants in the proceedings are not subject to the Nebraska *in personam* jurisdiction, and consequently the Nebraska Courts have no further power to implement and enforce their own decrees. Jurisdiction can therefore lie only in the Federal Courts by virtue of the necessity of enforcing the 1943 Compact. In aid of its original jurisdiction the United States Supreme Court may enjoin or stay proceedings in the Iowa State Courts.

An examination of Iowa's Objections to Motion for continuance reveals a disregard for the burden placed on the individual defendants and an apparent haste to resolve the individual cases even though no action was taken to assert the "rights" of Iowa until twenty years after the "rights" came into being. Time works only in favor of the State and to the detriment of the individual, for the State of Iowa recognizes no impediment by laches, estoppel or adverse possession. (See paragraph 13 of *Exhibit B.*)

The State of Iowa can afford to fight these lawsuits one at a time. The individual landowner cannot. Though it may appear that individual wealth is represented in the number of valuable acres involved, this Court need not be told the tremendous, immediate cash sums involved in preparing and trying a lawsuit so complex as each of these. The landowner cannot levy a tax to pay his lawyers. He must use funds outside the ordinary expenses of a farming operation and there is no hope of recovery. All he can expect in return is an expensive decree that affirms his rights—or disaster.

The State of Iowa by seeking to take these private lands without compensation is twisting the 1943 Com-

pact to its advantage by invoking the jurisdiction granted the Iowa courts by the provision in the compact establishing the boundary while at the same time ignoring those provisions of the Compact which were inserted to guarantee and safeguard the rights of the individuals claiming ownership under Nebraska law.

Respectfully submitted

CLARENCE A. H. MEYER
Attorney General of Nebraska
State Capitol Building
Lincoln Nebraska

JOSEPH R. MOORE
Special Assistant Attorney General
of Nebraska
1028 City National Bank Building
Omaha Nebraska

HOWARD H. MOLDENHAUER
Special Assistant Attorney General
of Nebraska
1100 First National Bank Building
Omaha Nebraska

Attorneys for Plaintiff

PROOF OF SERVICE

I, Clarence A. H. Meyer, Attorney General of the State of Nebraska, and a member of the Bar of the Supreme Court of the United States, hereby certify that on August _____, 1964, I served a copy of the foregoing Motion for Temporary Restraining Order and Affidavit and Statement in Support of Motion by depositing same in a United States Post Office, with first class postage prepaid, addressed to:

HONORABLE HAROLD E. HUGHES,
Governor of the State of Iowa
State Capitol
Des Moines, Iowa

HONORABLE EVAN L. HULTMAN
Attorney General of the State of Iowa
State Capitol
Des Moines, Iowa

such being their post office addresses.

Clarence A. H. Meyer
Attorney General,
State of Nebraska
State Capitol Building
Lincoln, Nebraska

AUG 1- 1964

JOHN F. DAVIS, CLERK

In The

Supreme Court of the United States

October Term, 1964

No. 17, Original

STATE OF NEBRASKA, PLAINTIFF,

v.

STATE OF IOWA, DEFENDANT,

OPPOSITION TO MOTION FOR A TEMPORARY RESTRAINING ORDER AND AFFIDAVIT IN SUPPORT OF OPPOSITION

EVAN HULTMAN
Attorney General of Iowa
State Capitol
Des Moines, Iowa

W. N. BUMP
Solicitor General of Iowa
State Capitol
Des Moines, Iowa

WILLIAM J. YOST
Assistant Attorney General of Iowa
State Capitol
Des Moines, Iowa

Attorneys for Defendant

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In The

Supreme Court of the United States

October Term, 1964

No. 17, Original

STATE OF NEBRASKA, PLAINTIFF

v.

STATE OF IOWA, DEFENDANT,

OPPOSITION TO MOTION FOR A TEMPORARY RESTRAINING ORDER

To the Honorable Byron R. White, Justice for the Eighth Judicial Circuit:

NOW comes the State of Iowa, the Defendant in the above entitled matter, and in response to the Motion for a Temporary Restraining Order of the Plaintiff, State of Nebraska, expressly reserving the right to file a Brief In Opposition to the Motion For Leave to File Bill of Complaint, as provided in Rule 9 of the Rules of the Supreme Court, respectfully shows:

1. That the motion for temporary restraining order and the affidavit of John S. Redd, in support of the motion for a temporary restraining order, are based upon the allegation that the actions of the State of Iowa interfere with the quiet enjoyment of individuals owning or occupying lands allegedly ceded to Iowa by the State of Nebraska under the Iowa-Nebraska Boundary Compact of 1943. It is well established by the decisions that this Court will not entertain a pro-

ceeding on original jurisdiction by a state on behalf of its citizens or group of citizens, and not in the interest of the state itself. (*Mass. v. Mo.*, 60 S. Ct. 39, 308 U. S. 1, 84 L. Ed. 3; *Ark.* v. *Texas*, 74 S. Ct. 109, 346 U. S. 368, 98 L. Ed. 80.)

2. That the motion for temporary restraining order and the affidavit in support thereof fail to allege or set forth any facts showing immediate and irreparable injury, loss or damage to the State of Nebraska, nor to its citizens. Nor are there any facts or allegations to show that an emergency exists, and therefore there is no basis in fact or in law for the granting of the motion prayed.

3. That it is conceded by the State of Nebraska in paragraph X of its Bill of Complaint that the State of Iowa is the owner to the bed of all navigable streams within the State of Iowa to the high water mark, and that any islands arising out of the beds of navigable streams in the state belong to the State of Iowa. That as owner of islands accreting to the beds of such navigable streams, the State of Iowa has not only the right, but the duty to protect and conserve these natural resources and the legal process instituted to adjudicate this ownership is a proper exercise of that duty. (*Smith* v. *Maryland*, 18 How. 71, 59 U. S. 71, 15 L. Ed. 269; *Iowa* v. *Ill.* 147 U. S. 1, 13 S. Ct. 239, 37 L. Ed. 55; *Hardin* v. *Jordan*, 140 U. S. 371, 11 S. Ct. 808, 35 L. Ed. 428; *Cedar Rapids* v. *Marshall*, 199 Ia. 1262, 203 N.W. 932; *Tyson and Schroeder* v. *Iowa*, 283 Fed. Supp. 802.)

4. That in the event this Honorable Court should grant the motion as prayed by the State of Nebraska, the State of Iowa would be precluded from exercising its right and duty to protect its natural resources;

chaos and destruction could ensue upon state-owned lands in the Missouri River, and citizens of either state would be temporarily vested with a license to encroach and commit waste by the removal of our natural forests and natural resources; and a few citizens could and would utilize property belonging to the State of Iowa which is to be held in trust by the State of Iowa for all of its citizens. That to grant the temporary restraining order would be such a detriment and injury to the State of Iowa and to the public, that it would far outweigh the benefit to be reaped by the limited number of citizens of Nebraska for whom this motion is made, who will suffer no injury or loss, and accordingly the temporary restraining order should be denied.

5. That the State of Iowa, now and for many years, has regulated most of its state-owned lands along the Missouri River without the interference by the State of Nebraska, and in some cases to the mutual advantage and enjoyment of the citizens of the State of Iowa and the citizens of the State of Nebraska, and should be permitted to continue such regulation.

WHEREFORE, it is respectfully prayed that the motion requesting such extraordinary and unnecessary relief be denied.

EVAN HULTMAN
Attorney General of Iowa
State Capitol
Des Moines, Iowa

W. N. BUMP
Solicitor General of Iowa
State Capitol
Des Moines, Iowa

WILLIAM J. YOST
Assistant Attorney General of Iowa
State Capitol
Des Moines, Iowa
Attorneys for Defendant

In The

Supreme Court of the United States

October Term, 1964

No. 17, Original

STATE OF NEBRASKA, PLAINTIFF,

v.

STATE OF IOWA, DEFENDANT,

State of Iowa)
) ss.
County of Polk)

WILLIAM J. YOST, being first duly sworn, on oath depose and says:

That he is an Assistant Attorney General for the State of Iowa and has been actively engaged in litigation involving state-owned lands in the State of Iowa along the Missouri River; that he is familiar with the case entitled *State of Iowa v. Henry E. Schemmel, et al.*, and is also familiar with the evidence in the possession of the State of Iowa, and that such evidence reflects that the property in question arose above the ordinary high water mark, as an island in the Missouri River on the left bank, or Iowa side of the boundary, prior to 1943, and that said property was in the State of Iowa before the 1943 Compact and still is; that several actions have been commenced by the State of Iowa to quiet title to certain lands lying within the State of Iowa in state courts involving citizens of the State of

Iowa, and on occasions, citizens of the State of Nebraska, and that the nature of these various actions vary in fact and law, and are incapable of being fully and finally commonly determined by a single determination in the Supreme Court of the United States or in any other forum; that the State of Iowa has been, in the past, involved as a defendant in several actions to quiet title to certain lands along the Missouri River within the State of Iowa, both in state and in federal courts, and the facts and issues in those cases varied from case to case, and were incapable of being commonly adjudicated by a single determination in the Supreme Court of the United States; that he is an attorney of record in the case entitled *State of Iowa, Plaintiff, v. Darwin Merrit Babbitt, et al., Defendants,* and is familiar with the evidence in the possession of the State of Iowa relating to the same, and that such evidence reflects that the property in question formed as an island in the Missouri River on the Iowa side of the boundary prior to 1943, and that ownership of said property was in the State of Iowa before the 1943 Compact and still is; that in all litigation instituted by the State of Iowa to quiet title to property in the Missouri River surveys are conducted by qualified land surveyors to ascertain the exact location of the 1943 boundary line, and in no instance has the State of Iowa attempted to transgress said boundary line.

WILLIAM J. YOST

Subscribed and sworn to before me this 12 day of August, 1964.

Notary Public in and for
Polk County, Iowa.

PROOF OF SERVICE

I, Evan Hultman, Attorney General of the State of Iowa and a member of the Bar of the Supreme Court of the United States, hereby certify that on August 12, 1964, I served a copy of the foregoing Opposition to Motion for Temporary Restraining Order and Affidavit, by depositing the same in a United States Post Office, with first class postage prepaid, addressed to:

HONORABLE FRANK B. MORRISON
Governor of the State of Nebraska
State Capitol
Lincoln, Nebraska

HONORABLE CLARENCE A. H. MEYER
Attorney General of Nebraska
State Capitol
Lincoln, Nebraska

such being their post office addresses.

Evan Hultman

EVAN HULTMAN
Attorney General
State of Iowa
State Capitol
Des Moines, Iowa

SEP 17 1964

JOHN F. DAVIS, CLE

In The

Supreme Court of the United States

October Term, 1964

No. 17, Original

STATE OF NEBRASKA, PLAINTIFF,

v.

STATE OF IOWA, DEFENDANT,

BRIEF OF DEFENDANT, STATE OF IOWA, IN OPPOSITION TO MOTION TO FILE BILL OF COMPLAINT

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COUNTER-STATEMENT OF CASE

For several years the State of Iowa has been quieting title to Missouri River riparian lands involving Iowa citizens in the Iowa courts, and occasionally involving Nebraska citizens in Iowa courts. The controversies have always rested upon the nature of the formation of the land, and have never transcended the Iowa-Nebraska Missouri River Compact of 1943. In essence, the primary questions to be resolved are whether or not the specific land in controversy formed as an island to the bed of the Missouri River on the left bank of the thalweg, remaining there until the Compact of 1943, or did such land form as an accretion to the riparian left bank, and, of prime importance, was there an avulsion at any time which would affect the

state boundary lines' location prior to its establishment by the Compact.

The foregoing questions have always been and should only be resolved by the supporting evidenciary matters before the courts of competent jurisdiction inasmuch as the principles of law are well settled, undisputed and recognized in Nebraska as well as Iowa.

The State of Nebraska asserts that the purpose of this present litigation is to resolve a controversy between the State of Iowa and the State of Nebraska, and with this assertion, we must disagree, as on this point our paths unequivocally divide.

Exhibits C, D, E, F, G, H and I contained in the plaintiff's Motion to File Bill of Complaint demonstrate palpably that the present suit filed by the plaintiff, State of Nebraska, before this Honorable Court is purely and simply an action by the State of Nebraska on behalf of a few Nebraska citizens whose identity is set forth in the foregoing exhibits, and in no sense constitutes a controversy between the states.

In the statement, they provide:

> "Titles, mortgages, and other liens good in Nebraska shall be good in Iowa as to any lands Nebraska may cede to Iowa, and any pending suits or actions concerning said lands may be prosecuted to final judgment in Nebraska and such judgments shall be accorded full force and effect in Iowa."

With this statement, we have no quarrel. However, Nebraska courts certainly recognize that they are absent authority to quiet title to land owned by Iowa, as

well as being without authority to convey by a Nebraska deed, land, which at the time of the conveyance constitutes land owned by the State of Iowa. Thus, we return to the precise evidenciary matters that continually confront courts in actions of this nature, i.e., did the land in question form as an island on the Iowa side of the thalweg, remaining there without an intervening avulsion prior to the 1943 Compact, and situated there at the establishment of said Compact. If so, it becomes cogent that the decrees set forth in Exhibits J and K are without force and effect, and would not be recognized by either Nebraska or Iowa, and the section of the Compact relied upon by Nebraska to assert an alleged controversy between states becomes inapplicable. If, however, the evidence demonstrates the land in Exhibits J and K was in Nebraska at such date and time, the Iowa courts will recognize such decrees and conveyances, (see, Statement of Case, Appendix A.), thus again no violation of the Compact.

Of paramount importance, however, is that in the case of *State of Iowa, v. Henry E. Schemmel,* a Nebraska title to the land in question is not involved other than that the defendant, Henry E. Schemmel, asserts that the land in question constitutes accretion to land which he holds by a Nebraska title. In that case, the State of Iowa fully recognizes the Nebraska title, but disputes that the land in litigation constitutes an accretion to the land which he holds by a Nebraska title.

Thus, the actions of the State of Iowa do not involve quieting title in the State of Iowa to any lands ceded by Nebraska in 1943, and no violation of the Iowa-Nebraska Boundary Compact of 1943 or Article IV, Section 1 of the Constitution of the United States exists.

It is respectfully submitted that the Motion for Leave to File the Bill of Complaint should be denied.

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BRIEF OF DEFENDANT, STATE OF IOWA, IN OPPOSITION TO MOTION TO FILE BILL OF COMPLAINT

ARGUMENT

1. The Bill of Complaint by the State of Nebraska does not establish the existence of a justiciable controversy between the State of Nebraska and the State of Iowa which necessitates an exercise by the United States Supreme Court of its power of original jurisdiction under the Constitution of the United States.

(a) The complaint of the State of Nebraska does not allege a cause of action because it fails in all respects to demonstrate that the State of Nebraska is the real party in interest and has been injured.

(b) It is elementary that a deed can only convey title to land actually owned by the

grantor, and the grantee takes no greater title under deed than the grantor had.

(c) Original jurisdiction of the Supreme Court of the United States cannot be exercised in a suit between states when the citizens of the complainant state are indispensable parties.

It is well established by the decisions that this court will not entertain a proceeding on original jurisdiction by a state on behalf of its citizens or group of citizens, and not in the interest of the state itself.

Mass. v. Mo., 60 S.Ct. 39, 308 U.S. 1, 84 L. Ed. 3;
Ark. v. Texas, 74 S.Ct. 109, 346 U.S. 368, 98 L.Ed. 80;
Okla. v. Gulf, Colorado & Santa Fe R.R. Co., 220 U.S. 290, 55 L.Ed. 469, 31 S.Ct. 437.

Its jurisdiction in respect of controversies between states will not be executed in the absence of necessity.

La. v. Texas, 176 U.S. 1, 15, 20 S.Ct. 251, 44 L.Ed. 347.

A State asking leave to sue another to prevent the enforcement and exercise of its duties must allege, in the complaint offered for filing, facts that are clearly sufficient to call for a decree in its favor. This Court's decisions definitely establish that not every matter of sufficient moment to warrant resort to equity by one person against another would justify an interference by this Court with the action of a state.

Mo. v. Ill., 200 U.S. 496, 520, 521, 26 S.Ct. 268, 50 L.Ed. 572;

N.Y. v. N.J., 256 U.S. 296, 209, 41 S.Ct. 492, 65 L.Ed. 937;

N.Dak. v. Minn., 263 U.S. 365, 374, 44 S.Ct. 138, 68 L.Ed. 342.

The burden upon the plaintiff to state fully and to clearly establish all essential elements of its case is greater than that generally required to be borne by one seeking an injunction in a suit between private parties.

Conn. vs. Mass., 282 U.S. 660, 669, 51 S.Ct. 286, 75 L.Ed. 602.

The contrariety and incongruity of the plaintiff's assertion that the Defendant State of Iowa is violating the Missouri River Boundary Compact of 1943 is readily borne out in paragraph XIV of the plaintiff's complaint, wherein they state:

> "Approximately the westerly 50 feet of the land described in the second amendment to plaintiff's petition in State of Iowa v. Babbit, marked 'Exhibit H', is presently in the State of Nebraska and is west of the center line of the proposed stabilized channel of the Missouri River as established by the alluvial plains maps referred to in the Iowa-Nebraska Boundary Compact."

compared with their allegation contained in paragraph XX of their Bill of Complaint, wherein they provide in pertinent part:

> "The problem is compounded by the fact that the maps referred to in the Iowa-Nebraska Boundary Compact are of too small a scale, (1" equals 2,640'), and do not contain sufficient detail for a surveyor to accurately locate the boundary on the ground."

Thus, by the Plaintiff's own allegations, they accuse the State of Iowa in one instance of exceeding the boundary line in one case by 50', only to admit in a sub-

sequent paragraph that they cannot accurately locate the boundary on the ground. This is hardly operative as a clear establishment of the essential elements to invoke original jurisdiction.

It is well settled and conceded by the State of Nebraska that the State of Iowa is the owner to the bed of all navigable streams within the State of Iowa from the high water mark to the boundary and any islands arising out of the bed belong to the State of Iowa.

Iowa v. Ill., 147 U.S. 1, 13 S.Ct. 239, 37 L.Ed. 55;
Hardin v. Jordan, 140 U.S. 371, 11 S.Ct. 808, 35 L.Ed. 428;
Cedar Rapids v. Marshall, 199 Ia. 1262, 203 N.W. 932;
Tyson and Schroeder v. Iowa, 283 Fed. Supp. 802.

As owner of islands accreting to the beds of such navigable streams, the State of Iowa has not only the right, but the duty to protect and conserve these natural resources and the legal process instituted to adjudicate this ownership is a proper exercise of that duty.

Smith v. Maryland, 18 How. 71, 59 U.S. 71, 15 L.Ed. 269.

It is equally well settled and conceded by the State of Iowa that Nebraska law invests the ownership to the bed of all navigable streams and islands accreting thereto on the Nebraska side of the boundary to the individual riparian owners along such navigable streams.

Kinkead v. Turgeon, 74 Neb. 587, 109 N.W. 746;
Independent Stock Farm v. Stevens, et al., 128 Neb. 619, 259 N.W. 647.

It can hardly be said, therefore, that any controversy exists between the State of Nebraska and the State of Iowa concerning these lands, since the State of Ne-

braska has absolutely no ownership in the same. This court has repeatedly held that a state may not invoke the jurisdiction of this court by a suit on behalf of its citizens against a state, and where the primary purpose of the suit is to protect its citizens against alleged violations of their rights.

Mass. v. Mo., supra; *Ark. v. Texas*, supra.

It is also clear that the specific cases about which the State of Nebraska complains and the parties thereto, with the exception of the State of Iowa, have not been joined in this action and thus no jurisdiction exists, for this court has held that jurisdiction will not be exercised where indispensable parties have not been made parties to the litigation.

California v. Southern Pacific Co., 157 U.S. 229, 39 L.Ed. 683 15 S.Ct. 591;

Minnesota v. Northern Securities Co., 184 U.S. 199, 46 L.Ed. 499, 22 S.Ct. 308.

Can it be seriously said that *Henry E. Schemmel* and *Darwin M. Babbit* are not materially or beneficially interested in the subject matter of this suit? We think not, for by virtue of Nebraska riparian law, they are the sole parties in interest and are wanting as parties to this litigation.

In the matter at bar, the factual claims are seriously disputed and are proper evidenciary matters to be resolved on an individual case basis in the proper court of record having competent jurisdiction to resolve the same.

It is elementary that a deed can only convey title to land actually owned by a grantor, and a grantee thereunder takes no greater title under the deed than the grantor had,

(*Sibley v. McMahon*, 98 So. 805, 210 Ala. 598;
Ridgeway v. Lewis, 160 S.W. 2d 50, 203 Ark. 1063;
Colorado Pac. Land Co. v. Clinton E. Worden Co., 23 P. 2d 314, 132 Cal. App. 720;
Flader v. Campbell, 207 P. 2d 1188, 120 Colo. 66;
Fitzpatrick v. Massee-Felton Lumber Co., 3 S.E. 2d 91; 188 Ga. 80;
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Kentucky River Coal Corporation v. Combs, 107 S.W. 2d 241, 269 Ky. 365;
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Huber v. Huber, Com.Pl., 92 Pittsb.Leg.J. 137;
Greene v. White, 153 S.W. 2d 575; 137 Tex. 361, 136 A.L.R. 626;
Peterman v. Harborth, Com.App., 300 S.W. 33;
Weishuhn v. Matejowsky, Civ.App., 1700 S.W. 2nd 567, error refused;
Perkins v. Campbell, Civ. App., 63 S.W. 2nd 567;
Peterson v. Paulson, 163 P.2d 830; 24 Wash. 2d 166; 18 C.J. p. 160 note 97;
Smith v. Braley, 184 P. 587, 78 Okl. 220,)

so as to pretermit further discussion of this point.

We submit that the foregoing holdings by this Court are applicable to the case at bar, for here Nebraska seeks, in effect, a declaratory judgment that the State of Iowa has violated the Missouri River Compact of 1943, when by the matters contained within their own pleadings demonstrates that Nebraska has no interest in the controversy as a State, but is attempting to invoke this Court's original jurisdiction on behalf of a few citizens.

CONCLUSION

The State of Nebraska has not shown that its complaint establishes the existence of a justiciable controversy, has not shown clear uncontroverted facts enabling it to the relief prayed for, has shown clearly that it is a suit by a state on behalf of its citizens, is absent indispensable parties, and therefore does not necessitate an exercise by this Honorable Court of its power of original jurisdiction, and its Motion for Leave to File Bill of Complaint should be denied.

WHEREFORE, it is respectfully prayed that this Honorable Court deny Plaintiff State of Nebraska's Motion for Leave to File Bill of Complaint.

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APPENDIX A

In The District Court of the State of Iowa

In and For Woodbury County

DARTMOUTH COLLEGE,
A Corporation,
Plaintiff,
vs.

GERALD ROSE,
GLORIA ROSE,
LAWRENCE HARRIS, and
ROSETTA HARRIS,
Defendants,

FINDINGS OF FACT, CONCLUSIONS OF LAW AND JUDGMENT AND DECREE

STATE OF IOWA,
Intervenor.

STATEMENT OF THE CASE

This action is to quiet title in the plaintiff to certain real estate lying in Woodbury County, Iowa, located on the Missouri River. Plaintiff Dartmouth College contends that the subject land was formed by accretion or reliction or both to its Nebraska riparian land. Defendants Gerald Rose, Gloria Rose, Lawrence Harris and Rosetta Harris, claimed ownership of the land by virtue of adverse possession and these defendants were found in default and judgment has previously been entered against them and none of these defend-

ants appealed. The State of Iowa intervened, claiming the land in question was an island and because of an avulsion, such land is the property of the State of Iowa.

The plaintiff and its predecessors in title owned land adjacent to the subject land on the Nebraska side of the Missouri River and throughout the years have quieted their title in Nebraska and such decrees were in evidence before this court. While true the State of Iowa was not a part in these actions in Nebraska, yet the court feels that they should be considered in light of all of the other evidence and exhibits in this case. These actions and decrees are, the court feels, entitled to consideration.

Various witnesses testified for both sides and numerous exhibits were introduced in evidence.

FINDINGS OF FACT

This trial took considerable time and there were numerous exhibits of maps, plats, photographs and documents introduced in evidence in this case and the court has considered all of the oral testimony of the various witnesses on both sides and has studied the numerous exhibits and makes the following findings of fact:

1. Plaintiff is the owner of the following described land lying in Nebraska and Iowa, to-wit:

> Commencing at the northwest corner of Lot 5, in Section 15, Township 27, Range 9 East of the 6th P.M., in Dakota County, Nebraska; thence due east along the north line of said lot 5, and the center line of said Section 15, extended to the right (west) bank of the Missouri River; thence southeasterly along the right (west) bank of the Missouri River to its intersection with the south line

of Section 22, Township 27 North, Range 9 East of the 6th P.M., extended; thence due west along the south line of said Section 22, extended, to the southwest corner of said Government Lot 7, in said Section 22, Township 27 North, Range 9 East, 6th P.M.; thence due north along the west line of said Government Lot 7, in said Section 22, a distance of 1745 feet; thence south 80° west, a distance of 2615 feet to the west line of Lot 5, Section 22, Township 27 North, Range 9 East, 6th P.M.; thence due north along the west line of said Government Lot 5 in said Section 22, extended 990 feet; thence south, 82° west, for a distance of 3902 feet; thence north 65° west, for a distance of 1300 feet; thence north, 30° east, for a distance of 1865 feet; thence due east for a distance of 1052 feet; thence due north for a distance of 1220 feet, to the Government meander corner on the north line of Section 21, Township 27 North, Range 9, East of the 6th P.M.; thence north along the west line of Lot 2, Section 16, Township 27 North, Range 9 East of the 6th P.M., to the northwest corner of said Lot 2 in said Section 16; thence east along the north line of Lot 7 extended, in Section 16, Township 27 North, Range 9 East, 6th P.M., to the southwest corner of Lot 5 in Section 15, Township 27 North, Range 9 East, 6th P.M.; thence north along the west line of said Lot 5, Section 15, Township 27 North, Range 9 East of the 6th P.M. to the place of beginning.

2. The subject land, a tract of land bounded on the east by the right (west) bank of the Missouri River; bounded on the west by the State boundary line between the States of Iowa and Nebraska as established by said states and approved by the United States in

1943; bounded on the north by the center line of Section 15, Township 27 North, Range 9 East of the 6th P.M. extended from said west boundary line to the right (west) bank of the Missouri River; bounded on the south by the south line of Section 22, Township 27 North, Range 9 East of the 6th P.M., extended from said west boundary line to the right (west) bank of the Missouri River, located in Woodbury County, Iowa, lines within Woodbury County, Iowa, and this court has jurisdiction of this matter.

3. The subject land was not an island but formed by accretion or reliction to plaintiff's land.

4. While there is evidence to the contrary, the court feels that by the greater weight of the evidence that no avulsion occurred in 1937 and that the boundary line between the States of Iowa and Nebraska moved to the east or to the Iowa side.

5. Following the gradual movement east of the river in 1937 the subject land was accreted to plaintiff's land and became a part of it.

6. Any movements of the river following 1937 were caused by or made by man-made avulsions and did not change the boundary line between the States of Iowa and Nebraska or affect plaintiff's ownership of the subject land.

7. In 1943 the Iowa-Nebraska boundary line was established in the center of a man-made channel in the Missouri River which was subsequently lost because of floods and is now dry and that said boundary line continued to run through the center of the abandoned channel.

8. Following the loss of the man-made channel the

Corps of Engineers permanently emplaced the channel in Iowa approximately where it had been in 1938 and plaintiff has quieted its title in Nebraska to the boundary line pact of 1943.

9. While following 1938 at times water ran down the western or Nebraska side there were chutes common along the Missouri River and that they now are all filled in except for a part in which Omaha Creek flows.

10. South of Mile Post 785 as shown on the maps and charts the channel of the river was always to the east or on the Iowa side and plaintiff, a Nebraska owner, owned to the center of the channel and still does.

11. That the plaintiff, a Nebraska riparian owner, owned to the thalweg and its title was good to all areas under water, and sandbars to the center of the Missouri River and the boundary pact of 1943 did not affect plaintiffs title to the subject land and all accretions and relictions west of the thalweg belonged to the plaintiff when the said Boundary pact put it within the boundary of the State of Iowa.

12. The court finds that under all the competent evidence that the subject land lying within the State of Iowa is owned by the plaintiff and its title in fee simple should be quieted and confirmed as against the State of Iowa.

CONCLUSIONS OF LAW

This was a non-jury trial and while some evidence was objected to by both sides there is no harm in taking any evidence which the parties consider relevant as long as incompetent evidence is not used to support the

court's finding or if there were not sufficient competent evidence to support the findings of fact.

The court concludes that the law is as follows:

1. The Missouri River is a navigable stream, and in Nebraska a riparian owner owns to the thread of the navigable channel (or thalweg) and in Iowa a riparian owner extends to the ordinary high water mark and ownership from such high water mark to the thalweg belongs to the State of Iowa.

Whitaker v. McBride, 197 U.S. 510, 25 S.Ct. 530.

Independent Stock Farm v. Stevens, et al., 259 N.W. 647, 128 Neb. 619.

Rand v. Miller, 250 Iowa 699, 95 N.W. 2nd 916.

State v. Dakota County, 250 Iowa 318, 93 N.W. 2d 595.

2. Prior to the boundary line pact of 1943 between the States of Iowa and Nebraska the boundary line followed the course of the gradual changes of the river.

State of Nebraska v. State of Iowa, 143 U.S. 359, 12 S.Ct. 396.

3. Accretion or reliction or both belong to the riparian owner and the presence of chutes and swales between the high bank and sandbars does not make an island.

Bigelow v. Herrick, 205 N.W. 531, 200 Iowa 830.

42 Iowa Law Review 58-62.

Payne v. Hall, 185 N.W. 912, 192 Iowa 780.

4. There is a presumption in favor of accretion as against an avulsion.

Bone et al. v. May et al., 225 N.W. 367, 208 Iowa 1094.

5. Nothwithstanding the rapidity of the changes in the course of the channel and the washing from one side and on to the other the law of accretion controls on the Missouri River.

State of Nebraska v. State of Iowa, 12 S.Ct. 396.
Milroy v. Pinney, 250 Iowa 1378, 98 N.W. 2d 720.
Solomon v. City, 51 N.W. 2d 472, 243 Iowa 634.

6. Land in a navigable stream which is surrounded by water in times of high water is not an island within the rule that the State takes title to newly formed islands in navigable streams.

Payne v. Hall, 185 N.W. 912, 192 Iowa 780.
Coon v. Johnston, 194 S.W. 2d 193, 208 Ark. 1053.
McBride v. Stanweden, 83 P. 822, 72 Kan. 508.

7. The mere fact that at times water from the Missouri River flows around sandbars or parts of them does not make them islands.

Payne v. Hall, 185 N.W. 912, 192 Iowa 780.

8. An avulsion is a sudden and rapid change in the channel of a stream where it suddenly changes its old bed and seeks a new one.

Conkey v. Knudsen, 4 N.W. 2nd 290, 141 Neb. 517.
State of Nebraska v. State of Iowa, 143 U.S. 359, 12 S.Ct. 396.

Under the Court's findings of fact an avulsion did not occur in 1937 as the State of Iowa contends.

JUDGMENT AND DECREE

IT IS HEREBY ORDERED, ADJUDGED AND DECREED by the court that the plaintiff Dartmouth College, a corporation, is the owner in fee simple of the

following described real estate within the State of Iowa, to-wit:

Commencing at the northwest corner of Lot 5, in Section 15, Township 27, Range 9 East of the 6th P.M., in Dakota County, Nebraska; thence due east along the north line of said Lot 5, and the center line of said Section 15, extended, to the right (west) bank of the Missouri River; thence southeasterly along the right (west) bank of the Missouri River to its intersection with the south line of Section 22, Township 27 North, Range 9 East of the 6th P.M., extended; thence due west along the south line of said Section 22, extended to the Southwest corner of said Government Lot 7, in said Section 22, Township 27 North, Range 9 East, 6th P.M., thence due north along the west line of said Government Lot 7, in said Section 22, a distance of 1745 feet; thence south, 80° west, a distance of 2615 feet to the west line of Lot 5, Section 22, Township 27 North, Range 9 East, 6th P.M.; thence due north along the west line of said Government Lot 5 in said Section 22, extended, 990 feet; thence south, 82° west for a distance of 3902 feet; thence north 65° west, for a distance of 1300 feet; thence north, 3° east, for a distance of 1865 feet; thence due east for a distance of 1052 feet; thence due north for a distance of 1220 feet, to the Government meander corner on the north line of Section 21, Township 27 North, Range 9 East of the 6th P.M., thence north along the west line of Lot 2, Section 16, Township 27 North, Range 9 East of the 6th P.M., to the northwest corner of said Lot 2 in said Section 16; thence east along the north line of Lot 2, extended, in Section 16, Township 27 North, Range 9 East, 6th P.M., to the southwest corner of Lot 5, in Section 15,

Township 27 North, Range 9 East, 6th P.M., thence north along the west line of said Lot 5, Section 15, Township 27 North, Range 9 East of the 6th P.M. to the place of beginning.

and its title and estate in the said real estate is hereby quieted and confirmed as an absolute title in fee simple and that the State of Iowa is forever barred and estopped from having or claiming any right, title or interest thereto.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the plaintiff, Dartmouth College, a corporation have judgment for its costs of this action.

Dated this 9th day of September, 1963.

(s) R. W. Crary,
R. W. Crary,
Judge of Fourth Judicial District.

PROOF OF SERVICE

I, Evan Hultman, Attorney General of the State of Iowa and member of the Bar of the Supreme Court of the United States, hereby certify that on September 15., 1964, I served a copy of the foregoing Brief of Defendant, State of Iowa, in Opposition to Motion to File Bill of Complaint, by depositing the same in a United States Post Office, with first class postage prepaid, addressed to

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Argument:

I. A compact entered into between States and approved by the Congress is a contract binding upon the States as parties thereto, and the rights and duties created by it should not be subject to unilateral determination by only one of the States but such determination is properly the function of the Supreme Court of the United States 4

II. Because the Court clearly has jurisdiction over boundary disputes, it must also have jurisdiction over the construction and enforcement of compacts to settle boundaries. The entire purpose of the compact clause of the Constitution would be defeated if such compacts, when entered into, could not be enforced by an action of one of the States being a party to the compact 15

III. This is a controversy between the States of Nebraska and Iowa and its determination should not require that all individuals presently being injured or threatened with injury by the action of the State of Iowa as a result of its breach of the compact be joined as indispensable parties to the action 29

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Iowa-Nebraska Boundary Compact of 1943 ..... 4, 6, 7, 8, 9, 10, 11, 13, 16, 24, 26, 27, 28, 29, 30

MISCELLANEOUS:

Robert M. Underhill, "The Instability of River Courses as State Boundary Lines With Reference to the Situation in Iowa", II Iowa Bar Review 11, 14 (1935) 16
The Federalist, No. LXXX 14

In The

Supreme Court of the United States

October Term, 1964

No. 17, Original

STATE OF NEBRASKA, PLAINTIFF,

V.

STATE OF IOWA, DEFENDANT.

SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

SUPPLEMENTAL STATEMENT

At the time of the filing of the MOTION FOR LEAVE TO FILE BILL OF COMPLAINT, STATEMENT IN SUPPORT OF MOTION AND COMPLAINT, the State of Nebraska also filed a concise BRIEF OF THE STATE OF NEBRASKA IN SUPPORT OF ITS MOTION FOR LEAVE TO FILE ORIGINAL BILL OF COMPLAINT. The State of Iowa responded with a BRIEF OF DEFENDANT, STATE OF IOWA, IN OPPOSITION TO MOTION TO FILE BILL OF COMPLANT. Because of the objections raised by the State of Iowa in opposition to the Court's taking jurisdiction of this matter, the State of Nebraska deems it advisable to file a Supplemental Brief in order to

correct certain inaccuracies in the Brief of the State of Iowa and to elaborate upon the clear issues which the Complaint presents.

This brief is directed solely to the question of whether this Court should take jurisdiction and is not directed to the merits of the controversy.

The Complaint attached to plaintiff's Motion for Leave to File clearly sets forth allegations that the State of Iowa is violating the Iowa-Nebraska Boundary Compact of 1943. The pleadings in the cases of *State of Iowa* v. *Babbit* and *State of Iowa* v. *Schemmel* which are attached to the Complaint as exhibits set forth factual situations concerning conduct of the State of Iowa which allegedly constitutes a violation by the State of Iowa of the Iowa-Nebraska Boundary Compact of 1943. Included within these allegations is the claim that the State of Iowa is presently attempting to quiet title to land which is within the State of Nebraska (Complaint, Par. XIV, pp. 14-15) and that this constitutes an encroachment upon the sovereignty of the State of Nebraska. This allegation, in addition to constituting a clear claim of encroachment upon the boundaries of Nebraska, is also indicative of the State of Iowa's interpretation of the Iowa-Nebraska Boundary Compact of 1943 and its unilateral approach towards the placing of the present boundary between Iowa and Nebraska. The State of Iowa, in its BRIEF OF DEFENDANT, STATE OF IOWA, IN OPPOSITION TO MOTION TO FILE BILL OF COMPLAINT, hereinafter referred to as "Iowa's Brief", at page 7 has attempted to point out an inconsistency between the allegations contained in Paragraph XIV and those of Paragraph XX of the Complaint. Iowa has clearly mis-

read the latter paragraph because Paragraph XX does not state that it is impossible in *all* areas to locate the boundary, but states that it is not possible in "many areas" to locate the center line of the proposed stabilized channel of the Missouri River within the meaning of the 1943 Compact, on the ground from maps presently on file in the office of the United States Army Corps of Engineers. These allegations are not inconsistent.

Because the Iowa-Nebraska Boundary Compact of 1943 deals with the present boundary between the two states and because its provisions went beyond the mere establishment of a boundary, but included other contractual provisions deemed essential to the Compact, the question of violation of the Compact becomes interwoven with the problems of boundary. It is the contention of the State of Nebraska that both boundary and Compact and its implications are involved in this case.

SUMMARY OF ARGUMENT

A Compact entered into between States and approved by the Congress is a contract creating mutual rights and obligations as between the States. As such, the extent of these rights and duties should not be subject to unilateral determination by an organ of only one of the States, but is properly the function of the Supreme Court of the United States.

Because the Court clearly has jurisdiction over boundary problems, it must have jurisdiction over the construction and enforcement of compacts to settle boundaries. The entire purpose of the compact clause of the Constitution will be defeated if such compacts,

when once entered into, cannot be enforced by peaceable judicial determination in the Supreme Court of the United States in an action by one of the States which was a party to the Compact. This is supported both by principles of sound reason and by the decisions of this Court.

Because a compact is binding upon, and for the benefit of, not only the States but also all of the citizens thereof, a determination of the construction and effect of a compact in an action between States does not require that all of the individuals affected be made parties as this controversy is between the State of Nebraska and Iowa and is of immediate and deep concern to the State of Nebraska, even though her interest is indissolubly linked with that of her citizens.

ARGUMENT

I.

A compact entered into between states and approved by the Congress is a contract binding upon the states as parties thereto, and the rights and duties created by it should not be subject to unilateral determination by only one of the states but such determination is properly the function of the Supreme Court of the United States.

The Iowa-Nebraska Boundary Compact of 1943 was entered into by the States of Iowa and Nebraska with the consent of the Congress of the United States under the authority of Article I, Section 10 of the Constitution of the United States which provides that "No State shall, without the Consent of the Congress . . . enter into any Agreement or Compact with another State

. . ." This compact, therefore, is a legal contract which created obligations on the part of each State, and the questions relating to the validity and interpretation of interstate compacts are properly subject to final determination by the Supreme Court. In *West Virginia ex rel Dyer* v. *Sims,* 341 U. S. 22, the State Auditor of West Virginia had refused to issue a warrant to defray West Virginia's share of the expenses arising out of a compact entered into with seven other States to control pollution of the Ohio River. An action of mandamus was brought to compel the State Auditor to issue a warrant for West Virginia's share of the expenses. Mr. Justice Frankfurter described the nature and effect of a compact at 341 U. S. 28 in the following language:

> "But a compact is after all a legal document. Though the circumstances of its drafting are likely to assure great care and deliberation, all avoidance of disputes as to scope and meaning is not within human gift. Just as this Court has power to settle disputes between States where there is no compact, it must have final power to pass upon the meaning and validity of compacts. It requires no elaborate argument to reject the suggestion that an agreement solemnly entered into between States by those who alone have political authority to speak for a State can be unilaterally nullified, or given final meaning by an organ of one of the contracting States. A State cannot be its own ultimate judge in a controversy with a sister State. To determine the nature and scope of obligations as between States, whether they arise through the legislative means of compact or the 'federal common law' governing interstate controversies (*Hinderlider* v. *La Plata Co.*, 304 U. S. 92, 110), is the function and duty of the Supreme Court of the Nation. Of course every deference will be shown to what the highest court of a State deems to be the law and

policy of its State, particularly when recondite or unique features of local law are urged. Deference is one thing; submission to a State's own determination of whether it has undertaken an obligation, what that obligation is, and whether it conflicts with a disability of the State to undertake it is quite another."

As a contract, rights and obligations were created which are binding on each State and its officials. This is to be distinguished from cases involving reciprocal legislation such as *Massachusetts* v. *Missouri*, 308 U. S. 1, cited at page 6 of Iowa's Brief.

The State of Iowa, however, apparently denies that the Iowa-Nebraska Boundary Compact has placed any duties upon it as such. It has taken the position at page 3 of its Brief that, should the evidence in the cases pending in the Iowa Courts demonstrate that the land in the cases of *Iowa* v. *Babbit* and *Iowa* v. *Schemmel* was in Nebraska at the time of the Boundary Compact, the Iowa Courts would recognize the Nebraska decrees and conveyances. This reasoning completely ignores the proposition that the Compact is a contract to which the State of Iowa is a signatory party and that, as such, the provision that titles good in Nebraska would be good in Iowa is binding upon the State itself. The State of Nebraska contends that, as a Compact, the provisions are binding not only on the judiciary but also on the State, its officials, and all of its citizens. The State of Iowa by the mere fact of questioning the title of these landowners in patent disregard of their Nebraska titles is in violation of the Compact. This has been alleged in the Complaint (Par. XIX) and the determination of whether Iowa's conduct constitutes a violation of the Compact is placed in issue by the Com-

plaint. Iowa's statements on pages 2 and 3 of its Brief that it recognizes Nebraska titles are misleading because Iowa first concludes that certain land is Iowa land and from that conclusion, which in this case is fully unmerited, goes one step further and states that therefore the Boundary Compact is not involved. It then carries its reasoning another step by stating that, because it has determined that the land was always in Iowa and the Boundary Compact was not involved, the laws or public acts, records and judicial proceedings of Nebraska are therefore not relevant. Iowa apparently has not even attempted to ascertain whether the occupants of the lands in *Iowa* v. *Babbit* claim through conveyances or judicial proceedings in the State of Nebraska. At page 39 of the Complaint, Interrogatory 4 is quoted asking Iowa to state whether it is in possession of the land described in their petition and the extent and nature of such possession. Iowa's answer, quoted at pages 43-44 of the Complaint indicates that Iowa does not deem it possible for any claim of adverse ownership to be asserted against the State of Iowa and that it therefore ". . . has made no investigation concerning exactly who is or may be in possession of parts or portions of the disputed area adversely to plaintiff [Iowa] and plaintiff should not be required to make an investigation concerning possession merely for the purpose of answering interrogatories . . ." In Iowa's answer to another interrogatory in the case of *Iowa* v. *Babbit*, it admits in answer 21 at pages 48-49 of the Complaint that it has not interviewed residents in the vicinity of the land involved who possess information and knowledge concerning the formation of said land and this had not been accomplished at the time of Iowa's filing its petition in its State Court. Iowa's

answer 22 at pages 49-50 of the Complaint does, however, seem to admit that it is aware of various instruments on file in Nebraska concerning the land in controversy, but Iowa makes the bold statement that these instruments are "spurious, fictitious, and of no force or effect" in Iowa. The State of Nebraska contends that, under the terms of the Iowa-Nebraska Boundary Compact, it is incumbent upon the State of Iowa, as a party to the Compact, to investigate the status of this land as it might appear on the records of the State of Nebraska or the Nebraska county which borders on the Missouri River at that point because, under the Compact, Iowa agreed to recognize the Nebraska titles. Not only has Iowa failed to investigate into these titles, but, when they are called to its attention, it appears that it has unilaterally determined that the titles are spurious and fictitious and therefore it has made up its own rules as to lands along the Missouri River in complete disregard of the Compact. It is no answer to say that the Iowa Court can determine this because the rights guaranteed the citizens of Nebraska were guaranteed by the State of Iowa in the Compact.

In the *Schemmel* case, Iowa, in its reply (quoted at pages 94-95 of the Complaint) denied that the land was ever within the State of Nebraska and alleged that the ownership of lands on the Nebraska side of the main channel is irrelevant and immaterial to any issue in the case because the land in controversy did not form as accretions to said Nebraska lands or as accretions to that part of the bed of the Missouri River which was in the State of Nebraska at the time of its formation. Iowa also alleged that the common law of Nebraska is irrelevant and immaterial to any issue in

the case. It is clearly Iowa's position, as shown by paragraph 1 of its reply quoted on page 94 of the Complaint, that the Iowa-Nebraska Boundary Compact of 1943 had no effect on the land.

Its position is wholly untenable because, separate and apart from the implications of Sections 3 and 4 of the Iowa-Nebraska Boundary Compact, in any action concerning the title to lands in the bed of or adjacent to the Missouri River, the Iowa-Nebraska Boundary Compact must be taken into consideration insofar as Sections 1 and 2 are concerned. Section 1, which is quoted at pages 24 to 26 and 28 to 30 of the Complaint, provides that the middle of the main channel of the Missouri River, which is to constitute the new boundary "shall be the center line of the proposed stabilized channel of the Missouri River as established by the United States engineer's office, Omaha, Nebraska, and shown on the alluvial plain maps of the Missouri River from Sioux City, Iowa to Rulo, Nebraska, . . . which maps are now on file in the United States engineer's office at Omaha, Nebraska, and copies of which maps are now on file with the Secretary of State of the State of Iowa and with the Secretary of State of the State of Nebraska." It should be pointed out that the channel was not completely stabilized at the time of the Compact and the Compact was referring to the proposed stabilized channel. This would apparently create an artificial line as the new boundary rather than the moving river boundary which was subject to change. The language "middle of the main channel" as used in the Compact would seem to be a line on the applicable maps equidistant from each bank of the proposed stabilized channel or the "designed channel". Since the deepest part of the main channel of the Missouri

River, where it constituted the boundary previously, varied from shore to shore, it would seem that the Compact resulted in the creation of a new boundary at almost every place along the entire border between Iowa and Nebraska. In light of this, it is difficult to understand how Iowa can take the position that the Compact is completely irrelevant to the actions which it is bringing, particularly since, in some of the actions, Iowa's surveys disregard the thread of the stream and run to the so-called middle of the designed channel or at least to what we would suppose Iowa considers to be the so-called middle of the designed channel. In the second Amendment to Iowa's Petition (Exhibit H, Complaint, page 57) in the *Babbit* case, Iowa has described the line of its survey as running along the Iowa-Nebraska Boundary, using what Iowa considers to be the center of the designed channel of the Missouri River. Nebraska claims in its Complaint that this line is erroneously placed by Iowa. Because of Iowa's action in the case of *Iowa* v. *Babbit* in extending its survey into Nebraska, there must be some dispute between the two States as to where this present boundary line is supposed to be.

Nebraska contends that Sections 3 and 4 were inserted in the Compact to protect private property owners and that Iowa, as a contracting party, bound itself not to question titles to these lands and Iowa waived and relinquished any right or claim of ownership over lands which prior to 1943 had been on the tax rolls of the State of Nebraska or its authorized governmental subdivisions or which have been occupied by private citizens, particularly the residents of Nebraska, who are in possession or had exercised incidents of owner-

ship over such land prior to or at the time of approval of the Iowa-Nebraska Boundary Compact.

The State of Iowa, by apparently taking advantage of the proposed boundary as Iowa understands the Compact and attempting to quiet title to lands up to what it considers to be the boundary as established by the 1943 Compact, is twisting the language and intent of the Compact in such a manner that it can be used to invoke the jurisdiction granted the Iowa courts by the provision in the Compact establishing the boundary while at the same time Iowa is ignoring those provisions of the Compact which were inserted to guarantee and safeguard the rights of individuals claiming ownership under Nebraska law. By taking this approach, Iowa can exert the entire resources of the State against individual land owners, one by one. The State can afford to fight these lawsuits in such a manner, but the individual landowner cannot. The tremendous and immediate cash sums involved in preparing and trying a lawsuit so complex as one of these is so burdensome that, even should the courts eventually rule in his favor, yet he shall have expended such tremendous sums in fees and expenses that he ultimately has lost. There is no way that he can win. The State of Nebraska contends that the language of Sections 3 and 4 was inserted to avoid such situations.

In addition, in the Iowa courts, the State of Iowa has taken the position that adverse possession cannot run against it, as shown in answer 4 to the interrogatories at page 43 of the Complaint, and we would assume that Iowa also takes the position that laches or estoppel cannot run against it because it is a State. Iowa is in a court of equity in the Iowa state courts

demanding equity, but evidently is not willing to abide by the general equitable principles in return. Iowa is taking the position that it is not bound by the acts of its instrumentalities or subdivisions, as illustrated by its answer to Interrogatory No. 22 at page 49-50 of the Complaint where Iowa states that a District Court action ordering the county officials of Mills County, Iowa to place certain instruments of record was not binding on the State, and as can be inferred by answer to Interrogatory No. 20 on pages 63-64 of the Complaint whereby the defendants in the *Babbit* case indicated that the Conservation Commission of the State of Iowa, under date of April, 1950, had disclaimed any ownership in the lands claimed by the defendants in that case.

The State of Iowa has also taken the position that only the Iowa common law is involved, as indicated by Iowa's answer to Interrogatory 9 on page 46 of the Complaint, wherein Iowa stated that its claim is "bottomed on the law of the State of Iowa which all parties to this case were, and are presumed to know and to have known.", and in the *Schemmel* case where Iowa alleged that the common law of Nebraska as to ownership of the beds of streams was irrelevant and immaterial (Complaint, p. 95). In Iowa's answer to Interrogatory No. 6 at page 44 of the Complaint, Iowa stated that the matter of possession of the land in dispute was irrelevant and immaterial for the "further reason that mere possession cannot have any significance in law or equity unless the same, from its inception, be coupled with color of title, and, in this case, none of the defendants have ever had any color of title." The requirement of "color of title" to assert an adverse possession to land is not existent in the Nebraska law and this evidently is another indication that the State of Iowa

is completely ignoring the laws of the State of Nebraska insofar as they might be pertinent and insofar as they might be in conflict with the laws of the state of Iowa.

One of the presumptions which exists in the Iowa law which would deserve re-examination in light of the action of the United States Army Corps of Engineers in completely re-designing the channel of the Missouri River, is that stated in *Kitteridge* v. *Ritter,* 172 Iowa 55, 151 N. W. 1097, 1098, in which the Iowa Court stated the presumption that:

> "The land, being concededly on the east side of the Missouri River, is presumed to be in Iowa."

There can be no basis for such a presumption where changes are man-made, and especially where, as here, the changes were taken into consideration in arriving at the location of the boundary line in drafting the Compact. Such presumption, if allowed to persist, works to the detriment of owners of land ceded by Nebraska by clearly placing the burden of proof upon them to prove title to lands east of the designed channel. It is submitted that a statement from this Court destroying such presumption on the Missouri River is necessary and proper, as a necessary effect of the Compact.

The application of an authoritative doctrine would eliminate the type of result illustrated by the case of *Durfee* v. *Duke,* 375 U. S. 106. Here, all the claimants to certain bottom land along the Missouri River appeared in a quiet-title action in the Nebraska courts. The Nebraska courts found that the land in question was in Nebraska. Certain of the claimants then filed a suit in a Missouri court to quiet title to the same land, contending that the land was in Missouri. The

suit was removed to a Federal District Court and the District Court, after hearing the evidence, expressed the view that the land was in Missouri, although it held that all the issues had been adjudicated and determined in the Nebraska litigation, and that the judgment of the Nebraska Supreme Court was *res judicata*, and was therefore binding upon all the parties. The Court of Appeals for the Eighth Circuit reversed the Federal District Court and held that the Court was not required to give full faith and credit to the Nebraska judgment, and that normal *res judicata* principles were not applicable because the controversy involved land and the Court in Missouri was therefore free to retry the question of the Nebraska Court's jurisdiction over the subject. This Court held that the jurisdictional issues had been fully and fairly litigated by the parties and fully determined in the Nebraska Courts and the Federal Court in Missouri was correct in ruling that further inquiry was precluded.

Iowa's conduct in attempting to obtain title to lands along the Missouri River in its courts seems to be the type of situation which the framers of our Constitution envisaged and provided for. In discussing the principles which ought to regulate the constitution of the federal judiciary, The Federalist, No. LXXX stated:

> "The reasonableness of the agency of the national courts in cases in which the State tribunals cannot be supposed to be impartial, speaks for itself. No man ought certainly to be a judge in his own cause, or in any cause in respect to which he has the least interest or bias. This principle has no inconsiderable weight in designating the federal courts as the proper tribunals for the determination of controversies between different States and their

citizens. And it ought to have the same operation in regard to some cases between citizens of the same State. Claims to land under grants of different States, founded upon adverse pretensions of boundary, are of this description. The courts of neither of the granting States could be expected to be unbiased. The laws may have even prejudged the question, and tied the courts down to decisions in favor of the grants of the State to which they belonged. And even where this had not been done, it would be natural that the judges, as men, should feel a strong predilection to the claims of their own government."

II.

Because the court clearly has jurisdiction over boundary disputes, it must also have jurisdiction over the construction and enforcement of compacts to settle boundaries. The entire purpose of the compact clause of the constitution would be defeated if such compacts, when entered into, could not be enforced by an action of one of the states being a party to the compact.

As stated in the Brief of the State of Nebraska in Support of its Motion for Leave to File Original Bill of Complaint, at page 2, this Court has repeatedly accepted original jurisdiction in matters involving disputes as to the location of the boundary between two States. However this Court has also recognized that the litigious solution is sometimes awkward and unsatisfactory and the Supreme Court has sometimes deemed it appropriate to emphasize the practical constitutional alternative provided by the compact clause. In *Hinderlider* v. *La Plata Co.*, 304 U. S. 92, 105-06, Mr. Justice Brandeis commented as follows:

". . . resort to the judicial remedy is never essential to the adjustment of interstate controver-

> sies, unless the States are unable to agree upon the terms of a compact, or Congress refuses its consent. The difficulties incident to litigation have led States to resort, with frequency, to adjustment of their controversies by compact, even where the matter in dispute was the relatively simple one of a boundary. In two such cases this Court suggested 'that the parties endeavor with the consent of Congress to adjust their boundaries.' *Washington* v. *Oregon*, 214 U. S. 205, 217, 218; *Minnesota* v. *Wisconsin*, 252 U. S. 273, 283. In *New York* v. *New Jersey*, 256 U. S. 296, 313, which involved a more intricate problem of rights in interstate waters, the recommendation that treaty-making be resorted to was more specific; and compacts for the apportionment of the water of interstate streams have been common."

In our present situation, this is what the States attempted to do in 1943. They did so with the long history of controversy concerning the boundary including the case of *Nebraska* v. *Iowa*, 143 U. S. 359, decree at 145 U. S. 519. Even this decision did not permanently solve all the problems concerning the boundary between the States, though it did set forth certain guide lines as to the effect upon the boundary of certain action by the Missouri River. However, that even with these guide lines many problems continued to exist following that Decree and prior to the Iowa-Nebraska Boundary Compact of 1943 is evidenced by an article by an Iowa lawyer, Robert M. Underhill, in "The Instability of River Courses as State Boundary Lines With Reference to the Situation in Iowa", II IOWA B. REV. 11, 14 (1935):

> "Application of these court-made rules has caused friction between the states of Iowa and Nebraska over the dominion of some twenty thousand acres of land, including the Carter Lake district

> at Council Bluffs, Holman's Island in Monona County and Flower's Island in Woodbury County. The uncertainty arising out of the decision in *Iowa* v. *Nebraska,* supra, has been commented upon by the Iowa historian Erik McKinley Eriksson, in (1927) 25 Iowa Jour. Hist. and Pol. 233, 235: 'This decision settled for a time the boundary difficulties between Iowa and Nebraska, but the fickle Missouri River has refused to be bound by the Supreme Court decree. In the past thirty-five years the river has changed its course so often that it has proved impossible to apply the court decision in all cases, since it is difficult to determine whether the channel of the river has changed by 'the law of accretion' or 'the law of avulsion'. Where it has been possible to apply the decision awkward situations have resulted. For instance, East Omaha is legally in Iowa - in fact it is included in the corporation of Council Bluffs - yet it is located on the West side of the river in close proximity to Omaha, with which city its interests are much more closely united than with Council Bluffs'."

This was written in 1935, approximately eight years prior to the Compact. Although for many years the Compact apparently seemed to have accomplished its purpose, it now appears that it did not settle the dispute between Iowa and Nebraska as indicated by the allegations contained in the Complaint which Nebraska is requesting leave to file. Should the Court refuse to take jurisdiction now to consider the controversy which has developed over the meaning and enforcement of the Compact, it would certainly tend to discourage the states from entering into agreements which have previously been encouraged by this Court. This was recognized at an early date in our history by Mr. Justice Baldwin in the case of *Rhode Island* v. *Massachusetts,* 12 Pet. 657, in which the Supreme Court took jurisdic-

tion in a controversy over the boundary between Rhode Island and Massachusetts. The case included a contention that a line between the States had been previously agreed upon and the question of the validity and efficacy of prior agreements was brought into issue. Massachusetts objected to the jurisdiction of the Supreme Court. Mr. Justice Baldwin pointed out that, at the time of the adoption of the Constitution, there were existing controversies between eleven states respecting their boundaries which had arisen under their respective charters and had continued from the first settlement of the Colonies. He then stated at pages 724-726:

> "By the first clause of the tenth section of the first article of the constitution, there was a positive prohibition against any state entering into 'any treaty, alliance or confederation;' no power under the government could make such an act valid, nor dispense with the constitutional prohibition. In the next clause, in a prohibition against any state entering 'into any agreement or compact with another state, or with a foreign power, without the consent of congress; or engaging in war, unless actually invaded, or in imminent danger, admitting of no delay.' By this surrender of the power, which, before the adoption of the constitution, was vested in every state, of settling these contested boundaries, as in the plentitude of their sovereignty they might; they could settle them neither by war, nor in peace, by treaty, compact or agreement, without the permission of the new legislative power which the states brought into existence by their respective and several grants in conventions of the people. If congress consented, then the states were in this respect restored to their original inherent sovereignty; such consent being the sole limitation imposed by the constitution,

when given, left the states as they were before, as held by this court in *Poole* v. *Fleeger,* 11 Pet. 209; whereby their compacts became of binding force, and finally settled the boundary between them; operating with the same effect as a treaty between sovereign powers. That is, that the boundaries so established and fixed by compact between nations, become conclusive upon all the subjects and citizens thereof, and bind their rights; and are to be treated to all intents and purposes, as the true real boundaries. 11 Pet. 209; s.p. 1 Ves. sen. 448-9; 12 Wheat. 534. The construction of such compact is a judicial question, and was so considered by this court in the *Lessee of Sims* v. *Irvine,* 3 Dall. 425-54; and in *Marlatt* v. *Silk,* 11 Pet. 2, 18; *Burton* v. *Williams,* 3 Wheat. 529-33, &c.

"In looking to the practical construction of this clause of the constitution, relating to agreements and compacts by the states, in submitting those which relate to boundaries to congress, for its consent, its giving its consent, and the action of this court upon them; it is most manifest, that by universal consent and action, the words 'agreement' and 'compact', are construed to include those which relate to boundary; yet that word boundary is not used. No one has ever imagined, that compacts of boundary were excluded, because not expressly named; on the contrary they are held by the states, congress and this court, to be included by necessary implication; the evident consequence resulting from their known object, subject-matter, the context, and historical reference to the state of the times and country. No such exception has been thought of, as it would render the clause a perfect nullity for all practical purposes; especially, the one evidently intended by the constitution, in giving to congress the power of dissenting to such compacts; not to prevent the states from settling their own boundaries, so far as merely affected

their relations to each other; but to guard against the derangement of their federal relations with the other states of the Union, and the federal government; which might be injuriously affected, if the contracting states might act upon their boundaries at their pleasure.

"Every reason which has led to this construction, applies with equal force to the clause granting to the judicial power jurisdiction over controversies between states, as to that clause which relates to compacts and agreements; we cannot make an exception of controversies relating to boundaries, without applying the same rule to compacts for settling them; nor refuse to include them within one general term, when they have uniformly been included in another. Controversies about boundary are more serious in their consequences upon the contending states, and their relations to the Union and governments, than compacts and agreements. If the constitution has given to no department the power to settle them, they must remain interminable; and as the large and powerful states can take possession, to the extent of their claim, and the small and weak ones must acquiesce and submit to physical power; the possession of the large state must consequently be peaceable and uninterrupted; prescription will be asserted, and whatever may be the right and justice of the controversy, there can be no remedy, though just rights may be violated. Bound hand and foot by the prohibitions of the constitution, a complaining state can neither treat, agree, nor fight with its adversary, without the consent of congress; a resort to the judicial power is the only means left for legally adjusting, or persuading a state which has possession of disputed territory, to enter into an agreement or compact, relating to a controverted boundary. Few, if any, will be made, when it is left to the pleasure of the state in possession; but when it is known, that some tribunal can decide

on the right, it is most probable that controversies will be settled by compact.

"There can be but two tribunals under the constitution who can act on the boundaries of states, the legislative or the judicial power; the former is limited, in express terms, to assent or dissent, where a compact or agreement is referred to them by the states; and as the latter can be exercised only by this court, when a state is a party, the power is here, or it cannot exist. For these reasons, we cannot be persuaded, that it could have been intended to provide only for the settlement of boundaries, when states could agree; and to altogether withhold the power to decide controversies on which the states could not agree, and presented the most imperious call for speedy settlement."

The Court then discussed the rules and principles adopted by it from a very early period including the principle at page 744: "That one state may file a bill against another, to be quieted as to the boundaries of disputed territory, and this court might appoint commissioners to ascertain and report them; since it is monstrous to talk of existing rights, without correspondent remedies." The Court then stated, 12 Pet. 657, 744-45:

"In the following cases, it will appear, that the course of the court on the subject of boundary, has been in accordance with all the foregoing rules; let the question arise as it may, in a case in equity, or a case in law, or a civil or criminal nature; and whether it affects the rights of individuals, or states, or the United States, and depends on charters, laws, treaties, compacts or cessions which relate to boundary. In *Robinson* v. *Campbell*, the suit involved the construction of the compact of boundary between Virginia and North Carolina, made in 1802; and turned on the question, whether

the land in controversy was always within the original limits of Tennessee, which the court decided. 3 Wheat. 213, 218, 224 . . . In *Burton* v. *Williams*, the case involved a collision of interest between North Carolina, Tennessee and the United States, under the cessions by the former to the two latter, in which this court reviewed all the acts of congress and of the two states on the subject, and the motives of the parties, to ascertain whether the *casus foederis* had ever arisen. The case also involved the construction of the compact between Tennessee and the United States, made in 1806. The court use this language in relation to it: 'The members of the American family possess ample means of defence, under the constitution, which we hope ages to come will verify. But happily for our domestic harmony, the power of aggressive operation against each other is taken away.' It is difficult to imagine, what other means of defence existed in such a case, unless those which the court adopted, by construing the acts recited, as the contracts of independent states, by those rules which regulate contracts relating to territory and boundary. 3 Wheat. 529, 533, 538 . . ."

In *Virginia* v. *Tennessee*, 148 U. S. 503, the Court exercised jurisdiction over a dispute between the States of Virginia and Tennessee as to their true boundary. Virginia claimed that an agreement between the two states entered into in 1803 constituted a compact establishing the boundary which was binding whereas Tennessee claimed that the compact was not valid and prayed to have the compact set aside and annulled and have a new boundary line run. Mr. Justice Field, in language assuming the jurisdiction of the Court, stated, 148 U. S. at 504:

"This is a suit to establish by judicial decree the true boundary line between the States of Virginia

> and Tennessee. It embraces a controversy of which this court has original jurisdiction, and in this respect the judicial department of our government is distinguished from the judicial department of any other country, drawing to itself by the ordinary modes of peaceful procedure the settlement of questions as to boundaries and consequent rights of soil and jurisdiction between States, possessed, for purposes of internal government, of the powers of independent communities, which otherwise might be the fruitful cause of prolonged and harrassing conflicts."

The Court considered that the line run was accepted by both States as a satisfactory settlement of the controversy which had, under their governments and that of the colonies which preceded them, lasted for nearly a century. It then stated at page 515: ". . . As seen from the acts recited, both States through their legislatures declared in the most solemn and authoritative manner that it was fully and absolutely ratified, established and confirmed as the true, certain and real boundary line between them; and this declaration could not have been more significant had it added, in express terms, what was plainly implied, that it should never be departed from by the government of either, but be respected, maintained and enforced by the governments of both." This compact contained provisions as to claims and titles to land derived from the government of the other state and certainly the duty of each state to respect, maintain and enforce the agreed boundary also was applicable to the other provisions of the compact. This is an affirmative duty although the State of Iowa refuses to recognize that obligation.

As the settlement of complex boundary problems by compact has been encouraged by the Court, it would

only seem logical that any disagreement between the States concerning the construction of such compacts should be decided by this Court in an action between the States as contracting parties. It is only natural that a state may want to protect certain rights of its citizens when land is being transferred to another jurisdiction and, if the land is transferred subject to those conditions, the granting state should have the satisfaction of knowing that any such provisions can be enforced by it. If, by transferring jurisdiction over land, the State is thereby merely subjecting that land transferred to the unilateral determination by the other State of the rights in and to that land, then it would not seem likely that such controversies would ever be settled by compact. If, however, the States do insist upon and include provisions designed to protect the rights of landowners as a condition to the establishment of a new boundary, and if the State has confidence that these provisions can be enforced by it, then it is much more probable that controversies will be settled by compact.

In the present case, the State of Nebraska, by entering into the Compact with the State of Iowa, thereby placed a great deal of land within the jurisdiction of the State of Iowa. As a contracting party, the State having placed its citizens in the situation which now exists, should be in a position whereby it can guarantee that the safeguards which were included in the Compact will be adhered to by the other State. Nebraska is interested in the welfare and comfort of its citizens and this is being threatened on a large scale by the State of Iowa's conduct. As was stated in *Missouri* v. *Illinois*, 180 U. S. 208 at 241, a case involving an injunc-

tion by the State of Missouri against the State of Illinois and the Sanitary District of Chicago to restrain them from permitting sewage to be discharged into the Mississippi River:

> "It is true that no question of boundary is involved, nor of direct property rights belonging to the complainant State. But it must surely be conceded that, if the health and comfort of the inhabitants of a State are threatened, the State is the proper party to represent and defend them. If Missouri were an independent and sovereign State all must admit that she could seek a remedy by negotiation, and, that failing, by force. Diplomatic powers and the right to make war having been surrendered to the general government, it was to be expected that upon the latter would be devolved the duty of providing a remedy and that remedy, we think, is found in the constitutional provisions we are considering.
>
> • • •
>
> "That suits brought by individuals, each for personal injuries, threatened or received, would be wholly inadequate and disproportionate remedies, requires no argument."

Although under different facts, in our situation likewise, the individual defense of each case by the landowners along the Missouri River is inadequate for many reasons. In part, there is the tremendous expense involved in complex cases of this type. There are the difficulties existent in any suit by a State against an individual with the doctrines of sovereign immunity which seem to apply. This is accentuated by the passage of time, during which witnesses have died, landmarks may have been destroyed, and evidence may have disappeared. By waiting as long as it has to

institute these actions, the State of Iowa has gained a tremendous advantage over the individuals. In *Virginia* v. *Tennessee*, 148 U. S. 503, Mr. Justice Field said at page 523:

> "In the case of *Rhode Island* v. *Massachusetts*, 4 How. 591, 639, this court, speaking of the long possession of Massachusetts, and the delays in alleging any mistake in the action of the commissioners of the colonies said: 'Surely this, connected with the lapse of time, must remove all doubts as to the right of the respondent under the agreements of 1711 and 1718. No human transactions are unaffected by time. Its influence is seen on all things subject to change. And this is peculiarly the case in regard to matters which rest in memory, and which consequently fade with the lapse of time and fall with the lives of individuals. For the security of rights, whether of States or individuals, long possession under a claim of title is protected. And there is no controversy in which this great principle may be invoked with greater justice and propriety than in a case of disputed boundary'."

In some of the pending cases brought by Iowa to acquire land along the border, witnesses which would be of assistance to defendants' claims have died or are of such an age that their memory is not sufficiently reliable that it is advisable to call them to testify. Since the States themselves refused to determine the exact line of the disputed boundary prior to the entry into the Compact of 1943, it does not seem fair or logical that the Compact should be so construed that individual landowners must now, approximately twenty years later, be confronted with the burden to prove that fact as against one of the States. It is Nebraska's position that it did not, in entering into the Compact,

thereby place its citizens in such an unfair position. Should this Court refuse jurisdiction of the case, it would thereby be so construing the Compact.

In addition, Iowa in its brief and in its pleadings in the cases of *Iowa* v. *Babbit* and *Iowa* v. *Schemmel* has clearly taken the position that it considers the only issue as being where the land formed. This ignores the doctrine which is well established in the law that land may become a part of a State as the result of long and continuous exercise by that State of dominion and jurisdiction over it with the acquiescence of the other State as indicated in the case of *Michigan* v. *Wisconsin*, 270 U. S. 295, 308, which involved a controversy between Michigan and Wisconsin over boundary wherein the Court said:

> "That rights of the character here claimed may be acquired on the one hand and lost on the other by open, long-continued and uninterrupted possession of territory, is a doctrine not confined to individuals but applicable to sovereign nations as well . . . (citing authority) . . ., and *a fortiori* to the quasi-sovereign States of the Union. The rule, long-settled and never doubted by this Court, is that long acquiescence by one State in the possession of territory by another and in the exercise of sovereignty and dominion over it is conclusive of the latter's title and rightful authority. *Indiana* v. *Kentucky*, 136 U. S. 479, 509, *et seq.*; *Virginia* v. *Tennessee*, 148 U. S. 503, 522-524; *Louisiana* v. *Mississippi*, 202 U. S. 153; *Maryland* v. *West Virginia*, 217 U. S. 1, 40-44; *Rhode Island* v. *Massachusetts*, 4 How. 591, 639; *Missouri* v. *Iowa*, 7 How. 660, 677; *New Mexico* v. *Colorado*, 267 U. S. 30, 40-41."

The present chaos and confusion which exists along the Iowa border is a matter of such great concern to

the State of Nebraska that this Court should take jurisdiction in order to settle the legal principles involved and the effect of the boundary compact both upon the boundary between Iowa and Nebraska, and the titles to land along that boundary and the rights of each State to the use of the Missouri River and the ownership of the bed of the Missouri River.

If Iowa is correct in its contention that the only issue is where the land formed, then it would seem that truly a state of chaos would exist along the Missouri River in light of the differences in law between Iowa and Nebraska concerning the rights of the States in and to navigable waters and the terms of the Compact. It must be conceded by Iowa that there have been many avulsions, both manmade and natural, along the Missouri River which in each instance would not have changed the boundary but have left it in the abandoned channel. In these situations, where the river had shifted entirely into Nebraska the entire bed of the stream would belong to the Nebraska riparian owner under Nebraska law with an easement for public navigation and Iowa would have had no claim whatsoever in its rights to the river except through Nebraska law. Thus, when Iowa agreed in the Compact that titles good in Nebraska would be good in Iowa, when the line was shifted to the middle of the main channel as shown on the Corps of Engineer maps, and assuming that that designed channel coincided with where the river might be now, then Iowa would not have any rights to the bed of the stream at that place, nor would it have any right to the use of the stream except through Nebraska law. On the other hand, where the river had shifted entirely into Iowa, Iowa would claim not only the abandoned channel but also the new channel. Consequently, when

the Compact was adopted and each State agreed that titles in the other State would be recognized, assuming that each State would live up to its commitment, under Iowa's present theory, it would mean that on certain areas of the river Iowa would own the entire bed, on other areas of the river Iowa would have no claim whatsoever to the bed and the rights of the public under Iowa law would not be clear and on other areas of the river where the deepest part of the designed channel happened to coincide exactly with the former channel, Iowa would only own from the high bank to the middle of the deepest or navigable channel. This would seem to create a state of utter confusion along the Missouri River and one which is in need of a solution.

III.

This is a controversy between the states of Nebraska and Iowa and its determination should not require that all individuals presently being injured or threatened with injury by the action of the state of Iowa as a result of its breach of the compact be joined as indispensable parties to the action.

Iowa has taken the position in its brief that the parties to the specific cases referred to in the State of Nebraska's complaint have not been joined in this action and that thus there is no jurisdiction by reason of lack of indispensable parties. Iowa has also claimed in its brief that there is no controversy between Nebraska and Iowa and that Nebraska's primary purpose is to protect its citizens against alleged violations of their rights (Pages 8 and 9 of Iowa's brief).

Admittedly, Nebraska is interested in the rights of its citizens and is attempting to protect those rights.

However, in this situation, the rights were created by the Compact and the jurisdiction over the land was transferred subject to the safeguards included in the Compact intended for the protection of these rights. Without provisions to protect the rights of the individual landowners, the Compact would never have been entered into by the State of Nebraska. The State has a clear interest because, in the exercise of its constitutional rights as a state it has entered into a Compact which affected the rights of many of its citizens. As a contracting party, a state should have a right to insert any safeguards which it deems necessary. Should the other state then violate those provisions, the contracting state has been injured by the very fact of the unilateral action breaching and abrogating the Compact.

There have been private actions between individual citizens to determine titles to land wherein the jurisdiction of the Court depended upon the location of the land or a provision in a grant or cession of land by one state including safeguards of the titles in the lands being granted. However, this should not preclude the states themselves from enforcing their own contracts. In *Rhode Island* v. *Massachusetts, supra,* Massachusetts claimed people inhabiting the disputed territory ought to be made parties, as their rights are affected. In response to this contention, the court said at page 748:

> "It is said, that the people inhabiting the disputed territory, ought to be made parties, as their rights are affected. It might with the same reason be objected, that a treaty or compact settling boundary, required the assent of the people to make it valid, and that a decree under the ninth article of confederation was void; as the authority to make it was derived from the legislative power

> only. The same objection was overruled in *Penn* v. *Baltimore*; and in *Poole* v. *Fleeger*, this court declared, that an agreement between states, consented to by congress, bound the citizens of each state. There are two principles of the law of nations, which would protect them in their property: 1st. That grants by a government *de facto*, of parts of a disputed territory in its possession, are valid against the state which had the right. 12 Wheat. 600-1. 2d. That when a territory is acquired by treaty, cession, or even conquest, the rights of the inhabitants to property are respected and sacred. 8 Wheat 589; 12 Ibid 535; 6 Pet. 712; 7 Ibid 857; 8 Ibid 445; 9 Ibid 133; 10 Ibid 330, 718 &c."

Thus it is not feasible that every party owning land along the boundary be made a contracting party to a compact and it is equally not feasible that all these parties be joined in an action to enforce the compact when one state is violating it.

Discussion of Cases Cited by Defendant

An examination of the cases cited by the defendant in opposition to the Motion to File the Bill of Complaint reveals that these cases are not relevant to the jurisdictional issue involved for either or both of the following reasons:

(a) No interpretation of a compact or agreement was involved;

(b) The cases are prematurely cited for the reason that the Court had already permitted the filing of the Complaint and determination was had after an examination of the issues on their merits.

Plaintiff will discuss these cases only briefly so as to illustrate the points made above. In the discussion

that follows, the page number in parentheses following the citation is a reference to the defendant's brief.

Massachusetts v. *Missouri*, 308 U. S. 1, (p. 6) involved an attempt to invoke the jurisdiction of the Court to determine which of two states had the right to impose transfer, succession or inheritance taxes. The Court stated the rationale of no justiciable controversy thus, 308 U. S. at 15-16:

> "It is not shown that the tax claims of the two states are mutually exclusive. On the contrary, the validity of each claim is wholly independent of that of the other and, in the light of our recent decisions, may constitutionally be pressed by each state without conflict in point of fact or law with the decision of the other."

The court also distinguishes between reciprocal legislation and a compact or treaty, and mere reciprocal legislation "cannot be regarded as conferring upon Massachusetts any contractual right".

In *Arkansas* v. *Texas*, 346 U. S. 368, (p. 6) the Court decided to take jurisdiction in a suit by Arkansas to enjoin the State of Texas from interfering with a charitable contribution from a Texas corporation for the construction of a hospital floor in the Arkansas State Medical Center. No compact was involved. The dissent of Mr. Justice Jackson, with three Justices joining, would have denied the motion for leave to file but recognized that:

> "If a controversy between two states concerns the construction of a compact, *Dyer* v. *Sims*, 341 U. S. 22, . . . this Court must, of course, determine their rights *inter sese*." 346 U. S. at 372-73.

Oklahoma ex rel West v. *Gulf, C. & S. F. R. Co.*, 220 U. S. 290 (p. 6), has no application to the case at bar. That was a case of a state's suing individual (corporate) defendants to enjoin commission of alleged criminal acts within the state.

Louisiana v. *Texas*, 176 U. S. 1, (p. 6), is cited in support of the statement that jurisdiction will not be executed in the absence of necessity. However, note the language at 176 U. S. 22:

> "But in order that a controversy between states, justiciable in this Court, can be held to exist, something more must be put forward than that the citizens of one state are injured by the maladministration of the laws of another. The states cannot make war, or enter into treaties, though they may, with consent of Congress, make compacts and agreements. When there is no agreement whose breach might create it, a controversy between states does not arise unless the action complained of is state action, and acts of state officers in abuse or excess of their powers cannot be laid hold of as in themselves committing one state to a distinct collision with a sister state."

The clear implication here is that a justiciable controversy does exist where there is a compact or agreement.

Missouri v. *Illinois*, 200 U. S. 496 (p. 6), was a case where the Court found the evidence on the merits of the case insufficient to support the Bill of Complaint. In its previous opinion, *Missouri* v. *Illinois*, 180 U. S. 208, the filing of the bill was sustained and a demurrer overruled. This was a case of preventing and enjoining a nuisance and involved no compact or agreement.

New York v. *New Jersey*, 256 U. S. 296 (p. 6), was another case in which the evidence was examined and found to be insufficient. Once again the citation is premature. *North Dakota* v. *Minnesota*, 263 U. S. 365 (p. 7), was another case where the bill was dismissed for failure to adduce sufficient evidence to show that defendants caused the injury complained of.

Connecticut v. *Massachusetts*, 282 U. S. 660 (p. 7), was a decision on the final determination of the case on its merits. The decision adopts the findings of the special master that the complainant had failed to sustain the burden of proof.

Iowa v. *Illinois*, 147 U. S. 1 (p. 8), does not hold for the statement for which cited. There Iowa was claiming the right to tax bridges and the Court merely held that the boundary between Iowa and Illinois was the center of the main navigable channel of the Mississippi River.

Smith v. *Maryland*, 18 How. 71 (p. 8), involved only the question of the proper exercise of power of the state to regulate the taking of oysters.

California v. *Southern Pacific Co.*, 157 U. S. 229 (p. 9), was a case in which a *decree* was sought against a person not a party to the law suit.

Minnesota v. *Northern Securities Co.*, 184 U. S. 199 (p. 9), was a suit between a state and a foreign corporation and has absolutely no application to the case at bar.

The cases which Iowa has cited for the proposition that a deed can convey title only to land actually

owned by a grantor and a grantee thereunder takes no greater title under a deed than the grantor had (p. 9-10) are not applicable at this stage. The question of whether Nebraska had sufficient interest in the lands in question to "deed" them is one of those at the root of the proceedings and can only be determined after a hearing on the merits.

CONCLUSION

The State of Nebraska respectfully contends that its Complaint discloses the existence of an actual dispute between Nebraska and Iowa; that it shows said States to be the real parties in interest; that it discloses a justiciable controversy; and that leave should be granted the State of Nebraska to file its Complaint herein.

Respectfully submitted,

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PROOF OF SERVICE

I, Howard H. Moldenhauer, Special Assistant Attorney General of the State of Nebraska, and a member of the Bar of the Supreme Court of the United States, hereby certify that on October —, 1964, I served a copy of the foregoing Supplemental Brief in Support of Motion for Leave to File Bill of Complaint by depositing same in a United States Post Office, with first class postage prepaid, addressed to:

HONORABLE HAROLD E. HUGHES,
Governor of the State of Iowa
State Capitol
Des Moines, Iowa

HONORABLE EVAN L. HULTMAN
Attorney General of the State of Iowa
State Capitol
Des Moines, Iowa

WALTER A. NIELSEN,
Attorney at Law
4832 Farnam Street
Omaha, Nebraska

such being their post office addresses.

HOWARD H. MOLDENHAUER
Special Assistant Attorney General,
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1100 First National Bank Building
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MOTION FILED

OCT 13 1964

In The

Supreme Court of the United States

October Term, 1964

No. 17, Original

STATE OF NEBRASKA, PLAINTIFF,

V.

STATE OF IOWA, DEFENDANT.

ROY M. HARROP, INTERVENOR

MOTION FOR LEAVE TO FILE PETITION OF INTERVENTION, STATEMENT IN SUPPORT OF MOTION AND PETITION OF INTERVENTION.

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No. 17, Original

STATE OF NEBRASKA, PLAINTIFF,

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STATE OF IOWA, DEFENDANT.

ROY M. HARROP, INTERVENOR

MOTION FOR LEAVE TO FILE PETITION OF INTERVENTION, STATEMENT IN SUPPORT OF MOTION.

1.

COMES now the intervenor, Roy M. Harrop, Et Al., and moves the Court for leave to file his Petition of Intervention in the case directed hereto.

2.

That intervenor has such a compelling interest (*New Jersey* v. *New York*, 345 U. S. 369) not represented by the State of Nebraska in that he was impleaded with John Schroeder, as one of the Appellants in the October Term 1961 Case designated in the files of the United

States Supreme Court as No. 357, which by reference is made a part hereof as fully as if set out verbatim, to-wit:

JOHN SCHROEDER, Et Al., APPELLANTS,

V.

HOMESTEAD CORPORATION, APPELLANTS,

Impleaded with

MARGARET A. WILLIAMS, Et Al., APPELLEES.

APPEAL FROM THE SUPREME COURT OF NEBRASKA.

3.

Intervenor further shows to the Court that this action is brought under the authority of Article III, Section 2, Clause 2, of the Constitution of the United States; and 28 U. S. C., Sec. 1251 (a) (1) (1948) Sec. 1257 (2); and Article IV, Section 1; Article XIV, Section 1 of the Constitution of the United States; and the Iowa-Nebraska Boundary Compact of 1943, approved by the Congress of the United States, Title 28, Section 1738 United States Code, Chapter 330 United States Statutes at Large (1943); Section 22-194 of the Revised Statutes of the State of Nebraska, 1943.

4.

The declared intervenor, Roy M. Harrop, is the surviving joint tenant of the property described in the action above enumerated, and the solution of the matters therein stated at this time will at once dispose of all of the boundless and vexatious land disputes arising out of the *Stabilization of the Missouri River channel by the United States Corps of Engineers under the author-*

ity of the Iowa-Nebraska Boundary Compact of 1943, *approved by the Congress of the United States.*

5.

WHEREFORE, it is respectfully prayed that this Honorable Court grant this Motion for leave to file this Petition of Intervention.

ROY M. HARROP
Attorney for Intervenor
Member of the Bar,
Supreme Court of the
United States

WALTER A. NIELSEN
Attorney for Intervenor
Member of the Bar,
State of Nebraska,
Federal Court,
District of Nebraska

CERTIFICATE OF MAILING

PROOF OF SERVICE

I, Walter A. Nielsen, one of the attorneys for Intervenor, hereby certify that on September 29, 1964, I served a copy of the foregoing Motion for leave to file a Petition of Intervention, by depositing same in the United States Post Office, with first class postage prepaid, addressed to:

HONORABLE EVAN L. HULTMAN, Attorney
for Defendant,
Attorney General of the State of Iowa
State Capitol,
Des Moines, Iowa,
and

CLARENCE A. H. MEYER, Attorney
for Plaintiff
Attorney General,
State of Nebraska,
State Capitol Building,
Lincoln, Nebraska.

WALTER A. NIELSEN
One of the Attorneys for
Intervenor.

STATEMENT OF CASE OF INTERVENOR

1.

Intervenor herein in support of his Motion declares that he has participated in considerable litigation concerning large tracts of property located in Harrison County, Iowa; that the District Court of Harrison County, Iowa, Case No. 18,376, rendered a declaratory

judgment on Dec. 30, 1952, quieting title to said land in John Schroeder, Et Al., said case namely referred to in the statement in the motion heretofore pleaded.

2.

1. The Declaratory Judgment of the State of Iowa above named was transcripted to the District Court of Washington County, Nebraska, in view of the fact that the action of the Corps of Engineers of the United States Army had altered the course of the Missouri River and placed a large portion of the lands in Washington County, Nebraska; that the Iowa-Nebraska Boundary Compact of 1943 ratified the titles to lands in the previous owners as transported to the Nebraska side of the River by the said action of the Corps of Engineers.

2. That the District Court of Washington County, Nebraska, under date of April 12, 1960, in Case No. 5648, Docket Q wherein the caption reads as follows:

> "John Schroeder and Roy M. Harrop, Plaintiffs
> V.
> HOMESTEAD CORPORATION, MARGARET A. WILLIAMS, A. C. SCHULMEISTER, County Treasurer of Harrison County, Iowa, HARRISON COUNTY, IOWA, and all persons unknown, claiming any right, title or interest in and to the following described real estate, to-wit: The SE¼ and Lot Three (3) and Lot Four (4) of Section Seven (7), Township 79, Range 45 West of the 5th P. M., all in Harrison County, Iowa, as shown by the United States Survey at Washington, D. C. and as recorded in Harrison County, Iowa; and all the heirs, spouses, assigns, grantees, legatees, devisees, and beneficiaries of each and all of the above named defendants, Defendants.
>
> WILLIAM W. FREELAND, Intervenor."

rendered judgment denying the ownership in the said John Schroeder, Et Al., the petitioner herein being a party in said action, and as a result deprived the said intervenor of the said Iowa lands under the Iowa-Nebraska Boundary Compact of 1943; and said Court thereby committed prejudicial error and perpetrated a fraud in violating intervenor's property rights when they took intervenor's land in violation of the Declaratory Judgment and Decree entered in Case No. 18,376 of the District Court of Harrison County, Iowa (1952) which was Res Adjudicata and Stare Decisis to the World; and the court denied full faith and credit under Section 3 of the Iowa-Nebraska Boundary Compact of 1943, which was ratified by Congress, and in violation of Article 4, Section 1, also Article 14, Section 1 of the Constitution of the United States took intervenor's property without due process of law and denied the intervenor equal protection of the law, and also in violation of Title 28, U. S. C. 1738, Title 43 U. S. C., Sec. 751-752, by use of a fictitious, fraudulent, overlapping metes and bounds private survey, made by Stuart A. Smith, Surveyor for defendants Ned Tyson, Et. Al., which was superimposed over the original government survey, contradicting and collaterally attacking the original government survey of Twp. 79 N. R. 45 West of the 5th P. M., Harrison County, Iowa; on lands owned by the intervenor, Et. Al., claiming the same to be a Tax Lot 1 in Sec. 7, Twp. 19 North, R. 12 East of the 6th P. M., intervenor alleges no such land exists within the territorial jurisdiction of the Nebraska courts in the State of Nebraska; and the Court committed prejudicial error in admitting this fictitious, fraudulent survey in evidence, (over the objection of this intervenor) and we ask this Court to take judicial notice thereof and rule thereon

on this matter which was overlooked by the Supreme Court of Nebraska in its opinion of June 3, 1963, and vacate and modify said decision in favor of this intervenor; and intervenor alleges that this is sufficient to require a hearing on this matter, which has never been ruled on, as the Nebraska courts lacked jurisdiction over the subject matter and denied the intervenor equal protection of the laws and due process of law in violation of Article 14, Section 1 of the Constitution of the United States and denied full faith and credit to Section 3 of the Iowa-Nebraska Boundary Compact of 1943.

3. Upon the rendition of judgment by the District Court of Washington County, Nebraska (Case No. 5648), John Schroeder, Et Al., to include Roy M. Harrop, Intervenor herein, appealed the said judgment to the Supreme Court of Nebraska, contending in said appeal that the said District Court of Washington County, Nebraska had failed to give full faith and credit to the laws, judgments and decrees of the sister state as required under Article 4, Section 1 of the Constitution of the United States; The Supreme Court of Nebraska, upon the presentation of the full brief and transcripted judgment as required under the Rules of the Supreme Court of the State of Nebraska, with the necessary brief filed therein, and rehearing asked thereon, the said Supreme Court of Nebraska affirmed the judgment of the District Court of Washington County, Nebraska, thereby failing to give full faith and credit under the Iowa-Nebraska Boundary Compact of 1943, and further the said Supreme Court of Nebraska thereupon deprived the intervenor herein, Et Al., of their Iowa property without due process of law and equal protection of the law, in violation of Article 14, Section 1 of the Constitution of the United States. See

also *Schroeder* v. *Freeland,* 188 Fed. 2d 517 (CCA 8th Dist. 1951) in which this Court held the land was not in Nebraska and reversed and dismissed said case and upheld the sovereignty of the State of Iowa, relating to Section 3 of the Iowa-Nebraska Boundary Compact of 1943; which was overlooked by the Nebraska Court in its Opinion of June 3, 1963.

See Appendix A for judgment of the Supreme Court of Nebraska in the appeal cited under Case No. 5648.

3.

4. It is respectfully requested that the Motion for leave to file the Petition of Intervention should be granted, and the Court rule thereon.

In The

Supreme Court of the United States

October Term, 1964

No. 17, Original

STATE OF NEBRASKA, PLAINTIFF,

V.

STATE OF IOWA, DEFENDANT.

ROY M. HARROP, INTERVENOR

PETITION OF INTERVENTION

Intervenor herein, Roy M. Harrop, a citizen of the United States and resident of State of Nebraska, brings this Petition of Intervention on behalf of himself and others and for his cause of action states as follows:

I.

The original jurisdiction of this Court is involved under Article III, Section 2, Clause 2 of the Constitution of the United States and 28 U. S. C., Sec. 1251 (a) (1) (1948).

II.

Intervenor asserts that he and all others similarly situated have such a compelling interest that they are

necessary parties in the action herein brought by the State of Nebraska against the State of Iowa, as amply stated, (see *New Jersey* v. *New York*, 34 U. S. 369) wherein it is shown that the State of Pennsylvania filed their statement of interest for the relief to be granted and thereafter became an active party in the proceedings under a special master's report.

III.

The State of Nebraska by its Attorney General has filed the original petition herein on behalf of certain individual property owners located in Nebraska, asserting this right as the only means available to the people of Nebraska to be defended from the activities and interference of the public officials of the State of Iowa and has stated and enumerated certain cases with particularity.

IV.

Intervenor herein on behalf of himself and all others similarly situated asserts that the action of the State of Nebraska does not aid him or others in his class; on the contrary the State of Iowa asserts a right to defend the lands situated within its boundaries; however, the intentions of the State of Iowa are to usurp the titles to the lands stated in the instant case, owned by Schroeder, Et. Al., to include intenvenor under Case No. 357 heretofore filed in the Supreme Court of the United States in the October 1961 term.

V.

Intervenor alleges that Section 3 of the Iowa-Nebraska Boundary Compact of 1943 as ratified by the Nebraska Legislature which provides: ["Section 3.

Titles, mortgages and other liens good in Iowa shall be good in Nebraska as to any lands Iowa may cede to Nebraska and any pending suits or actions concerning said lands may be prosecuted to final judgment in Iowa and such judgments shall be accorded full force and effect in Nebraska."] And is applicable in intervenor's case of *Schroeder, Et Al.*, Case No. 18,376 of the District Court of Harrison County, Iowa, as shown by Appendix B—attached hereto and made a part hereof, that portion applicable and necessary hereto being the judgment and decree of the District Judge of Harrison County, Iowa, filed December 30, 1952.

VI.

The jurisdiction of the Supreme Court of the United States in boundary disputes between states and individuals is exclusive and original and the jurisdiction of the Supreme Court of the United States in actions to construe property rights of citizens in a boundary compact is exclusive and original.

NOW THEREFORE INTERVENOR PRAYS:

That the Supreme Court of the United States rule that the avulsion of lands by the artifices of the Corps of Engineers of the United States Army in establishing the stabilized channel of the Missouri River (March 29, 1940) shown in the Alluvial Plain Map, Appendix A, *Schroeder, Et Al.* v. *Margaret A. Williams, Et Al.*, Appellees, No. 357, October Term 1961, United States Supreme Court be stated to apply equally to the State of Iowa and the State of Nebraska so that the ownership of lands on either side of the River shall not accrue on the principle or theory of accretion;

That the Court rule and restate that the title to alluvial deposits by avulsion belongs to the riparian owners along either side of the Missouri River, rather than to the State as claimed by the State of Iowa;

That the Court order the cessation of the constant warfare between the States of Iowa and Nebraska and all other states and individuals similarly situated, so that a definite rule of law shall be a mandate to all of the Courts of the United States.

That a special master be appointed by this Court to take evidence to the extent deemed necessary and report to this Court as to whether the lands involved in the intervenor's case referred to herein above, and were a part of the State of Iowa were Iowa lands ceded to Nebraska under the Iowa-Nebraska Boundary Compact of 1943 and upon taking such report that the Court find that neither the State of Iowa or State of Nebraska acquired any claim of ownership or title to such lands.

That all matters of issue between these two states and this intervenor, pertinent to said Iowa-Nebraska Compact of 1943, may be heard and determined in such manner as the Court may direct and that all proper inquiries may be had, and decrees and orders entered.

That the Court may retain jurisdiction of this matter, to make such further orders as may be necessary to enforce its decrees; and that Intervenor may have such other and further relief as to which in equity and good conscience it may be entitled.

Intervenor further respectfully prays that he finally have a day in Court which has been previously, in all

his efforts, denied him and prays that for all of the above and foregoing reasons that the opinion and decision of the trial court of District Court of Washington County, Nebraska of April 12, 1960) (See Appendix A attached hereto and made a part hereof), which is void for want of jurisdiction of the subject matter as shown on its face in the caption of the case which shows the real estate is not a part of Nebraska domain but within the State of Iowa, be reversed and vacated and set aside and the opinion of the Nebraska Supreme Court of March 3, 1961 be vacated for the same reason.

Intervenor respectfully submits that a hearing in the matter should be granted, the points suggested discussed and settled, the litigation finally ended and the legal property rights of intervenor preserved, and that intervenor have attorney fees and costs incurred.

Respectfully submitted,

ROY M. HARROP, Et Al., Intervenor

By ROY M. HARROP, Attorney
1822 Emmet Street,
Omaha, Nebr.
Member of Bar, Supreme Court
of the United States

WALTER A. NIELSEN,
4832 Farnam Street
Omaha, Nebraska 68132
Member of Nebraska Bar
Federal Courts of Nebraska
Attorneys for Intervenor

STATE OF NEBRASKA)
) SS
COUNTY OF DOUGLAS)

I, Roy M. Harrop, being first duly sworn on oath depose and say that I am one of the attorneys for the Intervenor in the above entitled action and I have personal knowledge of the facts alleged in the foregoing petition and that the statements contained in the petition are true and correct as I verily believe.

ROY M. HARROP

SUBSCRIBED in my presence and sworn to before me, by the said Roy M. Harrop, this 6th day of October, 1964.

WALTER A. NIELSEN
Notary Public

SEAL

CERTIFICATE OF SERVICE

I, Walter A. Nielsen, one of the attorneys for the intervenor, in this action, hereby certify that on October .... 1964, I served a copy of the foregoing Motion for Leave to File a Petition of Intervention and the Petition of Intervention and the appendices attached thereto by depositing same in a United States Post Office, with first class postage prepaid, addressed to:

HONORABLE EVAN L. HULTMAN
Attorney General of the State of Iowa
Attorney for the State of Iowa, Defendant
State Capitol
Des Moines, Iowa.

HONORABLE CLARENCE A. H. MEYER,
Attorney General of Nebraska
Attorney for the State of Nebraska, Plaintiff
State Capitol
Lincoln, Nebraska.

such being their post office addresses.

WALTER A. NIELSEN,
4832 Farnam Street,
Omaha, Nebraska. 68132
One of the Attorneys
for Intervenor.

APPENDIX A

IN THE DISTRICT COURT OF WASHINGTON COUNTY, NEBRASKA

Doc. Q Page 302

Case No. 5648

JOHN SCHROEDER and ROY M. HARROP,
PLAINTIFFS,

vs.

HOMESTEAD CORPORATION, MARGARET A. WILLIAMS, A. C. SCHULMEISTER, County Treasurer of Harrison County Iowa, HARRISON COUNTY IOWA, and all persons unknown, claiming any right, title or interest in and to the following described real estate, to-wit: The SE¼ and Lot Three (3) and Lot Four (4) of Section Seven (7), Township 79, Range 45 West of the 5th P.M., all in Harrison County, Iowa, as shown by the United States Survey at Washington, D.C., and as recorded in Harrison County, Iowa; and all the heirs, spouses, assigns, grantees, legatees, devisees, and beneficiaries of each and all of the above named defendants, DEFENDANTS.

WILLIAM W. FREELAND, INTERVENOR.

DECREE AND JUDGMENT

This matter came on for trial upon the issues made by the pleadings filed by the various parties commencing September 23, 1958, and continued thereafter on eight separate days agreed upon by the various parties, their counsel and the Court, until all the evidence had been presented by all of the parties; the plaintiffs John Schroeder, Roy M. Harrop, and the designated defendant Homestead Corporation and its successor American Cooperative Company, being represented by their attorneys, Roy M. Harrop, William L. Walker and Earl

Ludlam; the intervenor William W. Freeland being represented by his attorney, W. A. Day; the defendants, Earl Bylund and Flossie Bylund, husband and wife, by their attorney, Roy I. Anderson; and the defendants, Margaret A. Williams, John D. Cady and Elaine E. Cady, husband and wife, and Ned Tyson and Irma Tyson, husband and wife, and James Olson, Sr., by their attorney, Reed O'Hanlon, Sr.

On the first day of the trial the Court requested the County Surveyor of Washington County, Nebraska, Stewart A. Smith, to transport him to and upon all of the real estate involved in this action, and being accompanied by the respective counsel for the parties, thereupon went upon and inspected all of the land involved.

After the conclusion of the trial written arguments and briefs were submitted by the various counsel and the contents thereof and all of the testimony of the several witnesses and all of the exhibits produced by the several parties and received at the trial having been carefully considered, the Court now finds:

1. The Court finds generally against the plaintiffs John Schroeder and Roy M. Harrop and the designated defendant, Homestead Corporation, otherwise known as American Cooperative Company, a corporation, and for the several defendants, John Earl Bylund and Flossie Bylund, husband and wife; Margaret A. Williams; John D. Cady and Elaine E. Cady, husband and wife; Ned Tyson and Irma Tyson, husband and wife.

. . . . .

7. The Court specifically finds that the purported foreign judgment and decree of the District Court of

Harrison County, Iowa, dated December 30, 1952, said decree being entered in Case No. 18376 of said Court, is void and of no force and effect for the reason that said District Court of Harrison County, Iowa, had no jurisdiction over the land involved in this action, *said land being then and for many years prior to any of the incidents set forth in the pleadings in said Iowa action non-existent in the State of Nebraska,* and this Court now finds that said decree of December 30, 1952, of the District Court of Harrison County, Iowa, and all other proceedings in said Court prior thereto and thereafter were totally void and of no force and effect, and this Court hereby finds that said purported judgment is invalid and void and therefore is not entitled to registration as a foreign judgment or to full faith and credit in this state as petitioned for in the petition filed by the plaintiff John Schroeder, January 6, 1956, to commence this action in this Court. This Court further finds that the application for Writ of Scire Facias for execution on registered judgment and decree filed by the plaintiffs John Schroeder and Roy M. Harrop accompanying and as a part of said original petition, all filed January 6, 1956, should be denied. (Emphasis ours).

. . . . .

NOW therefore, it is ordered, adjudged and decreed by the Court that the purported judgment of the District Court of Harrison County, Iowa, dated December 30, 1952, in Case No. 18376 of said Court, and all proceedings theretofore or thereafter in said cause be and the same hereby are adjudged to be void and of no effect or force and registration of the same as a foreign judgment as prayed for in the petition of the plaintiff John Schroeder originating this action, is denied.

It is further ordered, adjudged and decreed by the Court that the so-called praecipe and application for writ of scire facias for execution on registered judgment and decree filed herein by the plaintiffs John Schroeder and Roy M. Harrop January 6, 1956, be and the same hereby are denied.

. . . . .

It is further ordered, adjudged and decreed by the Court that any and all instruments now filed in the office of the County Clerk of Washington County, Nebraska, and recorded in the records of said office of said county concerning the title to real estate, which purport to show any right, interest, claim or title of or in the plaintiffs John Schroeder and Roy M. Harrop or the defendant Homestead Corporation, now known as American Cooperative Company, in or to any of the land particularly described hereinbefore and adjudged to be owned by any of the defendants Earl Bylund and Flossie Bylund, husband and wife, Margaret A. Williams, John D. Cady and Elaine E. Cady, husband and wife, or Ned Tyson and Irma Tyson, husband and wife, are hereby cancelled and removed of record.

It is further ordered, adjudged and decreed by the Court that the plaintiffs John Schroeder and Roy M. Harrop and the defendant Homestead Corporation, now known as American Cooperative Company, and each of them, are hereby forever barred and enjoined from asserting or attempting to assert andy claim or right of possession or ownership or any title in or to all or any part of the several tracts of land hereinbefore described and adjudged to be owned by the said several defendants, Earl Bylund and Flossie Bylund, husband and wife, Margaret A. Williams, John D. Cady and Elaine

E. Cady, husband and wife, or Ned Tyson and Irma Tyson, husband and wife.

It is further ordered, adjudged and decreed by the Court that each of the parties hereto shall pay their own costs incurred in this action.

Done at Blair in Washington County, Nebraska, this 12th day of April, 1960.

BY THE COURT:
(s) Jackson B. Chase,
DISTRICT JUDGE.

Filed April 12, 1960, at 11:45 A.M. by Irvilla M. Smith, Clerk of the District Court.

APPENDIX B

IN THE DISTRICT COURT OF THE STATE OF IOWA, IN AND FOR HARRISON COUNTY

No. 18376

JOHN SCHROEDER, Et. Al., PLAINTIFF,
V.
HOMESTEAD CORPORATION, Et. Al., DEFENDANTS
(And William W. Freeland, Intervenor)

JUDGMENT AND DECREE OF SUPPLEMENTAL RELIEF BASED ON DECLARATORY JUDGMENT

Now on this 30th day of December, 1952, it being during the November, 1952, Term of this District Court, Harrison County, Iowa . . .

FINDINGS OF FACT

1. That the Court has jurisdiction of the parties and of the subject matter herein.

2. That the said petition of the plaintiff for supplemental relief and amendment thereto is authorized by law.

3. That . . . the plaintiff John Schroeder, and his co-owner, Roy M. Harrop, were adjudged to be the absolute owners in fee simple of the following described real estate, to-wit:

> The SE¼ and Government Lots Three (3) and Four (4) in Section Seven (7) and the North Half (½) of the Northeast Quarter (¼) of Section Seven (7), The Northwest Quarter of Section Eight (8), Government Lots Nos. 1 and 2, and the West Half (½) Northwest Quarter (¼) Section 18, and the Northwest Quarter (¼) and the West Half (½) of the Northeast Quarter (¼) of Section 20, and Government Lots Nos. 1 and 2, and the NE NE¼ of Section 19, all in Twp. 79 North, Range 45 West of the Fifth (5th) P. M. in Harrison County, Iowa, as shown by the United States Survey, Washington D. C., and as recorded in Harrison County, Iowa.

And the following described lands, to-wit:

> S½ of NE¼ and Government Lots Nos. 1 and 2 in Section 7,
>
> SW¼ of Section 8,
>
> E½ of the NE¼ and SE¼ and Government Lots Nos. 3 and 4, all in Section 18, and all of Section 17; all in Twp. 79 N. Range 45 West of the 5th P. M., Harrison County, Iowa, as shown by the United States Survey, Washington, D. C. and as recorded in Harrison County, Iowa.

is owned by the Homestead Corporation, a South Dakota Corporation, as established by deed, judgment and decree of the District Court of Harrison County, Iowa, and the United States District Court, Southern District of Iowa, Western Division, said decree dated Oct. 6, 1937 which has never been appealed, modified, vacated or set aside, and the same is now res adjudicata by all persons claiming by, through or under the said intervenor, William W. Freeland, or Margaret A. Williams, and any of the defendants in the above entitled action who have not pleaded to the petition and amendment for supplemental relief . . .

IT IS THEREFORE ORDERED, ADJUDGED, DECREED AND DECLARED by the Court that, ... William W. Freeland, intervenor, . . . and any person claiming by, through or under them be and they are hereby permanently enjoined from any molestation or interference on their part with the possession and occupancy of the plaintiff, John Schroeder, and his coowner, Roy M. Harrop, of the above described real estate . . . .

IT IS FURTHER ORDERED, ADJUDGED, DECREED AND DECLARED by the Court that all lands lying West of the Stabilized Channel of the Missouri River established by the United States Army Engineers under the Iowa-Nebraska Boundary Compact of 1943, which includes the real estate above described, is now situated in Harrison County, Iowa, and contiguous to the State of Nebraska; and that said real estate has never been allocated by the legislature of Nebraska or placed within any county of the State of Nebraska, and the District Court of no county in Nebraska has jurisdiction over said real estate.

IT IS FURTHER ORDERED, ADJUDGED, DECREED AND DECLARED by the Court that this Court retain jurisdiction of the parties and of the subject matter herein to make any other orders, judgments or decrees that are proper and necessary in the premises.

IT IS FURTHER ORDERED, ADJUDGED, DECREED AND DECLARED by the Court that the costs of this hearing, in the sum of $29.00, are taxed to the intervenor.

(signed) HAROLD E. DAVIDSON

Judge of the Fifteenth Judicial District of Iowa.

FILED
DEC 10 1964
JOHN F. DAVIS, CLERK

In The

Supreme Court of the United States

October Term, 1964

No. 17 Original

STATE OF NEBRASKA, PLAINTIFF,

V.

STATE OF IOWA, DEFENDANT.

ROY M. HARROP, INTERVENOR.

MOTION BY ROY M. HARROP, INTERVENOR, FOR RECONSIDERATION OF THE PETITION OF INTERVENTION, DENIED BY THE COURT, ENTERED IN THE ABOVE ENTITLED CASE, NOVEMBER 16, 1964.

ROY M. HARROP, Atty.-At-Law
1822 Emmet Street,
Omaha, Nebraska 68110
Member of the Bar, Supreme
Court of the United States,
State of Nebraska
State of Iowa
Counsel for Intervenor

JOE CHRISTENSEN, INC., 1821 O Street, Lincoln, Nebraska

In The

Supreme Court of the United States

October Term, 1964

No. 17 Original

STATE OF NEBRASKA, PLAINTIFF,

V.

STATE OF IOWA, DEFENDANT.

ROY M. HARROP, INTERVENOR.

MOTION BY ROY M. HARROP, INTERVENOR, FOR RECONSIDERATION OF THE PETITION OF INTERVENTION, DENIED BY THE COURT, ENTERED IN THE ABOVE ENTITLED CASE, NOVEMBER 16, 1964.

Comes now Roy M. Harrop, Intervenor, in the above entitled action (citizen of the United States and residentent of the State of Nebraska,) and moves this Court for a re-hearing of the Order of this Court, entered in the case November 16, 1964, for the following reasons, and each separately, which were overlooked by the Court:

1. For the sole purpose of directing the attention of this Court to the fact that this intervenor requested permission from Justice Byron White to file this Motion for Leave to File Petition of Inter-

vention in support of Motion and Petition of Intervenor, which was granted by said Justice Byron White.

2. That this Intervenor did file said Motion and Petition of Intervention, consisting of 23 pages setting out statement of the Case by the Intervenor.

3. That the jurisdiction of the Supreme Court of the United States and individuals is exclusive and original in actions to construe property rights of citizens in a boundary compact between states, i.e. the Iowa-Nebraska Boundary Compact of 1943, ratified by the Congress of the United States, also ratified by the Nebraska Legislature, which provides: (Sec. 3) "Titles, mortgages and other liens good in Iowa shall be good in Nebraska as to any lands Iowa may cede to Nebraska and any pending suits or actions concerning said lands may be prosecuted to final judgment in Iowa and such judgment shall be accorded full force and effect in Nebraska. And is applicable in intervenor's case of Schroeder, Et Al., Case No. 18,376 of the District Court of Harrison County, Iowa, as shown by Appendix B—attached thereto and made a part thereof, that portion applicable and necessary thereto being the judgment and decree of the District Judge of Harrison County, Iowa, filed December 30, 1952, and is res adjudicata and Stare Decisis to the World.

4. That in intervenor's statement of the case on P. 5, Par. 2: "That the District Court of Washington County, Nebraska, under date of April 12, 1960, in Case No. 5648 . . . . . See p. 6, line 5: 'and said Court thereby committed prejudicial error and perpetrated a fraud inviolating intervenor's property rights when they took intervenor's land in violation of the Declaratory Judgment entered in Case No. 18,376 . . . . . and the Court denied full faith and credit under Section 3 of the Iowa-Ne-

braska Boundary Compact of 1943 . . . . . and in violation of Article 4, Section 1, also Article 14, Section 1 of the Constitution of the United States took the Intervenor's property without due process of law and denied the intervenor equal protection of the law, and also in violation of Title 28, U. S. C. 1738, Title 43 U.S.C., Sec. 751.752, by use of a fictitious, fraudulent, overlapping metes and bounds private survey, made by Stuart A. Smith, Surveyor for defendants Ned Tyson, Et. Al, which was super-imposed over the original government survey, contradicting and collaterally attacking the original government survey of Twp. 79 North, R. 45 West of the 5th P. M., Harrison County, Iowa; on lands owned by the Intervenor, Et Al., claiming the same to be Tax Lot 1 in Sec. 7, Twp. 19 North, R. 12, East of the 6th P. M., Intervenor alleges no such land exists within the territorial jurisdiction of the Nebraska courts in the State of Nebraska; and the Court committed prejudicial error in admitting this fictitious, fraudulent survey in evidence (over the objection of this intervenor) and we ask this Court to take judicial notice thereof and rule thereon (see P.7) on this matter which was overlooked by the Supreme Court of Nebraska in its opinion of June 3, 1963, and vacate and modify said decision in favor of this Intervenor; and intervenor alleges that this is sufficient to require a hearing on this matter, which has never been ruled on, as the Nebraska courts lacked jurisdiction over the subject matter and denied the intervenor equal protection of the laws and due process of law in violation of Article 14, Section 1 of the Constitution of the United States and denied full faith and credit to Section 3 of the Iowa-Nebraska Boundary Compact of 1943.'

5. Intervenor further alleges that he paid taxes on the land in question from 1938 to 1959 in Harrison County, Iowa, as shown by statement of the Harri-

son County, Iowa, Assessor, Walter Noble, and that the acreage of said land amounts to 1912 acres in Harrison County, Iowa; See also *Schroeder* v. *Freeland,* 188 Fed. 2d 517 (CCA 8th Dist. 1951) in which this Court held the land was not in Nebraska and reversed and dismissed said case and upheld the sovereignty of the State of Iowa, relating to Section 3 of the Iowa-Nebraska Boundary Compact of 1943; which was overlooked by the Nebraska Court in its Opinion of June 3, 1963.

The intervenor further shows to this court that a certificate of service of the Motion for Leave to File a Petition of Intervention was made by Walter A. Nielsen, one of the attorneys for the Intervenor, by depositing same in a United States Post Office, with first class postage prepaid, addressed to the following:

Hon. Harold E. Hughes, Governor of the State of Iowa, Defendant, State Capitol, Des Moines, Iowa;

Hon. Evan L. Hultman, Attorney General of the State of Iowa, Attorney for State of Iowa, Defendant, State Capitol, Des Moines, Iowa;

Hon. Frank B. Morrison, Governor of the State of Nebraska, Plaintiff, State Capitol Building Lincoln, Nebraska;

Hon. Clarence A. H. Meyer, Attorney General of Nebraska, Attorney for the State of Nebraska, Plaintiff, State Capitol Building, Lincoln, Nebraska.

THEREFORE, for the above reasons the Intervenor prays and urges that the Supreme Court of the United States, reconsider the Petition of Intervention filed herein and that the Order entered by this Court be

modified to permit the Intervenor to be heard in this case and that a special master be appointed and the Intervenor be permitted to take evidence to the extent deemed necessary and report to this Court as to whether the lands involved in the Intervenor's case referred to herein above, and were a part of the State of Iowa, were lands ceded to Nebraska under the Iowa-Nebraska Boundary Compact of 1943 and upon taking such report that the Court find that neither the State of Iowa or State of Nebraska acquired any adverse claim of ownership or title to such lands owned by this Intervenor in Harrison County, Iowa. And intervenor further shows to this Court that no objections or answer has ever been filed by State of Nebraska, Plaintiff, by Hon. Clarence A. H. Meyer, Attorney-General of State of Nebraska; or by State of Iowa, Defendant, by Hon. Evan L. Hultman, Attorney General of the State of Iowa, against the Intervenor's MOTION FOR LEAVE TO FILE PETITION OF INTERVENTION or the PETITION OF INTERVENTION filed in this case.

Respectfully Submitted,

By Roy M. Harrop
Attorney for Intervenor

CERTIFICATE OF COUNSEL

Roy M. Harrop, one of the attorneys for the aforesaid Intervenor hereby respectfully certifies that the foregoing Motion for Reconsideration of the Petition of Intervention is submitted in good faith and believes it to be meritorious.

ROY M. HARROP
One of the Attorneys for
Intervenor

CERTIFICATE OF MAILING

PROOF OF SERVICE

I, Roy M. Harrop, one of the attorneys for Intervenor, hereby certify that on November 25, 1964, I served a copy of the foregoing MOTION BY ROY M. HARROP, Intervenor, FOR RECONSIDERATION OF THE PETITION OF INTERVENTION, by depositing same in the United States Post Office, Lincoln, Nebraska, with first class postage prepaid, addressed to:

Hon. Harold E. Hughes, Governor of the State of Iowa, Defendant, State Capitol, Des Moines, Iowa;

Hon. Evan L. Hultman, Attorney General of the State of Iowa, Attorney for State of Iowa, Defendant, State Capitol, Des Moines, Iowa;

Hon. Frank B. Morrison, Governor of the State of Nebraska, Plaintiff, State Capitol Building Lincoln, Nebraska.

Hon. Clarence A. H. Meyer, Attorney General of Nebraska, Attorney for the State of Nebraska, Plaintiff, State Capitol Building, Lincoln, Nebraska

such being their post office addresses.

ROY M. HARROP
One of the Attorneys for
Intervenor

MAR 30 1965

JOHN F. DAVIS, CLERK

In The

Supreme Court of the United States

October Term, 1964

No. 17, Original

STATE OF NEBRASKA, PLAINTIFF,

v.

STATE OF IOWA, DEFENDANT,

ANSWER OF DEFENDANT, STATE OF IOWA, TO COMPLAINT OF PLAINTIFF, STATE OF NEBRASKA

LAWRENCE F. SCALISE
Attorney General of Iowa
State Capitol
Des Moines, Iowa

ROBERT B. SCISM
Assistant Attorney General of Iowa
State Capitol
Des Moines, Iowa

WILLIAM J. YOST
Special Assistant Attorney General of Iowa
830 E. Grand Avenue
Des Moines, Iowa
Attorneys for Defendant

The State of Iowa, by Lawrence F. Scalise, Attorney General, makes answer to the Complaint of the State of Nebraska, as follows:

I. Admitted by decision of this Court, entered the 1st day of February, 1965.

II. Admitted.

III. Admitted.

IV. Admitted as concerns the area involved in *Nebraska v. Iowa*, No. 4, Original, 143 U. S. 359, 12 S. Ct. 396, 36 L. Ed. 186 (1892).

V. The State of Iowa admits the statements and averments contained in paragraph V with the exception of the concluding averment, "and it became almost impossible to determine the exact boundary between Iowa and Nebraska in many places at any given time in the past", which averment is specifically denied and proof of such averment is demanded.

VI. Admitted.

VII. Admitted. This averment demonstrates that the Iowa-Nebraska boundary has been validly established and that further definition of same is not required. Nor would any other definition be competent in the absence of an averment and finding that the Iowa-Nebraska Boundary Compact of 1943 is invalid. No averment of invalidity has been made.

VIII. Denied. The averments of paragraph VIII of Plaintiff's complaint contain conclusions of law to which no answer is required, but to the extent that they are relevant and material, the State of Iowa demands proof thereof.

IX. Denied, and the State of Iowa demands proof thereof. The State of Iowa admits that for several years it has been quieting title to Missouri River ri-

parian lands involving Iowa citizens in the Iowa courts and, on occasion, Nebraska citizens in Iowa courts. None of these actions brought by the State of Iowa has violated either the provisions or the spirit of the Iowa-Nebraska Boundary Compact of 1943, since they represent only efforts to determine ownership of lands. The primary questions to be resolved involve the manner in which disputed land formed, where it formed, when it formed, and the location of the boundary line between the states at various times. Material to these questions is whether the boundary line prior to the 1943 compact followed the changes in the course of the Missouri river or was left permanently in place at certain locations because of an avulsion.

X. Admitted except that the averment, "The State of Iowa, in prosecuting the previously mentioned quiet title actions, has proceeded under the Iowa common law principle of state ownership to the bed of the Missouri River from the high water mark to the thread of the stream and of state ownership of abandoned river channels of the Missouri River, in some cases in complete disregard of the provisions of the Iowa-Nebraska Boundary Compact and without regard to the state in which such land was formed and the fact surrounding the formation and occupancy or control over said land.", which averment is specifically denied and strict proof demanded thereof.

The State of Iowa answers further that the averments contained in Paragraph X of Plaintiff's complaint palpably demonstrate that this is a proceeding by a state on behalf of its citizens and not in the interest of the state itself.

XI. Admitted.

XII. Denied. The State of Iowa further answers that the averments are irrelevant and immaterial for the reason that determinations as to "residence" do

not determine ownership rights in real property. Nor does defining the boundary line which delimits each state's jurisdiction operate to diminish, modify, convey or destroy ownership rights in real property. Nor is the payment of taxes determinative of sovereignty. Nor is sovereignty determinative of what individuals or entities own land. Nor has the State of Nebraska "possessed" any of the lands in an ownership sense.

XIII. Denied. Proof of the relevant and material averments is demanded.

XIV. Denied. Proof of the averments is demanded.

XV. Admitted except that the averments, "Plaintiff is informed and believes that the boundary line between Nebraska and Iowa at the time of the Iowa-Nebraska Boundary Compact was to the east of the land described in said Petition because of prior avulsive action by the Missouri River which resulted in a change in the channel, but not in a change of the boundary between the states. Plaintiff is informed and believes that the channel of the Missouri River as it existed in 1943 at the time of the effective date of the Iowa-Nebraska Boundary Compact was entirely within Nebraska at such place and that under the terms of the Iowa-Nebraska Compact, the State of Iowa recognized that it had relinquished all claim to the ownership of land located in the bed of the Missouri River at that place. In the 1930's the United States Army Corps of Engineers, by dredging and the constructions of dikes and revetments, shifted the channel of the Missouri River in such manner that, if it should be determined that the then main channel of the Missouri River did in fact constitute the boundary between Iowa and Nebraska at that place, the boundary did not change, leaving land described in said Petition in the State of Nebraska, though located on the easterly side

of the Missouri River. Such land was ceded to Iowa by Nebraska under the provisions of the Iowa-Nebraska Boundary Compact.", which averments are denied and strict proof demanded.

XVI. Denied. Proof of the averments is demanded. The State of Iowa further answers that the State of Iowa acquired its ownership of that part of the bed of the Missouri River which then lay within the State of Iowa when the State of Iowa was admitted to the Union in 1846. As the Missouri River changed its bed after 1846, the State of Iowa acquired title to all beds which the river occupied from time to time within the State. Ownership in the State never ceased. This ownership continued after the land in question arose above ordinary high water mark because the land formed as an accretion to the state owned bed of the river. The State of Iowa further answers that if any taxes have been paid to the State of Iowa on the lands in question, they have been infinitesimal.

XVII. Denied. Proof of the relevant and material averments is demanded. The State of Iowa further answers paragraph XVII of Plaintiff's complaint by answering that it is already the owner of lands about which the Plaintiff specifically complains, and the individuals asserting claims to said lands are wrongfully, without authority and unlawfully converting the natural resources thereon to their own use and benefit. That the State of Iowa has been injured by the removal of timber, other natural resources and the use of land which it holds in trust for the benefit of all its citizens. That the encroachments are without the authority or permission of the State of Iowa.

XVIII. Denied. Strict proof of the averments is demanded.

XIX. Denied. Strict proof of the averments is demanded.

XX. Denied. Strict proof of the averments is demanded.

XXI. Denied. Strict proof of the averments is demanded. The averments further contain conclusions of law to which no answer is required, but to the extent to which they are relevant and material, the State of Iowa demands proof thereof.

WHEREFORE, Defendant, State of Iowa, prays:

I.

THAT THE COURT ADJUDGE AND DECREE that the Iowa-Nebraska Boundary Compact of 1943 is valid, and settled the boundary line between the respective states for the purpose of jurisdiction, and that any issues of private ownership of said lands between the State of Iowa and private citizens be resolved by the Courts of competent jurisdiction of the respective states or the proper federal forum exclusive of this Honorable Court.

II.

THAT THE COURT ADJUDGE AND DECREE that the State of Iowa is only required to recognize those valid titles, mortgages and other liens that are good in Nebraska, and that the asserted titles to the specific lands in question are not "good" in Nebraska or of the nature to be recognized as valid under section three of the Iowa-Nebraska Boundary Compact of 1943.

III.

THAT THE COURT ADJUDGE AND DECREE that the State of Iowa is the owner of the lands about which the Plaintiff specifically complains, and further adjudge and decree that the actions of the State of Iowa in protecting its natural resources in the cases of *State of Iowa v. Schemmel* and *State of Iowa v. Babbitt* do not constitute an abrogation of Iowa-

Nebraska Boundary Compact of 1943 nor a violation of Article IV, Section 1 of the Constitution of the United States.

IV.

THAT THE COURT ADJUDGE AND DECREE that this is merely a proceeding by the State of Nebraska on behalf of a few of its citizens and not assertive of any interests of the State itself, and that no adjudication of ownership claims in land asserted by individuals not parties to this action is possible, their presence being indispensable.

V.

THAT THE COURT ADJUDGE AND DECREE that the Iowa-Nebraska Boundary Compact of 1943 and particularly Section 3 thereof did not purport to create, alter, convey or determine ownership rights in land along or in proximity to the Missouri River and its abandoned river channels.

VI.

THAT THE COURT ADJUDGE AND DECREE that the prayer for an injunction restraining the State of Iowa, its officers, agents and servants be denied and that the State of Iowa be permitted to continue exercising its rights and performing duties in protecting its natural resources and regulating its state owned lands, and that the court affirm its faith in the Iowa Courts to do justice to all parties regardless of their state of residence.

VII.

THAT THE COURT ADJUDGE AND DECREE that the Bill of Complaint filed by the State of Nebraska be dismissed and that the Court make such

further orders as may be necessary to enforce its decrees; and that the Defendant may have such other and further relief as to which in equity and good conscience it may be entitled.

LAWRENCE F. SCALISE
Attorney General of Iowa

ROBERT B. SCISM
Assistant Attorney General of Iowa

WILLIAM J. YOST
Special Assistant Attorney General of Iowa

PROOF OF SERVICE

I, William J. Yost, Special Assistant Attorney General of the State of Iowa and member of the Bar of the Supreme Court of the United States, hereby certify that on March ...., 1965, I served a copy of the foregoing Answer of Defendant, State of Iowa, to Plaintiff's Bill of Complaint, by depositing the same in a United States Post Office, with first class postage prepaid, addressed to:

HONORABLE FRANK B. MORRISON
Governor of the State of Nebraska
State Capitol
Lincoln, Nebraska

HONORABLE CLARENCE A. H. MEYER
Attorney General of Nebraska
State Capitol
Lincoln, Nebraska

such being their post office addresses.

WILLIAM J. YOST
Special Assistant Attorney General
State of Iowa
State Capitol
Des Moines, Iowa

Office-Supreme Court, U.S.
FILED
AUG 11 1965
JOHN F. DAVIS, CLERK

In The

Supreme Court of the United States

October Term, 1964

No. 17, Original

STATE OF NEBRASKA, PLAINTIFF,

v.

STATE OF IOWA, DEFENDANT.

AMENDED ANSWER OF DEFENDANT, STATE OF IOWA, TO COMPLAINT OF PLAINTIFF, STATE OF NEBRASKA

LAWRENCE F. SCALISE
Attorney General of Iowa
State Capitol
Des Moines, Iowa

ROBERT B. SCISM
Assistant Attorney General of Iowa
State Capitol
Des Moines, Iowa

MICHAEL MURRAY
Special Assistant Attorney General of Iowa
Logan, Iowa

SEWELL E. ALLEN
Special Assistant Attorney General of Iowa
Onawa, Iowa
Attorneys for Defendant

The State of Iowa, by Lawrence F. Scalise, Attorney General, substitutes this amended answer for its previous answer to the complaint of the State of Nebraska, with the written consent of the adverse party as permitted by Rule 15(a), Rules of Civil Procedure, as follows:

I. Admitted by decision of this Court, entered the 1st day of February, 1965.

II. Admitted.

III. Admitted.

IV. Admitted as concerns the area involved in *Nebraska v. Iowa*, No. 4, Original, 143 U. S. 359, 12 S. Ct. 396, 36 L. Ed. 186 (1892).

V. The State of Iowa admits the statements and averments contained in Paragraph V with the exception of the concluding averment, "and it became almost impossible to determine the exact boundary between Iowa and Nebraska in many places at any given time in the past", which averment is specifically denied and proof of such averment is demanded.

VI. Admitted.

VII. Admitted. This averment demonstrates that the Iowa-Nebraska boundary has been validly established and that further definition of same is not required. Nor would any other definition be competent in the absence of an averment and finding that the Iowa-Nebraska Boundary Compact of 1943 is invalid. No averment of invalidity has been made.

VIII. Admitted.

IX. Denied, and the State of Iowa demands proof thereof. The State of Iowa admits that for several years it has been quieting title to riparian lands it

owns in Iowa along the Missouri River, in actions involving Iowa citizens in Iowa courts and, on occasion, Nebraska citizens in Iowa courts. No action of the State of Iowa has violated either the provisions or the spirit of the Iowa-Nebraska Boundary Compact of 1943, since: (1) No action has been taken or claim of ownership asserted in respect to any lands ceded by Nebraska to Iowa by the compact; (2) No action has been taken or claim of ownership asserted in respect to lands that ever were within the State of Nebraska; (3) Some of the land in respect to which the State of Iowa has brought a quiet title action or has asserted informally a claim of ownership was not in existence in 1943, but formed within the State of Iowa by reason of the Missouri River's convolutions subsequent to that time, becoming, on the facts of its formation and applicable law, the property of the State of Iowa.

X. Admitted except that the averment, "The State of Iowa, in prosecuting the previously mentioned quiet title actions, has proceeded under the Iowa common law principle of state ownership to the bed of the Missouri River from the high water mark to the thread of the stream and of state ownership of abandoned river channels of the Missouri River, in some cases in complete disregard of the provisions of the Iowa-Nebraska Boundary Compact and without regard to the state in which such land was formed and the fact surrounding the formation and occupancy or control over said land.", which averment is specifically denied and strict proof demanded thereof.

XI. Admitted.

XII. Denied. The State of Iowa further answers that the averments are irrelevant and immaterial for the reason that all of the lands in respect to which the State of Nebraska alleges an exercise of sovereignty always have been within the State of Iowa; and that

exercises of sovereignty, even if proved, are probative neither of title to lands nor of the jurisdiction in which they lie. The State of Iowa specifically denies that the State of Nebraska ever has possessed any of the lands in dispute in *State of Iowa v. Babbit*, or that the State of Iowa has acquiesced in the alleged possession. For further answer, the State of Iowa alleges that it has exercised jurisdiction and sovereignty over the land.

XIII. Denied. Proof of the relevant and material averments is demanded.

XIV. Denied. Proof of the averments is demanded.

XV. Admitted except that the averments, "Plaintiff is informed and believes that the boundary line between Nebraska and Iowa at the time of the Iowa-Nebraska Boundary Compact was to the east of the land described in said Petition because of prior avulsive action by the Missouri River which resulted in a change in the channel, but not in a change of the boundary between the states. Plaintiff is informed and believes that the channel of the Missouri River as it existed in 1943 at the time of the effective date of the Iowa-Nebraska Boundary Compact was entirely within Nebraska at such place and that, under the terms of the Iowa-Nebraska Compact, the State of Iowa recognized that it had relinquished all claim to the ownership of land located in the bed of the Missouri River at that place. In the 1930's the United States Army Corps of Engineers, by dredging and the construction of dikes and revetments, shifted the channel of the Missouri River in such manner that, if it should be determined that the then main channel of the Missouri River did in fact constitute the boundary between Iowa and Nebraska at that place, the boundary did not change, leaving land described in said Petition in the

State of Nebraska, though located on the easterly side of the Missouri River. Such land was ceded to Iowa by Nebraska under the provisions of the Iowa-Nebraska Boundary Compact.", which averments are denied and strict proof demanded.

XVI. Denied. Proof of the averments is demanded. The State of Iowa further answers that the State of Iowa acquired its ownership of that part of the bed of the Missouri River which then lay within the State of Iowa when the State of Iowa was admitted to the Union in 1846. As the Missouri River changed its bed after 1846, the State of Iowa acquired title to all beds which the river occupied from time to time within the State. Ownership in the State never ceased. This ownership continued after the land in question arose above ordinary high water mark because the land formed as an accretion to the state owned bed of the river. The State of Iowa further answers that if any taxes have been paid to the State of Iowa on the lands in question, they have been infinitesimal.

XVII. Denied. Proof of the relevant and material averments is demanded. The State of Iowa further answers Paragraph XVII of Plaintiff's complaint by answering that it is already the owner of lands about which the Plaintiff specifically complains, and the individuals asserting claims to said lands are wrongfully, without authority and unlawfully converting the natural resources thereon to their own use and benefit. That the State of Iowa has been injured by the removal of timber, other natural resources and the use of land which it holds in trust for the benefit of all its citizens. That the encroachments are without the authority or permission of the State of Iowa.

XVIII. Denied, for the reason that the lands in dispute in *State of Iowa v. Babbit* and in *State of Iowa v. Schemmel* are not lands which were ceded by Ne-

braska to Iowa by the 1943 compact, these lands never having been within the State of Nebraska at any time, and for the reason that actions by the State of Iowa in respect to these lands are not in any sense attempts to "obtain" title but are actions solely to quiet title to lands before and since the 1943 compact owned by the State of Iowa.

XIX. The State of Iowa denies that prior to and at the time of the adoption of the Iowa-Nebraska Compact the boundary line between Iowa and Nebraska had not been determined. It alleges, on the contrary, that the boundary line had been determined in law and in fact, and that it was the thalweg of the Missouri River except where the river had moved by avulsion. Defendant admits that, in many locations, the pre-compact boundary line has not been established by survey or monumented, but defendant denies that it is "almost impossible" to do so and alleges, on the contrary, that it was and is entirely possible to do so, and to do so at a cost not disproportionate to the value of lands, the determination of whose ownership might be aided thereby. Defendant admits that the Boundary Compact of 1943 provided no unique procedure for identifying specific parcels of land ceded by one state to the other or for placing their descriptions on record in the state to which they were ceded, but denies that existent "machinery" was inadequate to accomplish these ends. Defendant admits that the purpose of the Iowa-Nebraska Boundary Compact of 1943 was to establish the boundary line between the states as the center of the stabilized channel of the Missouri River, but denies that Sections 3 and 4 of the compact were meant solely to protect titles of individual citizens of Iowa and Nebraska. Defendant answers further that the compact was meant to protect all titles, without respect to the citizenship of the titleholder, and without respect to whether the titleholder

was an individual or a governmental body. Defendant denies that the compact was meant to preclude inquiry into whether titles to lands ceded were good in the ceding state, or that it was meant to vest good title in those who invoked indicia of title in one state as to lands never before or after the 1943 compact within their state or as to lands that came into being subsequent to 1943 not within their state. The State of Iowa further denies that it has unilaterally abrogated or is unilaterally abrogating the Iowa-Nebraska Boundary Compact, or that it has violated the provisions of Article IV, Section 1, of the Constitution of the United States.

XX. Denied. The first three sentences are immaterial and irrelevant. The State of Iowa further answers that the Iowa-Nebraska Boundary can be accurately located from the alluvial plain maps (Scale 1″ equals 2,640′) referred to in the Iowa-Nebraska Boundary Compact, and that it is informed and believes that United States Army Corps of Engineers construction maps (Scale 1″ equals 400′), which show the river alignment in conformance with the alignment on the alluvial plain maps, are available.

XXI. Denied. Strict proof of the averments is demanded. The averments further contain conclusions of law to which no answer is required, but to the extent to which they are relevant and material, the State of Iowa demands proof thereof.

WHEREFORE, Defendant, State of Iowa, prays:

I.

THAT THE COURT ADJUDGE AND DECREE that the Iowa-Nebraska Boundary Compact of 1943 is valid, and settled the boundary line between the respective states for the purpose of jurisdiction, and that

any issues of private ownership of said lands between the State of Iowa and private citizens be resolved by the Courts of competent jurisdiction of the respective states or the proper federal forum exclusive of this Honorable Court.

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THAT THE COURT ADJUDGE AND DECREE that the State of Iowa is only required to recognize those valid titles, mortgages and other liens that are good in Nebraska, and that the asserted titles to the specific lands in question are not "good" in Nebraska or of the nature to be recognized as valid under Section 3 of the Iowa-Nebraska Boundary Compact of 1943.

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THAT THE COURT ADJUDGE AND DECREE that the State of Iowa is the owner of the lands about which the Plaintiff specifically complains, and further adjudge and decree that the actions of the State of Iowa in protecting its natural resources in the cases of *State of Iowa v. Schemmel* and *State of Iowa v. Babbit* do not constitute an abrogation of the Iowa-Nebraska Boundary Compact of 1943 or a violation of Article IV, Section 1, of the Constitution of the United States.

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V.

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VI.

THAT THE COURT ADJUDGE AND DECREE that the prayer for an injunction restraining the State of Iowa, its officers, agents and servants be denied and that the State of Iowa be permitted to continue exercising its rights and performing duties in protecting its natural resources and regulating its state owned lands, and that the court affirm its faith in the Iowa Courts to do justice to all parties regardless of their state of residence.

VII.

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LAWRENCE F. SCALISE
Attorney General of Iowa
State Capitol
Des Moines

ROBERT B. SCISM
Assistant Attorney General of Iowa
State Capitol
Des Moines, Iowa

MICHAEL MURRAY
Special Assistant Attorney General of Iowa
Logan, Iowa

SEWELL E. ALLEN
Special Assistant Attorney General of Iowa
Onawa, Iowa
Attorneys for Defendant

We do hereby consent to the filing of the foregoing Amended Answer in the above entitled cause.

STATE OF NEBRASKA, Plaintiff

By: .....

JOSEPH R. MOORE
Special Assistant Attorney General
of Nebraska
1028 City National Bank Building
Omaha, Nebraska

PROOF OF SERVICE

I, Sewell E. Allen, Special Assistant Attorney General of the State of Iowa and member of the Bar of the Supreme Court of the United States, hereby certify that on August...., 1965, I served a copy of the foregoing Amended Answer of Defendant, State of Iowa, to Plaintiff's Bill of Complaint, by depositing the same in a United States Post Office, with first class postage prepaid, addressed to:

HONORABLE FRANK B. MORRISON
Governor of the State of Nebraska
State Capitol
Lincoln, Nebraska

HONORABLE CLARENCE A. H. MEYER
Attorney General of Nebraska
State Capitol
Lincoln, Nebraska

such being their post office addresses.

SEWELL E. ALLEN
Special Assistant Attorney General
State of Iowa

Office-Supreme Court, U.S.
FILED
JAN 19 1966
JOHN F. DAVIS, CLERK

In The

Supreme Court of the United States

October Term, 1964

No. 17, Original

STATE OF NEBRASKA, PLAINTIFF,

v.

STATE OF IOWA, DEFENDANT.

AMENDED ANSWER AND COUNTERCLAIM OF DEFENDANT, STATE OF IOWA, TO COMPLAINT OF PLAINTIFF, STATE OF NEBRASKA

LAWRENCE F. SCALISE
Attorney General of Iowa
State Capitol
Des Moines, Iowa

ROBERT B. SCISM
Assistant Attorney General of Iowa
State Capitol
Des Moines, Iowa

MICHAEL MURRAY
Special Assistant Attorney General of Iowa
Logan, Iowa

SEWELL E. ALLEN
Special Assistant Attorney General of Iowa
Onawa, Iowa
Attorneys for Defendant

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 17, Original

STATE OF NEBRASKA, PLAINTIFF,

v.

STATE OF IOWA, DEFENDANT.

AMENDED ANSWER

The State of Iowa, by Lawrence F. Scalise, Attorney General, substitutes this Amended Answer for its previous Answer to the Complaint of Plaintiff, State of Nebraska, as follows:

I. Admitted by decision of this Court, entered the 1st day of February, 1965.

II. Admitted.

III. Admitted.

IV. Admitted as concerns the area involved in *Nebraska v. Iowa*, No. 4, Original, 143 U. S. 359, 12 S. Ct. 396, 36 L. Ed. 186 (1892).

V. The State of Iowa admits the statements and averments contained in Paragraph V with the exception of the concluding averment, "and it became almost

impossible to determine the exact boundary between Iowa and Nebraska in many places at any given time in the past", which averment is specifically denied and proof of such averment is demanded.

VI. Admitted.

VII. Admitted. This averment demonstrates that the Iowa-Nebraska boundary has been validly established and that further definition of same is not required. Nor would any other definition be competent in the absence of an averment and finding that the Iowa-Nebraska Boundary Compact of 1943 is invalid. No averment of invalidity has been made.

VIII. Admitted.

IX. Denied, and the State of Iowa demands proof thereof. The State of Iowa admits that for several years it has been quieting title to riparian lands it owns in Iowa along the Missouri River, in actions involving Iowa citizens in Iowa courts and, on occasion, Nebraska citizens in Iowa courts. No action of the State of Iowa has violated either the provisions or the spirit of the Iowa-Nebraska Boundary Compact of 1943, since: (1) No action has been taken or claim of ownership asserted in respect to any lands ceded by Nebraska to Iowa by the compact; (2) No action has been taken or claim of ownership asserted in respect to lands that ever were within the State of Nebraska; (3) Some of the land in respect to which the State of Iowa has brought a quiet title action or has asserted informally a claim of ownership was not in existence in 1943, but formed within the State of Iowa by reason of the Missouri River's convolutions subsequent to that time, becoming, on the facts of its formation and applicable law, the property of the State of Iowa.

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title actions, has proceeded under the Iowa common law principle of state ownership to the bed of the Missouri River from the high water mark to the thread of the stream and of state ownership of abandoned river channels of the Missouri River, in some cases in complete disregard of the provisions of the Iowa-Nebraska Boundary Compact and without regard to the state in which such land was formed and the fact surrounding the formation and occupancy or control over said land.", which averment is specifically denied and strict proof demanded thereof.

XI. Admitted.

XII. Denied. The State of Iowa further answers that the averments are irrelevant and immaterial for the reason that all of the lands in respect to which the State of Nebraska alleges an exercise of sovereignty always have been within the State of Iowa; and that exercises of sovereignty, even if proved, are probative neither of title to lands nor of the jurisdiction in which they lie. The State of Iowa specifically denies that the State of Nebraska ever has possessed any of the lands in dispute in *State of Iowa v. Babbit*, or that the State of Iowa has acquiesced in the alleged possession. For further answer, the State of Iowa alleges that it has exercised jurisdiction and sovereignty over the land.

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Onawa, Iowa
Attorneys for Defendant

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OCTOBER TERM, 1964

No. 17, Original

STATE OF NEBRASKA, PLAINTIFF,

v.

STATE OF IOWA, DEFENDANT.

COUNTERCLAIM

The State of Iowa, by Lawrence F. Scalise, Attorney General, adopts each and every allegation, denial and admission of its Amended Answer to the Complaint of Plaintiff, State of Nebraska, and adds thereto the following:

COUNTERCLAIM

By way of counterclaim arising out of the transaction or occurrence which is the subject matter of Plaintiff's Complaint, Defendant State of Iowa states:

I.

The Iowa-Nebraska Boundary Compact of 1943 fixed a boundary line between the two states. In addition, the Compact, as ratified by the 56th General Assembly of the State of Nebraska on May 7, 1943, contained the following provisions pertinent to the subject matter of this counterclaim:

"Sec. 2. The State of Nebraska hereby cedes to the State of Iowa and relinquishes jurisdiction over all lands now in Nebraska but lying easterly of said boundary line and contiguous to lands in Nebraska.

"Sec. 3. Titles, mortgages, and other liens good in Iowa shall be good in Nebraska as to any lands Iowa may cede to Nebraska, and any pending suits or actions concerning said lands may be prosecuted to final judgment in Iowa and such judgment shall be accorded full force and effect in Nebraska.

"Sec. 4. Taxes for the current year may be levied and collected by Iowa, or its authorized governmental subdivisions and agencies, on lands ceded to Nebraska and any liens or other rights accrued or accruing including the right of collection, shall be fully recognized and the county treasurers of the counties affected shall act as agents in carrying out the provisions of this section; Provided. that all liens or other rights accrued or accruing, as aforesaid, shall be claimed or asserted within five years after this act becomes effective, and if not so claimed or asserted, shall be forever barred."

II.

On October 13, 1954, Earl H. Burket and Harriet C. Burket filed a petition in the District Court of Washington County, Nebraska, captioned *"Earl H. Burket and Harriet C. Burket, Plaintiffs, v. R. E. Krimlofski et al, Defendants,"* which petition was docketed in Docket Q at Page 240 and numbered Case No. 5586. A copy of this petition is attached hereto and marked "Exhibit A."

III.

On December 27, 1956, the District Court of Washington County, Nebraska, issued its decree in *Burket v. Krimlofski,* a copy of which is attached hereto and

market "Exhibit B." On January 2, 1958, defendants' Motions for a New Trial were overruled, and on January 7, 1958, defendants filed their Notice of Intent to Appeal to the Supreme Court of Nebraska. On July 3, 1958, the Supreme Court of Nebraska filed its opinion reversing the trial court and remanding the case to the District Court. Its directions were to render a judgment quieting title in plaintiffs to lands (as described) which had formed by accretion to the west bank of the Missouri River, and to quiet title in defendant Krimlofski to lands (as described) which had formed by accretion to a former island in the Missouri River. The dividing line between plaintiffs' and defendant Krimlofski's accretion lands was defined as the thread of a dried-up chute of the Missouri River, a chute which had been the main channel of the river until the U.S. Army Corps of Engineers caused it to move from the west side to the east side of the island in the late 1930's. It was found that Krimlofski had acquired ownership of the island by adverse possession. A copy of the opinion of the Supreme Court of Nebraska in *Burket v. Krimlofski* is attached hereto and marked "Exhibit C." The citation is 167 Neb. 45, 91 N.W.2d 57 (1958).

IV.

On April 19, 1955, Richard E. Krimlofski filed a petition in the District Court of Washington County, Nebraska, captioned "*Richard E. Krimlofski v. Helen M. Matters, et al, Defendants,*" which petition was docketed in Docket Q at Page 299 and numbered Case No. 5645. On August 6, 1961, six years later, Richard E. Krimlofski filed an amended petition in *Krimlofski v. Matters,* a copy of which is attached hereto and marked "Exhibit D."

On March 12, 1962, the District Court of Washington County, Nebraska, rendered its decree in *Krim-*

lofski v. Matters, a copy of which is attached hereto and marked "Exhibit E." On appeal, the Supreme Court of Nebraska on February 11, 1963, found as before that Krimlofski had acquired ownership by adverse possession of that same island involved in *Burket v. Krimlofski*, and quieted title in him as to accretions north of those disputed in the *Burket* case. A copy of that opinion (174 Neb. 774, 119 N.W.2d 501) is attached hereto and marked "Exhibit F."

V.

The evidence adduced in both *Burket v. Krimlofski* and *Krimlofski v. Matters* confirmed that: (1) The island, ownership of which in both cases was found to lie in Krimlofski, had formed east of the main channel of the Missouri River; (2) The island had remained east of the main channel until late in the 1930's, when the U.S. Army Corps of Engineers by means of dikes and other structures had diverted the main channel from the west to the east side of the island in the process of aligning and stabilizing the channel; (3) The former main channel between the island and the Nebraska bank was made to shrivel into a chute and dry up, and (4) It was by the foregoing processes that the island was caused to affix itself to Nebraska riparian lands.

VI.

The Supreme Court of the United States determined the boundary line between the states of Iowa and Nebraska in the case of *Nebraska v. Iowa*, 143 U.S. 359 (1892). It ascertained that the boundary line was the center of the main channel of the Missouri River; that the boundary line moved with the main channel when the channel's movement was caused by the gradual process of accretion; but that the boundary line remained in the center of a channel when the river aban-

doned that channel by avulsion. The court's decree, establishing the boundary line which remained in effect until the Compact of 1943, is found at 145 U.S. 519 (1892).

VII.

The island and accretions thereto, ownership of which was disputed in *Burket v. Krimlofski* and *Krimlofski v. Matters*, formed within the State of Iowa and remained within the State of Iowa until jurisdiction over it was ceded to Nebraska by the Iowa-Nebraska Boundary Compact of 1943. Movement of the main channel of the Missouri River to the east of the island was artificially caused and left the island undestroyed. This action by the U.S. Army Corps of Engineers did not move the boundary line from the channel west of the island. The island was owned by the State of Iowa before 1943, and the island and its accretions, now a part of the Nebraska mainland, are owned by the State of Iowa today. The State of Nebraska and its courts violated the Compact of 1943 by ignoring its applicability. In *Burket v. Krimlofski*, the Nebraska Supreme Court said:

> "Defendants contend that the island was originally in Iowa and now by compact between the states is in Nebraska. That situation does not enter into the decision here."

VIII.

In causing the main channel of the Missouri River to move from the west to the east side of the island involved in *Burket v. Krimlofski* and *Krimlofski v. Matters*, the U.S. Army Corps of Engineers was proceeding to channelize the river in conformance with a stabilization plan. This work began in the 1930's. The states of Nebraska and Iowa predicated a Compact in 1943 on an assumption of stabilization. Because World War II diverted funds and manpower,

control of the river suffered, and in places the river cut new channels. Work was resumed after the war and dams were constructed upstream to control the flow of water. The river could not be said to have been stabilized for all practical purposes until the recent past, however. Stabilization caused a drying up of lands on the east, or Iowa, side of the river, which historically had been wet and marshy for most of the length of the river, making approach from the Iowa side difficult. Historically, land on the west, or Nebraska side, of the river has been higher and drier, making possible the construction at an early date of towns, roads, and other installations along the river. This also made it possible for Nebraskans to reach islands in the river with facility. Some Nebraskans who claimed islands in the river were trespassers; that is, they owned no riparian lands and had no ownership under Nebraska law of islands which formed by accretion to the river bed. Krimlofski, a defendant in *Burket v. Krimlofski* and plaintiff in *Krimlofski v. Matters*, trespassed on the island whose formation and development was considered in those two cases.

IX.

Defendant is informed and believes that Nebraska courts have quieted title in Nebraska claimants to lands along, or arising from the bed of the Missouri River, in a substantial number of cases since 1943. Defendant is informed and believes that in many cases Nebraska courts have invoked and applied Nebraska's law of adverse possession in determining ownership of these lands, without determining: (1) Whether the lands formed within the State of Iowa; (2) Whether the lands were the subject of cession by reason of the 1943 Compact; (3) Whether the lands were owned in Iowa prior to cession by the State of Iowa or Iowa citizens; (4) Whether the lands were within the pro-

tection of Sections 2, 3 and 4 of the Iowa-Nebraska Boundary Compact of 1943; (5) Whether, as a consequence of the foregoing inquiries, it was obligatory to invoke and apply Iowa's laws in determining title to these lands, and (6) Whether titles to ceded lands were good in Iowa. In *Burket v. Krimlofski* and *Krimlofski v. Matters*, the State of Nebraska violated the Compact of 1943 by failing to recognize that title to the disputed island, and accretions thereto, was vested in the State of Iowa. Defendant is informed and believes that in other cases since 1943, the number of which is yet unknown to defendant, the State of Nebraska has violated the Compact by failing to recognize titles good in Iowa as to ceded lands owned in Iowa before cession by the State of Iowa or Iowa citizens.

X.

The State of Nebraska, in quieting title in its citizens to lands owned by the State of Iowa in *Burket v. Krimlofski* and *Krimlofski v. Matters*, violated Article IV, Section I, of the Constitution of the United States, which provides that: "Full faith and credit shall be given in each State to the Public Acts, Records and Judicial Proceedings of every other State."

WHEREFORE, the defendant, State of Iowa, prays the Court to:

I.

Adjudge and decree that the State of Nebraska consented by the Iowa-Nebraska Boundary Compact of 1943 to the ownership in Nebraska by the State of Iowa of lands owned by the State of Iowa prior to July 12, 1943, jurisdiction and sovereignty over which were ceded by Iowa to Nebraska.

II.

Adjudge and decree that the State of Nebraska violated the Iowa-Nebraska Boundary Compact of 1943 in the cases of *Burket v. Krimlofski* and *Krimlofski v. Matters* by failing to find that the island in dispute, and accretions thereto, had formed within the State of Iowa and had remained within the State of Iowa until July 12, 1943.

III.

Adjudge and decree that the State of Nebraska violated the Iowa-Nebraska Boundary Compact of 1943 in the cases of *Burket v. Krimlofski* and *Krimlofski v. Matters* by failing to find that the island in dispute, and accretions thereto, has been ceded by the State of Iowa to the State of Nebraska.

IV.

Adjudge and decree that the State of Nebraska violated the Iowa-Nebraska Boundary Compact of 1943 in the cases of *Burket v. Krimlofski* and *Krimlofski v. Matters* by applying its law of adverse possession in determining title to lands ceded by the State of Iowa to the State of Nebraska; by failing to invoke and apply the laws of Iowa to determine title to such lands; and by failing as a consequence to recognize title good in Iowa to the island in dispute and accretions thereto.

V.

Adjudge and decree that the Iowa-Nebraska Boundary Compact of 1943 requires both states to determine titles to ceded lands by determining whether titles to such lands were good in the ceding state, and that the compact has been violated by the State of Nebraska in each case since 1943 in which its courts have failed to determine whether ceded lands were the sub-

ject matter of such cases or have failed to invoke and apply Iowa law after such a determination.

VI.

Adjudge and decree that the State of Iowa retains the ownership in Nebraska of segments of abandoned channels of the Missouri River still covered by water where the abandonment of those channels was caused by diversionary works of the U.S. Army Corps of Engineers, or natural avulsion, before July 12, 1943.

VII.

Adjudge and decree that the State of Nebraska violated Article IV, Section 1, of the Constitution of the United States by quieting titles in Nebraska citizens to lands owned by the State of Iowa and ceded by Iowa to Nebraska by reason of the Iowa-Nebraska Boundary Compact of 1943.

VIII.

Retain jurisdiction of this matter to make such further orders as may be necessary to enforce its decrees, and grant the defendant such other and further relief as to which in equity and good conscience it may be entitled.

LAWRENCE F. SCALISE
Attorney General of Iowa

ROBERT B. SCISM
Assistant Attorney General of Iowa

MICHAEL MURRAY
Special Assistant Attorney General of Iowa

SEWELL E. ALLEN
Special Assistant Attorney General of Iowa

Attorneys for Defendant

EXHIBIT 'A'

IN THE DISTRICT COURT OF
WASHINGTON COUNTY, NEBRASKA

Doc. Q, No. 5586

EARL H. BURKET and
HARRIET C. BURKET,

Plaintiffs,

vs.

R. E. KRIMLOFSKI,
First and Real Name Unknown, ...
KRIMLOFSKI, First and Real Name Unknown, his wife, and all persons having or claiming any interest in: Part of Government Lot 3, in the West Half of the Southwest Quarter, Section 34, Township 17, Range 13, Washington County, Nebraska, described as follows: Beginning at the Northeast corner of the Southeast Quarter of Section 33, Township 17, Range 13, thence running in a southerly direction along the east line of Section 33, Township 17, Range 13, 782.5 feet; thence turning an angle 71°7′ to the left and continuing along this line in an easterly direction a distance of 436.3 feet; thence turning an angle of 2°1′ to the right and continuing along this line a distance of 315.0 feet; thence turning an angle of 98°41′ to the left and continuing along this line a distance of 203.5 feet; thence turning an angle of 76°54′ to the right and continuing along this line a distance of 29.0 feet to the point on the west bank of the Missouri River; thence turning an angle of 100°15′ to the left and continuing along the west bank of the Missouri River a distance of 240.0 feet to a point on the west bank of the Missouri River; thence turning an angle of 5°45′ to the left and continuing along the west bank of the Missouri River a distance of 628.0 feet to a point on the west bank of the Missouri River and on the north line of the Southeast Quarter of Section 33, Township 17, Range 13 produced; thence in a westerly direction along the north line of the Southeast Quarter of Section 33, Township 17, Range 13, produced a distance of 555.1 feet to the point of beginning, containing

14.2 acres more or less; and all accretions thereto, Real Names Unknown,

Defendants.

PETITION

Come now the plaintiffs and for cause of action against the defendants allege:

1. That the plaintiffs are the owners, as joint tenants with right of survivorship, of the following described real estate situated in the County of Washington, State of Nebraska, to wit:

Part of Government Lot 3, in the West Half of the Southwest Quarter, Section 34, Township 17, Range 13, Washington County, Nebraska, described as follows: Beginning at the Northeast corner of the Southeast Quarter of Section 33, Township 17, Range 13, thence running in a southerly direction along the east line of Section 33, Township 17, Range 13, 782.5 feet; thence turning an angle 71°7′ to the left and continuing along this line in an easterly direction a distance of 436.3 feet; thence turning an angle of 2°1′ to the right and continuing along this line a distance of 315.0 feet; thence turning an angle of 98°41′ to the left and continuing along this line a distance of 203.5 feet; thence turning an angle of 76°54′ to the right and continuing along this line a distance of 29.0 feet to the point on the west bank of the Missouri River; thence turning an angle of 100°15′ to the left and continuing along the west bank of the Missouri River a distance of 240.0 feet to a point on the west bank of the Missouri River; thence turning an angle of 5°45′ to the left and continuing along the west bank of the Missouri River a distance of 628.0 feet to a point on the west bank of the Missouri River and on the north line of the Southeast Quarter of Section 33, Township 17, Range 13 produced; thence in a westerly direction along the north line of the Southeast Quarter of Section 33, Township 17, Range 13, produced a dis-

tance of 555.1 feet to the point of beginning, containing 14.2 acres more or less; and all accretions thereto;

as shown on Exhibit A attached hereto and made a part hereof. That the plaintiffs and their predecessors in title have been in continuous possession of the above described property for a period exceeding twenty years last past, and have been in continuous, open, notorious and exclusive adverse possession of said real estate for the period aforesaid.

2. That the defendants R. E. Krimlofski and ..... Krimlofski, his wife, whose first and real names are unknown to the plaintiffs, claim some right, title or interest in and to the above described real estate and particularly the accretions thereto; that the basis, nature and extent of the claims of said defendants Krimlofski are unknown to the plaintiffs but are subject, junior and inferior to the paramount fee simple title of the plaintiffs in and to said real estate and all accretions thereto; that such claim, interest, right, title or lien as asserted by said defendants Krimlofski does not appear of record in or by their respective names in Washington County, Nebraska.

3. That there are persons who claim to have some interest in, right or title to or lien upon said property hereinabove described and shown as Exhibit A, together with accretions thereto, and that the ownership of, interest in, right or title to, or lien upon such property of such persons does not appear of record in or by their respective names in Washington County, Nebraska; and plaintiffs, after diligent investigation and inquiry, are unable to ascertain and do not know the names or whereabouts, if in this state, or the residences of such persons, and they are designated herein as all persons having or claiming any interest in said

particularly described real estate as shown on Exhibit A, together with accretions thereto.

4. Plaintiffs allege that none of the defendants to this action, as designated in the caption hereof and as particularly identified and referred to herein, have any right, title, interest, lien, claim or demand, of any nature whatsoever, in and to said real estate; and any interest which any of them may have had in said real estate has long been barred by the Statute of Limitations and by the adverse possession of the plaintiffs and their predecessors in title. And in this connection it is noted that by the decree of the District Court of Washington County, Nebraska, in Case No. 3833, and which decree was entered on January 11, 1932, title to the property herein particularly described, together with other properties, was quieted by said decree in Francis Tadmir Parker, who, on the 23rd day of January, 1932, conveyed the property here in question to the plaintiff Earl H. Burket who has been in possession and has occupied said premises continuously therefrom.

5. That by virtue of the facts set out above, there is cast a cloud upon the title of plaintiffs to said real estate, particularly with respect to the accretions thereto; that unless plaintiffs' title against the defendants and each of them is quieted and established, plaintiffs will be caused irreparable injury; that plaintiffs have no adequate remedy at law. With respect to that portion of plaintiffs' lands referred to and described herein as "all accretions thereto", plaintiffs allege and say that on the 23rd day of January, 1932, when the plaintiff Earl H. Burket obtained title to the property particularly described herein and shown on Exhibit A, the then west bank of the Missouri River was at the location shown and indicated on Exhibit A, which exhibit is the survey and engineer's drawing of said property as of the date January 23, 1932; that

since January 23, 1932, the Missouri River has slowly and gradually receded to the east accreting lands to the riparian lands of plaintiffs, and that at the present time the west bank of the Missouri River is some distance east of the location of said west bank as shown on Exhibit A, and that said accretion lands thereby created and accreted to the lands of the plaintiffs are really the lands here in controversy, and said lands are accretion lands to the lands of the plaintiffs and the property of said plaintiffs by reason thereof, as said accretion lands extend from the west bank of the Missouri River as of January 23, 1932, to the present west bank of said Missouri River and between the lines as extended to the present west bank of the Missouri River, which lines represent the north line of plaintiffs' property and the south point thereof as determined and established by the description herein above set forth and shown on Exhibit A attached hereto and made a part hereof.

WHEREFORE, plaintiffs pray that their title to said real estate be quieted and confirmed in them, as joint tenants with right of survivorship, as against each of said named defendants and against all persons having or claiming any interest in said real estate, real names unknown; and that each of them be enjoined forever from asserting any claim or interest in said real estate or any portion thereof; and for such other and further relief as equity may require.

EARL H. BURKET and
HARRIET C. BURKET, Plaintiffs

SPIER, ELLICK & SPIRE
By: CLARENCE SPIER
Their Attorney
712 Farm Credit Bldg.
Omaha, Nebraska
Atlantic 4133

STATE OF NEBRASKA }
COUNTY OF DOUGLAS } ss.

Earl H. Burket, being first duly sworn, on oath states that he is one of the plaintiffs in the above entitled action; that he has read the foregoing Petition, and that the facts therein stated are true, as he verily believes.

EARL H. BURKET

Subscribed in my presence and sworn to before me this 4 day of October, 1954.

LENOIR MATTER,
Notary Public.

EXHIBIT 'B'

IN THE DISTRICT COURT OF WASHINGTON COUNTY, NEBRASKA
Doc. Q 240, No. 5586

EARL H. BURKET and
HARRIET C. BURKET,

Plaintiffs,

vs.

R. E. KRIMLOFSKI,
First and Real Name Unknown, ... KRIMLOFSKI, First and Real Name Unknown, his wife, and all persons having or claiming any interest in: Part of Government Lot 3, in the West Half of the Southwest Quarter, Section 34, Township 17, Range 13, Washington County, Nebraska, described as follows: Beginning at the Northeast corner of the Southeast Quarter of Section 33, Township 17, Range 13, thence running in a southerly direction along the east line of Section 33, Township 17, Range 13, 782.5 feet; thence turning an angle 71°7′ to the left and continuing along this line in an easterly direction a distance of 436.3 feet; thence turning on angle of 2°1′ to the right and continuing along this line a distance of 315.0 feet; thence turning an angle of 98°41′ to the left and continuing along this line a distance of 203.5 feet; thence turning an angle of 76°54′ to the right and continuing along this line a distance of 29.0 feet to the point on the west bank of the Missouri River; thence

turning an angle of 100°15′ to the left and continuing along the west bank of the Missouri River a distance of 240.0 feet to a point on the west bank of the Missouri River; thence turning an angle of 5°45′ to the left and continuing along the west bank of the Missouri River a distance of 628.0 feet to a point on the west bank of the Missouri River and on the north line of the Southeast Quarter of Section 33, Township 17, Range 13 produced; thence in a westerly direction along the north line of the Southeast Quarter of Section 33, Township 17, Range 13, produced a distance of 555.1 feet to the point of beginning, containing 14.2 acres more or less; and all accretions thereto, Real Names Unknown,

Defendants.

DECREE

Now on this 27th day of December, 1956, the Court, being fully advised in the premises, finds that due and legal service of process has been made upon all the defendants in the manner and form provided by law; that this matter came on for hearing upon the Petition of the plaintiffs, trial was had, evidence having been adduced, and arguments of counsel heard, and this Court, being fully advised in the premises, finds generally in favor of the plaintiffs and against each and all of the defendants herein.

The Court further finds that the allegations contained in plaintiffs' petition are true and that the plaintiffs are the lawful owners in fee simple of the following described real estate, to wit:

Part of Government Lot 3, in the West Half of the Southwest Quarter, Section 34, Township 17, Range 13, Washington County, Nebraska, described as follows: Beginning at the Northeast corner of the Southeast Quarter of Section 33, Township 17, Range 13, thence running in a southerly direction along the east line of Section 33, Township 17, Range 13, 782.5 feet; thence turning an angle 71°7′ to the left and continuing

along this line in an easterly direction a distance of 436.3 feet; thence turning an angle of 2°1′ to the right and continuing along this line a distance of 315.0 feet; thence turning an angle of 98°41′ to the left and continuing along this line a distance of 203.5 feet; thence turning an angle of 76°54′ to the right and continuing along this line a distance of 29.0 feet to the point on the west bank of the Missouri River; thence turning an angle of 100°15′ to the left and continuing along the west bank of the Missouri River a distance of 240.0 feet to a point on the west bank of the Missouri River; thence turning an angle of 5°45′ to the left and continuing along the west bank of the Missouri River a distance of 628.0 feet to a point on the west bank of the Missouri River and on the north line of the Southeast Quarter of Section 33, Township 17, Range 13 produced; thence in a westerly direction along the north line of the Southeast Quarter of Section 33, Township 17, Range 13, produced a distance of 555.1 feet to the point of beginning, containing 14.2 acres more or less; and all accretions thereto, said accretions presently described as: Beginning at the Southeast corner of tax lot number 5 in Section 34, Township 17, Range 13, Washington County, Nebraska, thence N88°46′15″ E a distance of 1150.00 feet to a point; thence N21°09′30″ E a distance of 474.80 feet to a point; thence N23°09′15″ E a distance of 299.15 feet to a point; thence N41°32′00″ E a distance of 120.64 feet to a point; thence N89°55′00″ W a distance of 1751.28 feet to a point; thence S17°08′45″ E a distance of 628.00 feet to a point; thence S11°23′45″ E a distance of 240.00 feet to point of beginning. Said land being tax lot number 11 and containing 26.76 acres;

and that with respect to that portion of plaintiffs' lands referred to and described herein as accretion land, since plaintiffs obtained title on the 23rd day of January 1932, the Missouri River has slowly and gradually receded to the east accreting lands to the

riparian lands of the plaintiffs, and that at the present time the west bank of the Missouri River is some distance east of the location of said west bank at the time plaintiffs took title on January 23, 1932, and that said accretion lands thereby created and accreted to the lands of the plaintiffs are accretion lands to the lands of the plaintiffs and the property of said plaintiffs by reason thereof as said accretion lands extend from the west bank of the Missouri River as of January 23, 1932, to the present west bank of said Missouri River and between the lines as extended to the present west bank of the Missouri River, which lines represent the north line of plaintiffs' property and the south point thereof as determined and established by the description hereinabove set forth; and that plaintiffs and their predecessors in title have been in continuous possession of the above described property for a period exceeding twenty years last past and have been in continuous, open, notorious and exclusive adverse possession of said real estate for the period aforesaid under claim of title in fee simple and that plaintiffs are entitled to a decree quieting their title thereto as against all of the defendants.

THEREFORE, IT IS ORDERED AND DECREED BY THE COURT that the plaintiffs are the lawful owners in fee simple of the following described real estate, to wit:

Part of Government Lot 3, in the West Half of the Southwest Quarter, Section 34, Township 17, Range 13, Washington County, Nebraska, described as follows: Beginning at the Northeast corner of the Southeast Quarter of Section 33, Township 17, Range 13, thence running in a southerly direction along the east line of Section 33, Township 17, Range 13, 782.5 feet; thence turning an angle 71°7′ to the left and continuing along this line in an easterly direction a distance

of 436.3 feet; thence turning an angle of 2°1′ to the right and continuing along this line a distance of 315.0 feet; thence turning an angle of 98°41′ to the left and continuing along this line a distance of 203.5 feet; thence turning an angle of 76°54′ to the right and continuing along this line a distance of 29.0 feet to the point on the west bank of the Missouri River; thence turning an angle of 100°15′ to the left and continuing along the west bank of the Missouri River a distance of 240.0 feet to a point on the west bank of the Missouri River; thence turning an angle of 5°45′ to the left and continuing along the west bank of the Missouri River a distance of 628.0 feet to a point on the west bank of the Missouri River and on the north line of the Southeast Quarter of Section 33, Township 17, Range 13 produced; thence in a westerly direction along the north line of the Southeast Quarter of Section 33, Township 17, Range 13, produced a distance of 555.1 feet to the point of beginning, containing 14.2 acres more or less; and all accretions thereto, said accretions presently described as: Beginning at the Southeast corner of tax lot number 5 in Section 34, Township 17, Range 13, Washington County, Nebraska, thence N88°46′15″ E a distance of 1150.00 feet to a point; thence N21°09′30″ E a distance of 474.80 feet to a point; thence N23°09′15″ E a distance of 299.15 feet to a point; thence N41°32′00″ E a distance of 120.64 feet to a point; thence N89°55′00″ W a distance of 1751.28 feet to a point; thence S17°08′45″ E a distance of 628.00 feet to a point; thence S11°23′45″ E a distance of 240.00 feet to point of beginning. Said land being tax lot number 11 and containing 26.76 acres;

that title to said real estate be and it hereby is quieted in the plaintiffs against the claims or apparent claims of all of the defendants or any and each of them, of whatever kind or character, and that the defendants and each of them and all persons claiming by, through or under them, be and they hereby are forever en-

joined from claiming or asserting any interest or ownership of any kind or character or from interrupting plaintiffs' use, enjoyment or possession of or in the above described real estate.

BY THE COURT
JAMES T. ENGLISH
Judge

EXHIBIT 'C'

EARL H. BURKET and
HARRIET C. BURKET,

Appellees,

vs.

R. E. KRIMLOFSKI, first and real name unknown, Mina Krimlofski, his wife,

Appellants.

No. 34395

Supreme Court of Nebraska

July 3, 1958

Action for a decree quieting title in plaintiffs of certain accretion and reliction lands in the Missouri River. Decree for plaintiffs and defendants' motion for new trial was denied in the District Court, Washington County, English, J., and the defendants appealed. The Supreme Court, Simmons, C. J., held that the evidence established existence of the island and adverse possession to it by the defendants and that the parties were entitled to a decree as indicated in the opinion.

Reversed and remanded with directions.

Heard before SIMMONS, C. J., and MESSMORE, YEAGER, WENKE, and BOSLAUGH, JJ.

SIMMONS, Chief Justice.

In this action plaintiffs seek a decree quieting title in them to certain accretion and reliction lands. The action was against defendants Krimlofski and all other persons having or claiming an interest in the lands involved.

Defendant R. E. Krimlofski answered claiming title by adverse possession to the land involved. He prayed for a decree quieting title in him.

The trial court rendered a decree for the plaintiffs. Defendants filed a motion for a new trial, in part on the ground of newly discovered evidence. A hearing was held on this motion. Defendants offered, and there were received in evidence, maps and aerial photographs.

The trial court denied the motion and defendants appeal. We reverse the judgment of the trial court and remand the cause with directions.

The cause is here for trial de novo. Both parties here treat the exhibits, introduced on the motion for a new trial, as in evidence and each relies on them. The plaintiffs contend that they were not properly newly discovered evidence; that a hearing on that ground should not have been had; and that the exhibits should not have been admitted. Plaintiffs do not cross-appeal. We consider the exhibits as evidence for our consideration.

Defendants assign error in the refusal of the trial court to admit two photographs in evidence. Each was cumulative of other evidence in the record. It is not necessary to further consider the assignments.

Defendants further complain of error in admitting on cross-examination testimony of Mr. Krimlofski as to a conversation had with Mr. Burket obviously for the purpose of exploring the possibility of a settlement.

The evidence possessed no controlling influence on the decision here made. This assignment will not be considered further in this opinion.

Without dispute plaintiffs in 1932 became the owners of a tract of land referred to as Tax Lot 5, lying west of the Missouri River with the east bank of the land described in the deed as "along the west bank of the Missouri River." The deed also described "And all accretions thereto." The evidence shows that there was then a county road along the west bank of the river and at that time was a few feet therefrom. Defendants contend that whatever accretions attached to the land attached to the county road and that they belong to the county and not the plaintiffs. There is no evidence in the record showing the title of the county to the roadway other than that which points toward an easement based on use. We do not consider the contention of controlling merit, and put it aside.

Defendants' claim of title rests on a claim of adverse possession to an island in the Missouri River. Defendants are husband and wife. This island first appeared as a sand bar in 1926. The evidence shows that they took possession of this sand bar in 1926, planting willows on it and sinking anchor weights so as to dock boats on it. They built duckblinds on it and fished from it. By 1927 willows were growing on it. In a few years it became timbered with cottonwoods, willows, and underbrush. They then conceived the idea of making a wild life sanctuary of it. They put up "No Trespassing," "No Hunting," and similar signs. Whenever others came upon it they claimed ownership of it, ordered them off, and make their control effective. When others built hunting blinds on the island, they destroyed them. In later years they policed the property to put out and prevent fires. They granted permission to friends to use the island. At the time of the trial

this island was heavily timbered, with trees going to a height of 40 or 50 feet in parts of it.

Without reciting the evidence in detail, we deem it sufficient to establish the existence of the island and adverse possession to it as such under the rules last stated in Worm v. Crowell, 165 Neb. 713, 87 N.W.2d 384: The claim of title to land by adverse possession must be proved by actual, open, exclusive, and continuous possession under a claim of ownership for the statutory period of 10 years. The possession is sufficient if the land is used continuously for the purpose to which it may be in its nature adapted.

The established rule is: Title by prescription may be acquired to an island in a stream, which otherwise would belong to a riparian owner. Accretions to an island so held and occupied for more than the statutory period belong to the owner of the island, and not to the riparian owner to whom the island or a part of it would otherwise belong. Briard v. Hashberger, 107 Neb. 199, 185 N.W. 430. See Higgins v. Adelson, 131 Neb. 820, 270 N.W. 502.

We come then to the question of fact as to whether the accretion and reliction land involved here belongs to the defendants as owners of the island or to plaintiffs as owners of the mainland.

The land in dispute extends directly east from the plaintiffs' land.

Defendants contend that the island was originally in Iowa and now by compact between the states is in Nebraska. That situation does not enter into the decision here. Nor are we concerned with the question of the navigability of the Missouri River. The rule is: "* * * the rights of riparian owners upon the Missouri River to land formed by accretion are the same as if the river were not navigable, and * * *

the common law applies in full force." Kinkead v. Turgeon, on rehearing, 74 Neb. 580, 109 N.W. 744, 746, 7 L.R.A., N.S., 316, 121 Am.St.Rep. 740. See, also, Worm v. Crowell, supra.

The rules also are: Land uncovered by a gradual subsidence of water is not an accretion, but a reliction. The same law applies to both these forms of addition to real estate which are held to be the property of the abutting landowner. State v. Ecklund, 147 Neb. 508, 23 N.W.2d 782. Accretion is the process of gradual and imperceptible addition of solid material, called alluvion, thus extending the shore line out by deposits made of contiguous water, or by reliction, the gradual withdrawal of the water from the land by the lowering of its surface level from any cause. Where by the process of accretion and reliction, the water of a river gradually recedes, changing the channel of the stream and leaving the land dry that was theretofore covered by water, such land belongs to the riparian owner. Ziemba v. Zeller, 165 Neb. 419, 86 N.W.2d 190. Accordingly we will refer to the lands herein involved as accretion land without making an effort to determine where accretion ends and reliction begins.

Reference will be made to the work of the U.S. Army Engineers in controlling the Missouri River and its effect on the creation of the problem here presented. The rule as to that is: The fact that accretion is due, in whole or in part, to obstructions placed in the river by third parties does not prevent the riparian owner from acquiring title thereto. Ziemba v. Zeller, supra.

We go now to the evidence as to the accretion involved.

We have referred above to the situation that the evidence shows existed in the river, in 1926 and following, showing the development of the island. The

evidence is that in the early years the Missouri River had two channels, one on the Iowa side to the east of the island, and one on the Nebraska side touching within a few feet of the border of plaintiffs' land.

We discuss the exhibits chronologically. Exhibit 16 is a picture offered by defendants taken on the island in 1927 showing small willows growing thereon. This picture was excluded on the ground that it was not within the issues of the case. Parol evidence of that fact had been admitted. We deem its exclusion an obvious error and consider it here.

Exhibit 15 is a picture offered by defendants showing the existence of the island in the river, with water beyond to the east. This was taken from a point on the mainland to the immediate north of plaintiffs' land.

Exhibit 6 is an exhibit offered by plaintiffs. It is a map prepared by the U.S. Army Engineer's office in September 1930. This map shows a large island with the legend "willows" on it. The southern end lies to the east of plaintiffs' land. It shows the main channel of the river to the west of the island and touching the plaintiffs' land to the immediate east of the county road.

Exhibit 2 is a map offered by plaintiffs based on a survey made in 1931. It shows the Missouri River touching plaintiffs' land to the immediate east of the county road.

Exhibit 10 is a photograph taken in January 1935, and offered by plaintiffs. It shows the high bank of the river close to the road and ice in front where plaintiffs' son is skating.

Exhibit 9 is a picture taken in October 1935 offered by plaintiffs taken from a cabin site on a high point on their land. It is a picture looking down from an

elevation on the river bank. It shows the main channel of the river in the immediate foreground and the island beyond with trees growing upon it and water between the island and the Iowa mainland.

Exhibit 22 is a map offered by the defendants prepared by the U.S. Army Engineer's office on October 29, 1936. It shows a large island in the river east and north of the plaintiffs' land with an indication of sand bars accreted thereto extending down to and opposite plaintiffs' land. It shows the main channel of the river touching plaintiffs' land as before described. It also shows dike piling and revetments completed across the main channel some distance to the north. This fixes the first definite date of the commencement of control work by the U.S. Army Engineers.

Exhibit 23, offered by defendants, is a map prepared by the U.S. Army Engineer's office dated May 5, 1937. It shows additional dikes completed across the main channel of the river to the north. It shows the island as before but not as distinct as in the previous exhibit.

Exhibit 24 is a map offered by the defendants prepared by the U.S. Army Engineer's office dated October 21, 1938. It shows additional dikes and revetments completed across the former main channel of the river. It shows a larger island to the north but nothing directly to the east of plaintiffs' land. It shows a channel to the west of the island and touching plaintiffs' land as above described.

Exhibit 25 is a like map offered by defendants dated May 1, 1939. It shows the main channel to the east of the large area of land located where the island began.

Exhibit 26 is a like map offered by the defendants dated March 20, 1940. It shows the main channel of the river to the east of the island with the island ex-

tending down to and opposite plaintiffs' land with an open water area to the west of the island.

Exhibit 7 is a like map offered by the plaintiffs dated March 29, 1940. It shows a large island extending down to and almost opposite plaintiffs' land with an open water area to the west.

Exhibit 27 is an aerial photograph offered by defendants taken August 15, 1941, by the U.S. Department of Agriculture. It shows the main channel of the river to the east of a large island that extends down to the east of plaintiffs' land and about half the distance of their eastern boundary. It shows an open channel from the north to the south running the full length of the island to its west. This is now described in the evidence as a chute. It shows definitely for the first time a narrow accretion area, wider at the south, attached to plaintiffs' land.

Exhibit 8 is a U.S. Army Engineer's map dated 1946-1947, offered by plaintiffs. It shows the main channel of the river fully established to the east of the land here involved. To the west is a solid area of land bearing the legend "willows." This extends for the full distance and beyond the boundaries of plaintiffs' land extended to the east. It shows the chute between this land and the mainland to the west.

Exhibit 28 is an aerial photograph offered by defendants taken by the U.S. Department of Agriculture dated July 31, 1949. This shows the island now extended downstream well beyond plaintiffs' land. It shows the main channel of the river to the east. It shows the channel of the chute, then largely dry land. It shows the accretion to plaintiffs' land, above mentioned, to the west of the chute channel, and vegetation growth both to the west and east of the chute channel.

In 1954 the defendants fenced in the land on the west

side. The exact location of the fence is not determinable. The discovery of the fence by the plaintiffs seems to have precipitated this controversy.

Exhibit 29 is an aerial photograph offered by defendants taken by the U.S. Department of Agriculture on June 7, 1955. It shows the main channel of the river to the east of the area involved with vegetation-covered land extending to the west to the road on plaintiffs' land. The old outline of the bed of the chute, then dry land as described by witnesses, is clearly visible with greater growth of vegetation on a narrow strip of land to the west attached to plaintiffs' land and to the east of the chute bed also.

Exhibit 18, a photograph offered by the defendants, taken in 1956, shows this vegetation to be trees of a substantial size.

The parol testimony supports the story shown by the exhibits. We will not extend it by the recital of it more than has been done.

It is clear that an island formed in the river, in 1926 and following, between the two large channels of the river. As recited herein defendants established title to the island by adverse possession. Beginning then, as a result of the work of the Army Engineers, the main channel of the river was consolidated and flowed to the east of the island. Accretions began to form on the island and over the years its boundaries were extended to the west and south by that process, leaving for a time a channel west of the island, herein referred to as the chute. Accretions began to form then to the east of plaintiffs' land to the west of the chute and these attached to plaintiffs' land. Finally as a result of reliction the chute also became dry land.

We conclude that the accretion land east of the chute attached to and became a part of the island in defendants' ownership. The accretion land to the west

of the chute attached to and became a part of plaintiffs' land.

The Supreme Court of North Dakota recently stated the applicable rule for determining the dividing line, in Hogue v. Bourgois, N.D., 71 N.W.2d 47, 49, 54 A. L.R.2d 633, as follows: "* * * Where the accretion commences with the shore of the island and afterwards extends to the mainland, or any distance short thereof, all the accretion belongs to the owner of the island; but, where accretions to the island and to the mainland eventually meet, the owner of each owns the accretions to the line of contact."

In Roll v. Martin, 164 Neb. 133, 82 N.W.2d 34, we found "no fault" with a contention that the owners of land were entitled to all accretions to the thread of the closed channel as a matter of right.

Accordingly we find that plaintiffs are entitled to a decree quieting title in them to the accretion land here involved attached to their land from its old bank, east to the thread of the chute channel as it existed before it became dry land by reliction as shown on exhibit 29.

The defendants are entitled to a decree quieting title in them to the accretion land here involved which attached to the island which lies generally east of the thread of the chute channel as shown by exhibit 29 as it existed before it became dry land by reliction.

The plaintiffs advance the contention here that defendants must prove adverse possession, not alone to the island, but also to the land attached thereto by accretion and reliction. Such a rule, of course, would nullify any rights resting on accretion or reliction. In Roll v. Martin, supra, we found no fault with the contention that one who owned an island was not required to take possession of accretion land in order to establish his claim thereto as a matter of right unless

someone actually had established the right thereto by adverse possession. Plaintiffs' evidence falls short of proving adverse possession to the accretion land.

Plaintiffs further argue that one of the reasons for the riparian right rule is to assure the owner of riparian lands continued access to the water of a stream and accordingly he has the right to have his land follow the stream so as to preserve his riparian right of access to the water.

Plaintiffs rely on a statement found in City of St. Louis v. Rutz, 138 U.S. 226, 11 S.Ct. 337, 34 L.Ed. 941. That case in turn relies on Mulry v. Norton, 100 N.Y. 424, 3 N.E. 581. A reading of these cases reveals that the court was there dealing with the rights of conterminous owners of mainland. The problem here presented does not seem to have been involved.

The rule is: Land, to be riparian, must have the stream flowing over it or along its border. Stratbucker v. Junge, 153 Neb. 885, 46 N.W.2d 486.

The fact here is that plaintiffs' land, although once riparian, is no longer riparian and it does not now have those rights that once attached to the land.

A somewhat comparable case is that of Wholey v. Caldwell, 108 Cal. 95, 41 P. 31, 30 L.R.A. 820, 49 Am. St.Rep. 64. There land that was once riparian, by natural forces became non-riparian. The owner claiming riparian rights asserted the right to go upon the land of others and to restore the water to its former channel. The court held that when the flow was lost, the riparian rights were lost with it.

We find no merit in the contention.

The judgment of the trial court is reversed and the cause remanded with directions to render a judgment quieting title to each of the parties to the land involved as above indicated.

If the parties cannot agree as to the location of the common boundary line, then the court is directed to receive evidence limited to that issue and to determine the exact location by metes and bounds of the thread of the chute as it appears on exhibit 29 and to decree that such line is the boundary line.

Reversed and remanded with directions.

CARTER, J., participating on briefs.

EXHIBIT 'D'

IN THE DISTRICT COURT OF WASHINGTON COUNTY, NEBRASKA

Case No. 5645, Doc. Q, Page 299

RICHARD E. KRIMLOFSKI,

Plaintiff,

vs.

HELEN M. MATTERS, a single person; Jacob J. Jobst and Annie Jobst, his wife; Bernard J. Jobst and Emma S. Jobst, his wife; Martha Uerling, a single person; and all persons having or claiming any interest in and to the following described real estate, to-wit: Beginning at a point 399.4 feet East of the Southwest corner of the Northwest Quarter of the Northwest Quarter of Section 34, Township 17 North, Range 13 East of the 6th P.M., Washington County, Nebraska, said point being on the Quarter-Quarter line, thence North 13°30′ West, a distance of 148.5 feet, thence North 50°45′ East, a distance of 1089.2 feet, thence North 61° East, a distance of 1003.2 feet to government meander corner between Sections 27 and 34, Township 17 North, Range 13 East of the 6th P.M. Washington County, Nebraska, thence East on said Section line a distance of 1525 feet to a point on the West bank of the Missouri River, thence Southwesterly along the West bank of the Missouri River a distance of 1450 feet to a point on the North line of Lot 2, Section 34, Township 17 North, Range 13

East of the 6th P.M. extended, thence West on said line to the place of beginning, all being in the North Half of the North Half of Section 34, Township 17 North, Range 13 East of the 6th P.M., Washington County, Nebraska.

Defendants.

AMENDED PETITION

COMES NOW the plaintiff and for cause of action against the defendants alleges:

I.

The plaintiff is the owner in fee simple of part of Tax Lot 10 and original Gov't lot 1 lying East of the center of a dry chute described as follows:

> Beginning at a point on the North line of Section 34 T17N R13E, 895.6 feet East of the Northwest corner of said Section 34 and assuming the North line of said section to be due East; thence continuing East a distance of 2582.80 feet to the West bank of the Missouri River; thence following the meander of said West bank, S 9°27'30" W a distance of 307.4 feet; thence S 15°03'30" W a distance of 294.7 feet; thence S 23°59' W a distance of 800.0 feet to a point on the E-W ¼¼ line of Section 34; thence West along the ¼¼ line (Said ¼¼ line being parallel with the North line of Section 34) a distance of 2587.5 feet to the center of a dry chute; thence N 19°04' E along said center of a dry chute a distance of 1396.62 feet to the point of beginning. Lying in the N½ of the N½ of Section 34 T17N R13E of the 6th P.M. in Washington County, Nebraska, and containing 81.58 acres more or less.

II.

The plaintiff acquired title to said land as follows: In 1926, plaintiff took possession of an island in the Missouri River, which island occupied a part of the above described area. Said island was separated from

the land on the west bank of the Missouri River by the main channel of the Missouri River. As a result of the work of the Army Engineers commencing in 1937, the main channel of the Missouri River was consolidated and made to flow east of said island. Accretions formed on said island and over the years, its boundaries were extended to the west and south by the process of accretion and reliction, being finally separated from accretions to Government Lot 1 in Section 34, and accretions to the Northeast Quarter of the Northeast Quarter of Section 33, Township 17 North, Range 13 East of the 6th Principal Meridian in Washington County, Nebraska, and accretions to other riparian land to the south thereof, only by a chute which was the remnant of the former channel of the Missouri River. The land described in paragraph 1 hereof, is that part of said island which is now in the North Half of the North Half of said Section 34, together with accretions thereto, bounded on the west by the center line of said chute. The plaintiff maintained actual, open, notorious, exclusive, continuous and adverse possession of the land described in paragraph 1 hereof under claim of ownership from 1926, or its subsequent appearance, until 1955, when the defendant, Martha Uerling, first asserted a claim to said land, and plaintiff has continued to the present time to hold such possession, subject only to the disturbance thereof by the defendant, Martha Uerling, commencing in 1955.

III.

On December 15, 1949, after the plaintiff had perfected his title to the above described land by more than 10 years adverse possession as aforesaid, the defendant, Martha Uerling, purchased land from Emma M. M. Jacobus, a widow, who executed and delivered to said defendant a deed describing said land as follows:

Northeast Quarter of the Northeast Quarter ($NE\frac{1}{4}NE\frac{1}{4}$) of Section Thirty-three (33), and Government Lot One (1) in Section Thirty-four (34) all in Township Seventeen (17) North, Range Thirteen (13) East of the 6th P.M., in Washington County, Nebraska,

which deed was filed December 18, 1949, and recorded in Book 67, Page 485 of the Deed Records of Washington County, Nebraska.

IV.

Prior to 1926, the Missouri River had eroded away the Northeast corner of the Northeast Quarter of the Northeast Quarter of said Section 33, and had eroded away all of said Government Lot 1, except a very small triangular piece of land in the Southwest corner thereof which was the remainder of original Government Lot 1 after western movement of Missouri River, described as follows:

Beginning at the $\frac{1}{4}\frac{1}{4}$ corner South of the Northwest corner of Section 34 T17N R13E; thence East along the $\frac{1}{4}\frac{1}{4}$ line South of the North line of said Section 34 a distance of 220.0 feet; thence N 21°48′ W a distance of 592.36 feet to a point on the West line of said Section 34; thence South along the aforesaid line a distance of 550.0 feet to the point of beginning. Lying in the $NW\frac{1}{4}$ of the $NW\frac{1}{4}$ of Section 34 T17N R13E of the 6th P.M., in Washington County, Nebraska, and containing 1.39 acres more or less.

Subsequently, the Missouri River added accretions to said Southwest corner of Government Lot 1, in Section 34 and to the Northeast Quarter of the Northeast Quarter of said Section 33, which accretions are bounded on the East by the center of the chute which is the West boundary line of the land described in paragraph 1 hereof, and which accretions, insofar as they are within the boundaries of said Section 34, are

part of Government Lot 1 and part of Tax Lot 10 lying West of the center line of a dry chute described as follows:

Beginning at the Northwest corner of Section 34 T17N R13E; thence East along the North line of said Section 34 a distance of 895.6 feet to the center line of a dry chute; thence S 19°04′ W along the center line of said chute a distance of 1396.62 feet to a point on the ¼¼ line South of the North line of Section 34; thence West along the aforesaid ¼¼ line a distance of 219.50 feet; thence N 21°48′ W a distance of 592.36 feet to a point on the West line of said Section 34; thence North a distance of 770.0 feet to the point of beginning. Lying in the NW¼ of the NW¼ of Section 34 T17N R13E of the 6th P.M. in Washington County, Nebraska, and containing 18.84 acres more or less.

V.

In 1955, for the first time, the defendant, Martha Uerling, asserted a claim to the land described in paragraph 1 hereof, claiming it as well as the land west of said chute as accretions to said Government Lot 1 in Section 34 and to the Northeast Quarter of the Northeast Quarter of Section 33.

VI.

Said land, described in paragraph 1 hereof, is part of an island and accretion to an island as alleged in paragraph 2 hereof, and is not accretion to said Government Lot 1 in Section 34 or to the Northeast Quarter of the Northeast Quarter of Section 33, but even if it were accretion to said last mentioned parcels of land, the plaintiff nevertheless perfected his title thereto by adverse possession as alleged in paragraph 2 hereof, prior to December 15, 1949, and prior to any disturbance of his possession by the defendant,

Martha Uerling, and nothing has since occurred which would deprive plaintiff of his title to said land.

VII.

There are persons who appear, or may appear, to have some claim of interest in, right or title to, or lien upon the property described in this paragraph, and the claim of such persons does not appear of record in and by their respective names in Washington County, Nebraska, and plaintiff, after diligent investigation and inquiry is unable to ascertain and does not know the names or whereabouts, if in this State, or the residences of such persons, and they are therefore designated herein as "all persons having or claiming any interest in and to the following described real estate, to-wit:

Beginning at a point 399.4 feet east of the Southwest corner of the Northwest Quarter of the Northwest Quarter of Section 34, Township 17 North, Range 13 East of the 6th P.M., Washington County, Nebraska, said point being on the Quarter-Quarter line, thence North 13°30′ West, a distance of 148.5 feet, thence North 50°45′ East, a distance of 1089.2 feet, thence North 61° East, a distance of 1003.2 feet to Government meander corner between Sections 27 and 34, Township 17 North, Range 13 East of the 6th P.M., Washington County, Nebraska, thence east on said section line a distance of 1525 feet to a point on the West bank of the Missouri River, thence Southwesterly along the West bank of the Missouri River a distance of 1450 feet to a point on the North line of Lot 2, Section 34, Township 17 North, Range 13 East of the 6th P.M., Washington County, Nebraska, extended, thence West on said line to the place of beginning, all being in the North Half of the North Half of Section 34, Township 17 North, Range 13 East of the 6th P.M., Washington County, Nebraska,

real names unknown." The defendants, Helen M. Matters, Jacob J. Jobst and Annie Jobst, his wife, Bernard J. Jobst and Emma S. Jobst, his wife, appear to claim or may appear to claim some right, title, interest, estate in or lien on the premises last above described. None of the named defendants, and none of said defendants whose names are unknown have any right, title or interest in said real estate, and any interest which any of them may have had in said real estate had been barred by the statute of limitations long before the filing of this suit.

VIII.

By virtue of the facts set out above, there is cast a cloud upon the title of plaintiff in the real estate described in paragraph 1 hereof, which prevents the quiet use and enjoyment of said premises, and which tends to impair and lessen the value of the same, and will, unless plaintiff's title as against the defendants is quieted and established, cause plaintiff irreparable injury and that plaintiff has no adequate remedy at law.

WHEREFORE, plaintiff prays that his title to said real estate described in paragraph 1 hereof be quieted and confirmed in him as against each of said defendants, including all persons having or claiming any interest in said real estate, real names unknown, and that each of them be forever enjoined from asserting any claim or interest in said real estate or any portion thereof; and plaintiff prays for such other and further relief as may be just and equitable in the premises.

RICHARD E. KRIMLOFSKI, Plaintiff
By: ROY I. ANDERSON and
SWARR, MAY, ROYCE, SMITH, ANDERSEN & ROSS.
His Attorneys

STATE OF NEBRASKA }
COUNTY OF DOUGLAS } ss.

RICHARD E. KRIMLOFSKI, being first duly sworn, on oath deposes and says that he is the plaintiff in the above entitled action; that he has read the foregoing amended petition, and that the facts stated therein are true as he verily believes.

RICHARD E. KRIMLOFSKI

SUBSCRIBED in my presence and sworn to before me this 1st day of April, 1961.

EDSON SMITH,
Notary Public

Filed at 9:00 A.M. Apr. 6, 1961.
CHRIS K. BENDORF
Clerk District Court

EXHIBIT 'E'

IN THE DISTRICT COURT OF WASHINGTON COUNTY, NEBRASKA

Case No. 5645, Doc. Q, Page 299

RICHARD E. KRIMLOFSKI,

Plaintiff,

vs.

HELEN M. MATTERS, a single person; Jacob J. Jobst and Annie Jobst, his wife; Bernard J. Jobst and Emma S. Jobst, his wife; Martha Uerling, a single person; and all persons having or claiming any interest in and to the following described real estate, to-wit: Beginning at a point 399.4 feet East of the Southwest corner of the Northwest Quarter of the Northwest Quarter of Section 34, Township 17 North, Range 13 East of the 6th P.M., Washington County, Nebraska, said point being on the Quarter-Quarter line, then North 13°30′ West, a distance of 148.5 feet, thence North 50°45′ East, a distance of 1089.2 feet, thence North 61° East, a distance of 1003.2 feet to

Government meander corner between Sections 27 and 34, Township 17 North, Range 13 East of the 6th P.M., Washington County, Nebraska, thence East on said section line a distance of 1525 feet to a point on the West bank of the Missouri River, thence Southwesterly along the West bank of the Missouri River a distance of 1450 feet to a point on the North line of Lot 2, Section 34, Township 17 North, Range 13 East of the 6th P.M. extended, thence West on said line to the place of beginning, all being in the North Half of the North Half of Section 34, Township 17 North, Range 13 East of the 6th P.M., Washington County, Nebraska,

Defendants.

DECREE

This case came on for trial by the Court upon the issues as made up by the pleadings. Plaintiff appeared in person and by his attorney, Edson Smith. Defendant, Martha Uerling, appeared in person and by her attorney, Paul I. Manhart. The other defendants listed and described in the caption of the above-entitled case, failed to make any appearance, although due and legal service of process was made upon all of the defendants in the manner and form provided by law, and default was duly filed and entered against the defendants other than Martha Uerling, which default is incorporated in this decree and made a part hereof as though copied herein. Evidence was heard in this case on November 6, 7, 8, 9, and 10, 1961. On November 11, 1961, at the request of the parties, the undersigned, the District Judge presiding at said trial, accompanied by counsel for the parties, inspected the disputed land and adjoining land referred to in the exhibits in the case and in the testimony. Thereafter, counsel for the parties submitted briefs to the Court, and on February 15, 1962 presented their oral arguments to the Court. The matter was thereupon submitted to the Court. And now upon consideration

of the pleadings and the evidence, and being fully advised in the premises—

1. The Court finds generally as to the following described real estate in favor of the plaintiff, Richard E. Krimlofski, and that the allegations of his amended petition are true, and that he is the owner in fee simple of a tract of land described as follows:

> Beginning at a point on the North line of Section 34, Township 17 North, Range 13 East, 895.6 feet East of the Northwest corner of said Section 34 and assuming the North line of said Section to be due East; thence continuing East a distance of 2582.80 feet to the West bank of the Missouri River; thence following the meander of said West bank, South 9°27'30" West a distance of 307.4 feet; thence South 15°03'30" West a distance of 294.7 feet; thence South 23°59' West a distance of 800.0 feet to a point on the East-West Quarter-Quarter line of Section 34; thence West along the Quarter-Quarter line (Said Quarter-Quarter line being parallel with the North line of Section 34) a distance of 2587.5 feet to the center of a dry chute; thence North 19°04' East along said center of a dry chute a distance of 1396.62 feet to the point of beginning, lying in the North Half (N½) of the North Half (N½) of Section 34, Township 17 North, Range 13 East of the 6th P.M. in Washington County, Nebraska, and containing 81.58 acres more or less;

that said land includes part of what was formerly an island in the Missouri River, together with accretion extending from said island both to the East and West thereof; that the accretions to said island extending from it to the West eventually met and joined the accretions to the West bank of the Missouri River at the center line of the chute referred to in the above description, which chute was the remnant of the former channel of the Missouri River; that the plaintiff, Richard E. Krimlofski, has maintained actual,

open, notorious, exclusive, continuous, and adverse possession of the said island and the accretions thereto contained in the above description for more than ten years prior to 1955, the year in which this suit was filed; that plaintiff's said adverse possession of said island commenced in 1926 or shortly thereafter, and of the accretions thereto from the time they appeared, and continues to the present time, subject only to the interference therewith by the defendant, Martha Uerling, commencing in August of 1955; and that by reason of the facts aforesaid, the said plaintiff, Richard E. Krimlofski, is entitled to a decree quieting title thereto in him against the defendant, Martha Uerling, and all the other defendants herein, and the Court finds generally against the defendant, Martha Uerling, on her cross-petition as to the above described real estate.

2. The Court finds as to the following described real estate generally in favor of the defendant, Martha Uerling, and that with regard thereto, the allegations of her cross-petition are true, and that she is the owner in fee simple of a tract of land described as follows:

> The Northeast Quarter (NE¼) of the Northeast Quarter (NE¼) of Section 33 and that part of the Northwest Quarter (NW¼) of the Northwest Quarter (NW¼) of Section 34 described as follows: beginning at the Northwest corner of Section 34; thence East along the North line of said Section 34 a distance of 895.6 feet to the center line of a dry chute; thence South 19°04′ West along the center line of said chute a distance of 1396.62 feet to a point on the Quarter-Quarter line South of the North line of Section 34; thence West along the aforesaid Quarter-Quarter line a distance of 439.50 feet to the Southwest corner of the Northwest Quarter (NW¼) of the Northwest Quarter (NW¼) of Section 34; thence North along the section line a distance of 1320 feet to the point of beginning; all in Township

17, North, Range 13 East of the P.M. in Washington County, Nebraska;

that the above-described real estate was acquired by the defendant, Martha Uerling, by purchase and as accretion to land purchased by her; that the defendant, Martha Uerling, and her predecessors in title have been in open, notorious, exclusive, continuous and adverse possession of the above-described real estate for more than ten years last prior to the commencement of this action, and during all of that time asserted title to the said premises against all persons whomsoever.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court that the plaintiff, Richard E. Krimlofski, is the lawful owner in fee simple of the following described real estate:

Beginning at a point on the North line of Section 34, Township 17 North, Range 13 East, 895.6 feet East of the Northwest corner of said Section 34 and assuming the North line of said Section to be due East; thence continuing East a distance of 2582.80 feet to the West bank of the Missouri River; thence following the meander of said West bank, South 9°27'30" West a distance of 307.4 feet; thence South 15°03'30" West a distance of 294.7 feet; thence South 23°59' West a distance of 800.0 feet to a point on the East-West Quarter-Quarter line of Section 34; thence West along the Quarter-Quarter line (Said Quarter-Quarter line being parallel with the North line of Section 34) a distance of 2587.5 feet to the center of a dry chute; thence North 19°04' East along said center of a dry chute a distance of 1396.62 feet to the point of beginning, lying in the North Half (N½) of the North Half (N½) of Section 34, Township 17 North, Range 13 East of the 6th P.M. in Washington County, Nebraska, and containing 81.58 acres more or less;

that title to said real estate be, and it hereby is quieted

in the said plaintiff against the claims or apparent claims of the defendants or of any or each of them, of whatever kind or character, and that the defendants and each of them and all persons claiming by, through or under them, be and they hereby are forever enjoined from claiming or asserting any interest or ownership of any kind or character in the above-described real estate or any portion thereof, and from interrupting the use, enjoyment, or possession of, or in the above-described real estate by the plaintiff, Richard E. Krimlofski.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the defendant, Martha Uerling, is the lawful owner in fee simple of the following described real estate, to-wit:

> The Northeast Quarter (NE¼) of the Northeast Quarter (NE¼) of Section 33 and that part of the Northwest Quarter (NW¼) of the Northwest Quarter (NW¼) of Section 34 described as follows: beginning at the Northwest corner of Section 34; thence East along the North line of said Section 34 a distance of 895.6 feet to the center line of a dry chute; thence South 19°04' West along the center line of said chute a distance of 1396.62 feet to a point on the Quarter-Quarter line South of the North line of Section 34; thence West along the aforesaid Quarter-Quarter line a distance of 439.50 feet to the Southwest corner of the Northwest Quarter (NW¼) of the Northwest Quarter (NW¼) of Section 34; thence North along the section line a distance of 1320 feet to the point of beginning; all in Township 17, North, Range 13 East of the 6th P.M. in Washington County, Nebraska;

that title to said real estate be, and it hereby is quieted in the defendant, Martha Uerling, in fee simple against the claims or apparent claims of the plaintiff and of the other defendants herein, and of any and

each of them, of whatever kind and character, and that the plaintiff and the other defendants herein and each of them, and all persons claiming by, through or under them, be and they hereby are forever enjoined from claiming or asserting any interest or ownership of any kind or character in the above-described real estate or any portion thereof, and from interrupting the use, enjoyment or possession of, or in the above-described real estate by the defendant, Martha Uerling.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED by the Court that the costs of this action be, and they hereby are taxed against the defendant, Martha Uerling, and in favor of the plaintiff, Richard E. Krimlofski, and said plaintiff shall recover his costs herein expended taxed in the amount of $67.46.

DATED this 12th day of March, 1962.

BY THE COURT,
DONALD BRODKEY
District Judge

Prepared by:
SWARR, MAY, ROYCE, SMITH, ANDERSEN & ROSS
By EDSON SMITH
Attorneys for Plaintiff,
Richard E. Krimlofski

Receipt of a copy of the above proposed decree is acknowledged this 9th day of March, 1962, together with notice that it will be presented to the Court at Blair, Nebraska, at 9:30 A.M. on March 12, 1962.

PAUL I. MANHART
Attorney for Defendant

EXHIBIT 'F'

SUPREME COURT OF NEBRASKA

RICHARD E. KRIMLOFSKI, Appellee,

v.

HELEN M. MATTERS, et al., Appellees,

Impleaded with MARTHA UERLING, Appellant.

No. 35296

February 8, 1963.

Appeal from the district court for Washington County: Donald Brodkey, Judge. Affirmed.

Heard before Simmons, C. J., Carter, Messmore, Yeager, Spencer, Boslaugh, and Brower, JJ.

Brower, J.

This was an action brought in the district court for Washington County, Nebraska, by the plaintiff and appellee Richard E. Krimlofski against the defendant and appellant Martha Uerling and other defendants to quiet title to real estate lying on the west bank of the Missouri River. All defendants except the appellant Martha Uerling defaulted.

The plaintiff's petition sought to quiet title to a tract of land designated in exhibit No. 1 as Tract C, and described by metes and bounds in the judgment of the trial court. The tract is bounded on the west by the centerline of a chute or dry run, on the east by the present west bank of the Missouri River, on the north by the north line of Section 34, Township 17 North, Range 13 East of the 6th P.M., and on the south by the south line of Government Lot No. 1 of said section, assuming both of said lines were extended eastward to the river. The tract contained 81.58 acres. Government Lot 1 or Lot 2 may be referred to simply as Lot 1 or 2.

Plaintiff's asserted claim of ownership was by adverse possession of an island formed in the river and accretion and reliction east towards the river and the west to the chute.

Defendant by her answer and cross-petition claimed the premises as owner by a chain of title from the

United States to said Lot 1 on the west bank of the river and accretion thereto, and adverse possession in herself and predecessors in title. Her cross-petition asked that her title be quieted as against all parties to the action.

A trial to the court resulted in a finding and judgment for the plaintiff. Defendant's motion for a new trial being overruled she has brought the cause to this court on appeal.

The defendant's assignments of error, so far as need be considered by us, are that the judgment is contrary to the law and the evidence. She alleges that the trial court erred in admitting certain evidence but neither in the assignment of error nor the motion for new trial is the evidence referred to set out, though it is alluded to in the argument, and it cannot be considered on appeal.

Since 1912, plaintiff made a hobby of fishing and hunting and protecting wild animals. In 1922, he obtained permission from James Snodderly, the owner of Lot 2 to the south of Lot 1, to use his river-front as a headquarters and boat landing. The landing was about 200 feet north of Snodderly's house. Plaintiff brought there at first two inboard motorboats and rowboats. A road running north out of Florence known as the River Road ran through Lots 1 and 2, leaving about 50 feet of ground between this road and the landing at Snodderly's. In the year 1926, Snodderly gave Krimlofski the land in Lot 2 which lay east of the road. The plaintiff by means of his boats had access to the island from the landing. Snodderly's house burned in 1930 and plaintiff built and paid for another for him with an understanding that he be given Lot 2. Snodderly died without signing any papers and plaintiff later bought the lot at public sale. In 1926, a sandbar had formed an island east of the Snodderly Lot which extended north beyond the north

line of Lot 1, and south in front of the place south of the Snodderly Lot known as the "Burket Place." Lot 1, according to the evidence of plaintiff, had then been washed away except for a few acres. In 1926, plaintiff put duck blinds on different parts of the island. Thereafter, he hunted and fished thereon and invited his friends. He ordered away those not invited and patrolled the island at times. At different times he brought houseboats and installed several places to anchor them on both sides of the island. Further details of plaintiff's evidence as to his occupancy will not be set out as plaintiff's evidence was substantially the same in this action with respect to the premises in suit as it was on his behalf in a previous case in this court concerning the land claimed by Burket lying further south on this same island. Burket v. Krimlofski, 167 Neb. 45, 91 N. W. 2d 57. Plaintiff's witnesses testified much the same as to the occupancy in both cases and there are many photographs in evidence showing the presence of the witnesses at and near the disputed premises and in the plaintiff's boats at outings throughout the years 1926 to 1948.

In 1926, and for many years thereafter, plaintiff and several witnesses testified that a large body of water about 200 feet in width ran between the island and the bank of the river to the west. Plaintiff's houseboats made trips up this waterway and around the island. As the years went by the trees and vegetation grew thereon. The willows held the silt and debris from floods and the island became larger. By accretion and reliction the island extended farther into the river on the east side and towards the shore on the west. This process was greatly accelerated after revetments were built to control the river north of the island in 1936. The western shore extended in the same manner and in time it was divided from the accretion from the island only by a small stream de-

nominated throughout the case as "the chute." Later except in times of high water it became but a "dry run." Plaintiff testified the trees in the center of the island were larger and tapered off in height toward the chute; and that those on the higher land to the west likewise were larger and became shorter as they approached the chute.

A surveyor who testified for the plaintiff introduced more than 55 maps made by government engineers in their work on the river which showed the island, the river on its west, and the growth of the island over the years. Some of the earlier maps show but a small spot where the island was, and on some it cannot be seen. The witnesses however testified that at times the bar was covered by high water. The surveyor also testified the maps made by the government engineers were sometimes made to picture the shore from boats, and islands were not always noticed. In some instances only the shoreline or the main course of the river was desired to be traced. We think these show the island and its growth and acceleration after the time the revetments were built in 1936. Aerial photographs were likewise introduced that tend to show this also.

Defendant produced a witness Andreas Andreason whose testimony sharply conflicted with this evidence. He testified that in 1936 and 1937 he cut and hauled willows over the land involved for government use in riprapping; that Lot 1 and its accretion, from which the defendant's claim stems, extended three-quarters of a mile to the river; that he drove right through it; that there was no chute off the river though water was brought down to the lower areas at times through a creek or draw; and that the so-called "chute" was a dry slough, dry enough on the land in suit to haul willows with a team and wagon to the east river bank.

This conflicts with several maps prepared by the Corps of Army Engineers at different times in 1936.

They are numbered in sequence as exhibits 58-16 to 58-22 in which the island in question is plainly shown, together with the river on the west thereof with its soundings placed on the exhibits. The water at all times shown on those maps appears at least 3 or 4 feet deep and on those dated in July of that year, 12 to 20 feet in depth.

It likewise conflicts with one of the defendant's witnesses who testified that there was a split channel and an island in the year 1936.

The government patent at entry No. 23 of the defendant's abstract of title dated October 16, 1903, shows the area in Government Lot 1 to be 34.20 acres. The deed at entry No. 36, dated September 26, 1910, and another entry No. 37, dated January 18, 1911, both describe Lot 1 as "9 acres more or less with all accretions and increases." It would appear that at this time most of Lot 1 was considered by the grantors to be washed away.

The testimony of the remaining witnesses of the defendant, one her brother-in-law and three her nephews, was largely negative in character. It is to the effect that they were on the premises in question on occasions and didn't see the signs, fences, blinds, or paths testified to by the plaintiff nor did they meet him or anyone thereon at those times. Morover most of these witnesses did not testify concerning the premises prior to 1940 at which time the nephews were quite young.

The defendant received a deed from Emma Jacobus dated in December of 1949. The premises were therein described as the northeast quarter of the northeast quarter of Section 33, and Lot 1 of Section 34, Township 17 North, Range 13 East of the 6th P.M. No accretion is mentioned therein. The purchase agreement dated in November 1949 between the same par-

ties contains the same description followed by the words "containing 40 acres more or less." In 1955, defendant procured a second deed from Emma Jacobus, dated August 12, 1955, and recorded that day, describing Lot 1 of said section, followed by a metes and bounds description of the land in question to the banks of the Missouri River. The defendant's agent bulldozed plaintiff's fence down in August 1955, which was followed by plaintiff bringing this action on August 19, 1955. Emma Jacobus testified by deposition. She testified that she and her deceased husband, who owned the land as joint tenants, bought it in 1927 or 1928; and that the road then ran at the foot of the hill and the river was right next to the road. They both lived at Florence until his death after which she continued to reside there. At the time of her deposition she lived at the Florence Home for the Aged. The Jacobuses placed no buildings, improvements, or fences on the premises. They had no boats and took no outings or picnics thereon. After her husband's death in 1943 she viewed it from the road only as she drove past it on two or three occasions.

It seems clear that the defendant's prodecessor in title was not even conscious of the existence of extensive accretion land when she entered into the purchase agreement with the defendant. Neither is there evidence of any operations on the land in suit by the defendant or her agents after her purchase except the testimony of "walking through" it at infrequent intervals. Her first deed was dated within 10 years of the filing of this suit and no right by adverse possession could accrue during the period of her ownership.

The rules of law applicable to this action are all set out in the case of Burket v. Krimlofski, *supra*, involving similar claims on this same island. We shall now state them. "The claim of title to land by adverse possession must be proved by actual, open, exclusive,

and continuous possession under a claim of ownership for the statutory period of 10 years. The possession is sufficient if the land is used continuously for the purpose to which it may be in its nature adapted.

"Title by prescription may be acquired to an island in a stream, which otherwise would belong to a riparian owner. Accretions to an island so held and occupied for more than the statutory period belong to the owner of the island, and not to the riparian owner to whom the island or a part of it would otherwise belong.

"Land uncovered by a gradual subsidence of water is not an accretion but a reliction. The same law applies to both these forms of addition to real estate which are held to be the property of the abutting landowner.

"Accretion is the process of gradual and imperceptible addition of solid material, called alluvion, thus extending the shore line out by deposits made by contiguous water, or by reliction, the gradual withdrawal of the water from the land by the lowering of its surface level from any cause.

"Where by the process of accretion and reliction, the water of a river gradually recedes, changing the channel of the stream and leaving the land dry that was theretofore covered by water, such land belongs to the riparian owner.

"The fact that accretion is due, in whole or in part, to obstructions placed in the river by third parties does not prevent the riparian owner from acquiring title thereto.

"Where the accretion commences with the shore of the island and afterward extends to the mainland, or any distance short thereof, all the accretion belongs to the owner of the island; but, where accretions to the

island and to the mainland eventually meet, the owner of each owns the accretion to the line of contact.

"Land, to be riparian, must have the stream flowing over it or along its border."

From the evidence in this case it appears the claims of the plaintiff as to occupation of the island openly, exclusively, and continuously under claim of ownership for more than 10 years following the late 1920's, were amply proved by the preponderance of the evidence. His use of the island was for the purposes to which it could be adapted. Further we find the preponderance of the evidence shows that the land between the island and the chute was accretion land attached to the island and not the mainland. Also the defendant failed in her proof concerning any title acquired to the lands in suit by adverse possession.

It follows that the judgment of the district court was right and should be affirmed.

Affirmed.

Simmons, C. J., not participating.

ORDER GRANTING LEAVE TO FILE AMENDED ANSWER AND COUNTERCLAIM

IT IS ORDERED that leave to file an amended answer and counterclaim be, and the same is hereby granted subject to the requirement, however, that the answer of the State of Iowa, as further amended, be filed in printed form in compliance with the Rules of the Supreme Court, with the Clerk of the Supreme Court, and served as required by such Rules upon the plaintiff.

IT IS ORDERED that the plaintiff shall be and is hereby granted 30 days from the filing of said amended answer and counterclaim in the Supreme Court within which to answer or otherwise plead to said counter-claim.

Dated Nov. 26, 1965.

WALTER L. POPE
Judge, United States Circuit Court of Appeals
Ninth Circuit

Special Master

PROOF OF SERVICE

I, Sewell E. Allen, Special Assistant Attorney General of the State of Iowa and member of the Bar of the Supreme Court of the United States, hereby certify that on January ...., 1966, I served a copy of the foregoing Amended Answer and Counterclaim of Defendant, State of Iowa, to Plaintiff's Bill of Complaint, by depositing the same in a United States Post Office, with first class postage prepaid, addressed to:

HONORABLE FRANK B. MORRISON
Governor of the State of Nebraska
State Capitol
Lincoln, Nebraska

HONORABLE CLARENCE A. H. MEYER
Attorney General of Nebraska
State Capitol
Lincoln, Nebraska

JOSEPH R. MOORE
Special Assistant Attorney General of Nebraska
1028 City National Bank Building
Omaha, Nebraska

HOWARD H. MOLDERHAVER
Special Assistant Attorney General of Nebraska
1100 First National Bank Building
Omaha, Nebraska

such being their post office addresses.

SEWELL E. ALLEN
Special Assistant Attorney General
State of Iowa

FILED
FEB 1 2 1966
JOHN F. DAVIS, CLERK

In The
Supreme Court of the United States
October Term, 1964

No. 17, Original

STATE OF NEBRASKA, PLAINTIFF,

V.

STATE OF IOWA, DEFENDANT.

ANSWER TO COUNTERCLAIM

CLARENCE A. H. MEYER
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JOE CHRISTENSEN, INC., 1821 O Street, Lincoln, Nebraska



In The

Supreme Court of the United States

October Term, 1964

No. 17, Original

STATE OF NEBRASKA, PLAINTIFF,

V.

STATE OF IOWA, DEFENDANT.

ANSWER TO COUNTERCLAIM

Comes now the plaintiff, the State of Nebraska, and for answer to the Counterclaim of defendant, State of Iowa, denies generally all matters pleaded in defendant's Amended Answer which are incorporated in the Counterclaim except as such allegations admit the allegations of the Complaint and Plaintiff further alleges in Answer to the Counterclaim:

I.

Plaintiff admits the allegations contained in Paragraph I of the Counterclaim.

II.

Plaintiff admits the allegations contained in Paragraph II of defendant's Counterclaim.

III.

Plaintiff admits the allegations contained in Paragraph III of defendant's Counterclaim except plaintiff denies that part which states "The dividing line between plaintiffs' and defendant Krimlofski's accretion lands was defined as the thread of a dried-up chute of the Missouri River, a chute which had been the main channel of the river until the U.S. Army Corps of Engineers caused it to move from the west side to the east side of the island in the late 1930's." The quoted sentence of the Counterclaim refers to parts of the opinion not a critical consideration in the proceedings and not determinative of the question of the location of the Iowa-Nebraska Boundary in the 1930's or prior thereto.

IV.

Plaintiff admits the allegations contained in paragraph IV of the Counterclaim.

V.

Plaintiff denies the allegations contained in paragraph V of the Counterclaim. Plaintiff is without present complete information as to the nature and extent of the evidence adduced in the two Krimlofski cases referred to. Plaintiff further alleges that the issues in those cases being different from the issues herein, the evidence in those cases is neither conclusive nor determinative. Plaintiff further specifically denies that the island referred to formed east of the main channel of the Missouri River, that the island remained east of the main channel until late in the 1930's, or that the chute between the island and the Nebraska bank was the main channel.

VI.

Plaintiff denies the allegations contained in Paragraph VI of the Counterclaim that any "boundary line" between the States of Iowa and Nebraska has ever been determined except in the area of Carter Lake, Iowa, and plaintiff admits the remaining allegations of Paragraph VI of the Counterclaim.

VII.

Plaintiff denies the allegations contained in Paragraph VII of the Counterclaim. As stated in Paragraph V hereinabove, plaintiff denies that the islands and accretions thereto referred to in the two Krimlofski cases formed within the State of Iowa or that the boundary line was in the channel west of the island. Plaintiff further denies that the island was owned by the State of Iowa before 1943 or that the lands are owned by the State of Iowa today. In this regard, plaintiff further alleges on information and belief that in the cases of *Burkett* v. *Krimlofski* and *Krimlofski* v. *Matters*, proper jurisdiction was obtained over any parties having or claiming any interest in the land involved including the State of Iowa. After the passage of ten years from the effective date of the Compact, the State of Iowa was subject to defeasance of any title or claim of title it may have had to lands within the jurisdiction of the State of Nebraska, as these lands were, according to defendant's admission.

VIII.

Plaintiff denies the allegations contained in Paragraph VIII of defendant's Counterclaim except as such allegations may constitute admissions of plaintiff's Complaint. The last sentence of such paragraph is contrary to defendant's Exhibit "F" and is also immaterial.

IX.

Plaintiff denies the allegations in paragraph IX of defendant's Counterclaim that the State of Nebraska violated the Compact of 1943 in the cases of *Burkett* v. *Krimlofski* and *Krimlofski* v. *Matters* and plaintiff denies the rest of the allegations of Paragraph IX for the reason that such allegations are not sufficiently definite to permit plaintiff to ascertain the truth or accuracy thereof.

X.

Plaintiff denies the allegation contained in paragraph X of defendant's Counterclaim for the reason that the decisions in the two cited cases are not contrary to the Constitution of the United States and for the further reason that plaintiff is unable to determine from the Counterclaim the "Public Acts, Records and Judicial Proceedings" to which the defendant has reference.

WHEREFORE, plaintiff, State of Nebraska, prays for dismissal of the Counterclaim and renews the Prayer of the original Complaint herein.

CLARENCE A. H. MEYER
Attorney General of Nebraska
JOSEPH R. MOORE
Special Assistant Attorney
General of Nebraska
HOWARD H. MOLDENHAUER
Special Assistant Attorney
General of Nebraska
Attorneys for Plaintiff.

PROOF OF SERVICE

I, Clarence A. H. Meyer, Attorney General of the State of Nebraska, and a member of the Bar of the Supreme Court of the United States, hereby certify that on February —, 1966, I served a copy of the foregoing Answer to Counterclaim by depositing same in a United States Post Office, with first class postage prepaid, addressed to:

HONORABLE HAROLD E. HUGHES,
Governor of the State of Iowa
State Capitol
Des Moines, Iowa

HONORABLE LAWRENCE F. SCALISE
Attorney General of the State of Iowa
State Capitol
Des Moines, Iowa

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Assistant Attorney General of Iowa
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Onawa, Iowa

such being their post office addresses.

Clarence A. H. Meyer
Attorney General
State of Nebraska
State Capitol Building
Lincoln, Nebraska

Supreme Court, U. S.
FILED
NOV 9 1971
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 17 Original

STATE OF NEBRASKA, Plaintiff

v.

STATE OF IOWA, Defendant

REPORT OF SPECIAL MASTER

JOSEPH P. WILLSON
Senior District Judge
Special Master

SMITH BROS., LAW PRINTERS, 650 SECOND AVENUE, PITTSBURGH, PA. 15219

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ISSUES TO BE DECIDED

I. *Has Iowa violated the "Iowa-Nebraska Boundary Compact of 1943?"*

(a) The Special Master reports findings and conclusions that Iowa has violated the Iowa-Nebraska Compact of 1943 by claiming ownership of Nottleman and Schemmel Islands.

II. *Where all land in controversy north of Omaha is located in the State of Iowa contiguous to the Missouri River, does the Nebraska law of accretion operate to create riparian rights within the territorial limits of Iowa?*

(a) The Special Master says No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 17 Original

STATE OF NEBRASKA, Plaintiff

v.

STATE OF IOWA, Defendant

REPORT OF SPECIAL MASTER

I. PRELIMINARY STATEMENT

In support of its motion to file its complaint in this Court, Nebraska stated:

"The purpose of this litigation is to resolve the controversy between the Plaintiff, The State of Nebraska, and the Defendant, The State of Iowa, growing out of the actions of the State of Iowa in attempting to unilaterally abrogate the Iowa-Nebraska Boundary Compact of 1943 and in attempting to assert title to lands which prior to 1943 had been within the jurisdiction of the State of Nebraska and title to which had been in citizens of the State of Nebraska."

On March 18, 1963 the State of Iowa brought suit in the State Court of Mills County, Iowa, in a case captioned *State of Iowa, Plaintiff v. Darwin Merrit Babbit, et al.,* Equity No. 17433, which is recited in Paragraph XI in the complaint in this case and which case is still pending and in which Iowa seeks to quiet title in the sovereign State of Iowa to Nottleman Island.

Also, on March 26, 1963 the State of Iowa filed suit in the State Court of Fremont County, Iowa, captioned *State of Iowa, plaintiff v. Henry E. Schemmel, et al., defendants,* Equity No. 19765, in which Iowa sought and still seeks to quiet title in the State of Iowa to the island known as Schemmel Island.

These two suits and others brought by Iowa precipitated the instant litigation.

Nebraska contends that the titles to these two islands were "good in Nebraska" on the date of the 1943 Compact. These islands are now in Iowa but, says Nebraska, they are ceded lands under Section 2 of the Compact and, therefore, Iowa must recognize the private Nebraska titles, as provided in Section 3 of the Compact.

Nebraska says that Iowa should be enjoined from further prosecuting these two lawsuits. Iowa's response is that these two islands were formed on the Iowa side of the original boundary line and always have been in the State of Iowa, and that they are not lands ceded to Iowa under the Compact.

In addition to Nottleman and Schemmel Islands, Nebraska charges Iowa with wrongfully claiming 21 recreation land areas along the Missouri River based on

claims by Iowa under its "common law" to areas as beds or abandoned beds or islands arising in the bed of the Missouri River. Iowa's response to this charge by Nebraska is that Iowa claims to own 32 areas in Iowa and in the immediate vicinity of the Missouri River. Two areas she claims entirely by conveyance. Thirty of these she claims at least in part by application of her common law upon the facts as to how these 30 areas were formed. Eight of these 30 areas and part of a ninth came into existence prior to 1943. Twenty-one and part of the 22nd of these 30 areas have come into existence since 1943.

The land area claimed by Iowa totals over 14,000 acres. Nottleman Island alone contains 1550 acres, and Schemmel Island contains 550 acres. All the land involved herein is unquestionably worth several hundred thousand dollars. However, in deciding this case it is unnecessary to determine the value of any of this land.

II. PRETRIAL AND TRIAL

On April 26, 1965 The Honorable Walter L. Pope, Senior Judge, Court of Appeals for the Ninth Circuit, was appointed Special Master in this case in place of The Honorable J. Warren Madden, resigned. Judge Pope conducted extensive pretrial proceedings. He held conferences with counsel, directed depositions and further pleadings, and the submission of pretrial statements.

Nebraska's pretrial statement comprised 181 pages; Iowa's pretrial statement comprised some 279 pages. Thereafter, supplemental pretrial statements were filed by each state.

Due to ill health, Judge Pope resigned as Special Master in June 1968. The Court then appointed The Honorable Charles Vogel as Special Master, but he served only a brief period and resigned; and my appointment as Special Master in this case was made on October 21, 1968.

A pretrial conference was held of all counsel at Pittsburgh on January 22, 1969, and the trial of the case was fixed to commence on April 9, 1969 at Omaha.

Nebraska took 12 trial days to present its evidence, and Iowa's evidence was presented thereafter over a period of 12 trial days. A trial transcript of 3,720 pages was compiled. At pretrial counsel marked some 3,500 exhibits, but they estimate that only 800-900 exhibits were actually admitted in evidence at the trial. Thereafter each state prepared printed briefs and resumes' of evidence. Oral argument was held at Omaha beginning September 29, 1970 and continuing 4 days. At my suggestion during the course of the oral argument

counsel mentioned the exhibit numbers in support of the point then being made. The oral arguments have been printed and will be submitted with the exhibits.

It was noticed in Judge Pope's pretrial proceedings that he gave wide latitude to counsel with respect to the several contentions of each state. During the trial before me, I followed the admonition of the Court in *Virginia v. West Virginia,* 246 U.S. 565, 590. As each litigant is a sovereign state, it was my desire that both states be afforded full opportunity to be heard and that all propositions of law and fact as urged be given consideration. All evidence offered by each state was admitted and considered. However, presentation of the so-called "eyeball" cumulative testimony based upon the recollection of various elderly witnesses as to events and situations which they observed many years previously was to some extent discouraged.

It may be noted at this point also that contrary to litigation between private parties the lapse of time between the filing of this case and its termination has tended to allay excitement and tense feelings.

These states have had river boundary problems for over 100 years. The language in the address of Charles Warren, Esquire, entitled "THE SUPREME COURT AND DISPUTES BETWEEN STATES" at the College of William and Mary on Charter Day in 1940 is appropo. He said:

> "One important phase of all these suits is to be particularly noted, namely, that in many cases, the mere pendency of the suit in the Court for long periods of time has tended to allay interstate feelings and to bring about amicable settlement. Lapse of time is a great mollifier — that 'old common

arbitrator, Time,' as Shakespeare termed it. A chance to cool off is the frequent solution of many differences arising from irritation, anger, and unreason. Time, moreover, gives opportunity to establish the facts involved, and to make clear the real cause of the disagreement as distinguished from the ostensible factors in the suit. Time absorbed in the preparation and trial often develops the fact that parties are not so far apart as at the beginning they supposed. The Court has thoroughly realized this emollient influence; and, while not countenancing unnecessary delays; it has regarded suits between states as demanding grave circumspection in taking of successive steps both by counsel in trial and argument and by the Court itself in its rulings." (Bulletin of The College of William and Mary in Virginia, Vol. 34, No. 5 (June 1940) pp 1-34).

Counsel in this case have expressed their satisfaction that all possible factual evidence necessary to a decision in this case has been presented to the Special Master. It should be noticed also that able and experienced counsel representing these states have been indefatigable in searching out evidence and the applicable decisions. The states are well represented by their respective counsel. Their summaries of the evidence, their briefs, and their submission of proposed findings have resulted in clarifying and simplifying the complicated factual and legal issues.

As to the river area South of Omaha, Nebraska has two main grounds for relief:

FIRST: Its evidence was directed toward the contention that both Nottleman and Schemmel Islands were formed and arose on the west or Nebraska side of the Thalweg of the Missouri River. It contends this evidence shows that the main channel, which was the boundary line between the states, was east of the two islands on the date of the Compact.

SECOND: Nebraska contends that regardless of how land along navigable rivers may have formed, long acquiescence by one state in possession of territory by another is conclusive of the latter's sovereignty over that territory. Lapse of time is particularly significant in boundary and jurisdictional disputes and the state raising claims should not be benefited by its own delay in asserting those claims. Equitable principles support a determination that will least disturb rights and titles long regarded as settled and fixed by the people most to be affected. The fact that officers and representatives of both states, as well as the inhabitants, recognized that both Nottleman Island and Schemmel Island were in Nebraska prior to the compact should be controlling that these were Nebraska lands.

It is believed that Nebraska's evidence as to Nottleman and Schemmel Islands epitomizes the river problems which arose prior to the 1943 Compact as to the river boundary south of Omaha. But that same evidence bears on the solution of the whole controversy. It is believed that a judicial determination of this controversy requires a careful examination of the pre 1943 history of the Missouri River.

* * * * * * * *

In their submissions as evidence, each state has presented a pre-1943 history of the Missouri River. Nebraska has summarized a general history of the boundary problems prior to 1943, incorporating therein the Corps of Engineers Reports prior to 1943 and concluding with the enactment of the Compact. The history and the Engineers Reports are accepted as findings, and in large part the Nebraska report follows:

III. GENERAL HISTORY OF THE IOWA-NEBRASKA BOUNDARY PROBLEMS AS SUBMITTED BY NEBRASKA

A. Original Boundary and Litigation Between Nebraska and Iowa

The State of Iowa was admitted into the Union in 1846 with its westerly boundary as the "middle of the main channel of the Missouri River . . ." (Ex. P-2601). The State of Nebraska was admitted into the Union in 1867 with its easterly boundary described as "the middle of the channel of the said Missouri River" (Ex. P-2602). Over the years, the Missouri River has been notorious for the many natural changes and periodic flooding which occurred on numerous occasions. The result has been the creation of an alluvial plain between the bluffs on the Iowa side and the bluffs on the Nebraska side several miles in width, all of which has been part of the River from time to time. These changes have caused controversy and uncertainty all along the Iowa-Nebraska boundary.

In 1890 the State of Nebraska brought an original action in the Supreme Court of the United States against the State of Iowa to determine the boundary in the Carter Lake area. Although the Complaint (Ex. P-1722)

in that action refers specifically to Carter Lake, allegations were made by the State of Nebraska that the Missouri was a river of the first class, navigable by steamers of heavy tonnage, it flowed through lands of soft sand loam, and its banks were not protected by rocks or the roots of trees or other matter against the operation of the waters. Its current was rapid, flowing from five to ten miles an hour and its course was very circuitous, every few miles changing from one direction to another. The allegation was further made that the boundary or line dividing the States in the region described had never been settled, defined or established and people had settled in said lands and, because of the doubts excited by the disputes as to the boundary, defied the laws of both states.

Iowa answered in 1891 (Ex. P-1722) and, among other things, alleged:

> "Further answering, and by way of additional defense the defendant says that the Missouri river is a river of the first class; that the amount of water which flows down it is very large and varies greatly in amount; that within the limits and termini of the meander line described in the bill, it flows through a plain bounded by bluffs, which are four or five miles apart. The whole of the plain between said bluffs is composed of soft, friable, sandy loam, not protected against the action of the water and very easily susceptible thereto. It readily and rapidly yields to the force of the current and the banks formed of it afford a very slight resistance to the changes that the rapidly flowing river is constantly making. This plain is also level, being as low at the

base of the bluffs on either side as it is in the centre, and therefore the force of gravity does not help to confine the river to any certain part of it. The current of the Missouri river is very rapid, varying at different places and with the time of year, and the stage of the water from five to ten miles an hour. The river is subject to annually and semi-annually recurring freshets, usually occurring in June and April, popularly known as the 'June rises' and 'April rises' during which, for a few weeks, the amount of water flowing down the river is increased to many times its ordinary and usual volume and the river leaves its accustomed channel and spreads over a large part of the plain. During these freshets the process of change is very rapid, especially while the water is subsiding. While the water is up over the banks, it frequently cuts through the necks of bends, entirely forsaking its former channel, and while it is subsiding, it cuts away its bank on one side and builds them up on the other as rapidly as ten to one-hundred and fifty feet within twenty-four hours."

Iowa also alleged that the bed in which the Missouri River flowed during the periods of low water each year was altogether uncertain, and that its real bed was the whole of the plain before described, and "It is liable to flow in any portion of said plain, and has, in fact, within the memory of man, flowed over nearly every portion of it, except a few hundred acres in the north-western angle of the Iowa meander line, and, in view of the history and character of said river and plain, will probably do so again within as short a period.

Iowa then described the movement of the river in the area in controversy as follows:

> "The changes were so rapid that the river frequently cut away one bank and added to the other over one hundred and fifty feet in a single day and one hundred feet in twelve hours, and they were therefore perceptible, appreciable, and measurable. Strips of territory hundreds of feet wide and containing many acres, which at the beginning of the freshet were covered by the waters of the river, would within a few weeks or days be filled with earth and soil, and at the subsidence of the waters at the end of this short period appear as dry ground. Large tracts of ground covering many acres in extent were cut away by the river in a few days, and the current would flow where these tracts had been, and later in the same year, the waters would rapidly recede, depositing earth, and the identical tracts would again become dry ground. At various points within the limits of the termini aforesaid, land which was on the Nebraska side of the river was cut away rapidly, and the current flowed where said land had been, and then during the next freshed (sic) the river changed its course, leaving the said land far removed from the new bed of the stream."
>
> * * *
>
> "And the defendant alleges that the changes and facts above set forth are characteristic of the Missouri river between the two States, and that similar phenoma (sic) have frequently taken place, and may, from the character and history of said river and plain, be expected to take place in the future."

Iowa then alleged an avulsion and that it claimed jurisdiction over the land, maintained government thereon, and collected taxes therefrom and had asserted its authority and sovereignty over the land involved since the State of Iowa was admitted into the Union. Most of these same allegations were incorporated by Iowa into a cross bill.

In its opinion in the case of *State of Nebraska v. State of Iowa,* 143 U.S. 186 (Ex. P-2603, the court found that in 1877 the river above Omaha suddenly cut through the neck of an ox-bow and made a new channel and this constituted an avulsion. Consequently, the center line of the old channel remained the boundary between the states. The court went further and held that the usual principles concerning the laws of accertion and avulsion were applicable to the Missouri River, notwithstanding the rapidity of the changes in the course of the channel. The court said that this was true not only in respect to the rights of individual landowners, but also in respect to the boundary lines between the states. The boundary line between Iowa and Nebraska remained a varying line, so far as affected by these changes of diminution and accretion in the mere washing of the waters of the stream except in such places where the stream suddenly abandoned its old and sought a new bed as an avulsion.

The decree is then found at 145 U.S. 519 (Ex. P-2604) wherein the court described this fixed boundary line in the abandoned channel by metes and bounds. This is the well-known area of Carter Lake, Iowa, which borders Omaha on the right bank of the present Missouri River.

B. Nebraska Legislative History Prior to 1943

Following the decision in the first case of *Nebraska v. Iowa* and commencing in 1901, the legislative history of both Nebraska and Iowa is replete with references to attempts to settle the boundary problems between the two states. In 1901 the Nebraska legislature passed an act authorizing the Governor of the State of Nebraska to appoint three commissioners on behalf of the state to jointly meet with a like commission from the State of Iowa in agreeing upon a boundary line between the said states (Ex. P-1851). In 1903 the Nebraska legislature passed another act authorizing the Governor of Nebraska to appoint three commissioners on behalf of the state to act with a like commission from the State of Iowa in agreeing upon a boundary line between the states (Ex. P-1852). Again, in 1905, the Nebraska legislature adopted a resolution providing that the State of Nebraska would not claim title or ownership to lands then lying within the boundaries of the State of Iowa which have thereafter become within the boundaries of the State of Nebraska by virtue of the action of any commissions appointed by the states and ratified by the states (Ex. P-2301).

In 1913, the legislature of the State of Nebraska adopted an act providing for a boundary commission and the preamble states:

> "Whereas, the original boundary line between the states of Nebraska and Iowa along the river front of Douglas and Sarpy Counties in Nebraska, and Pottawattamie County in Iowa was changed by the great flood of 1881 so that a part of the original state of Iowa has for over thirty years been on the

west side of the present channel of the Missouri river and part of the state of Nebraska has been for over thirty years upon the east side of the present channel of the Missouri river, and

Whereas, under the rule of law in the United States, the state boundary in such cases still follows the old channel of the river unless an agreement is made between the states for its change, and

Whereas, it is desirable for both Iowa and Nebraska that the boundary line between the states be made to conform with the natural boundary of the Missouri river, . . ."

The act then authorized the Governor of Nebraska to appoint three commissioners to act with a similar commission appointed by the State of Iowa to ascertain and report the facts relating to the boundary as far as it relates to Pottawattamie County and Douglas and Sarpy Counties (Ex. P-1853).

In 1915, the Nebraska legislature adopted a concurrent resolution again authorizing the Governor of Nebraska to appoint three commissioners to act in conjunction with a like commission from the State of Iowa, "this commission to remain in office until settlement is made between the states, and the proper boundary determined, or the commission is sooner dissolved by legal authority" (Ex. P-1854).

In 1919, the Thirty-seventh Session of the Nebraska legislature approved another concurrent resolution, again repeating the language about the great flood of 1881, but not mentioning any particular counties. The preamble states:

> "Whereas, the original boundary line between the States of Nebraska and Iowa along the river front of counties bordering on, or through which the Missouri river flows, was changed by the great flood of 1881 so that a part of the original State of Iowa has for over thirty years been on the west side of the present channel of the Missouri and part of the State of Nebraska has been for over thirty years upon the east side of the present channel of the Missouri . . . ."

The Governor was authorized to appoint three commissioners to act with a similar commission appointed by Iowa and they were to report back relating to the boundary as the same relates to the counties of Iowa and Nebraska bordering on, *or through which* the Missouri River flowed (Ex. P-1855).

In 1941, the Fifty-fifth Session of the Nebraska legislature passed an act to establish the boundary line in the center of the main channel of the Missiouri River, but excepting Carter Lake by referring to the original action of *Nebraska v. Iowa*. This act was captioned "RELATING TO IOWA—NEBRASKA BOUNDARY." (Ex. P-1856).

C. Iowa Legislative History Prior to 1943

In Iowa, in 1902, a bill authorizing the Governor to appoint a commission to meet with a like commission from the State of Nebraska to agree upon a boundary line and report to the Governor was introduced in the senate and referred to committee, but no further action was taken (Ex. P-1790, P-1791).

In 1913, a provision was adopted by the Iowa legislature for the appointment of a boundary commission to act in conjunction with the commission from adjoining states under certain circumstances (Ex. P-1803). Also, in 1913, Senate Joint Resolution 9 was introduced, which provided for the appointment of a commission to ascertain and report facts relating to the existing boundaries between Iowa and Nebraska and the resolution had almost identical language to the 1913 Nebraska Act, Ex. P-1853 (Ex. P-1793). It was reported unfavorably and indefinitely postponed.

In 1923 Iowa passed a bill providing that the Governor appoint a boundary commission consisting of three disinterested persons. This bill provided:

> "The boundary commission shall at once, upon its appointment, proceed to ascertain and report the facts relating to the existing boundary between the states of Iowa and Nebraska so far as the same relate to the counties of Iowa and Nebraska bordering on, *or through which* the Missouri river flows, to report drafts of compacts or agreements to be entered into by the states in settlement of said boundary . . . ." (Emphasis supplied.)

There was also a specific provision that the boundary as it then existed between Council Bluffs and Omaha at the point known as Carter's Lake be preserved (Ex. P-1796).

In 1927, the Forty-Second General Assembly of Iowa passed a bill to make an appropriation to pay the expenses of the boundary commission commenced under the acts of the Fortieth General Assembly (Ex. P-1798, P-1799). In 1935, a bill passed the Senate of the

Forty-sixth General Assembly of the State of Iowa providing that the Governor shall appoint a boundary commission to act in conjunction with a similar commission appointed by the Governor of Nebraska to ascertain and report the facts relating to the existing boundaries between the States of Iowa and Nebraska "bordering on or through which the Missouri River flows" and to report drafts of compacts or agreements (Ex P-1804).

In 1937, a bill was introduced in the senate of the Forty-seventh General Asembly of Iowa for an act to establish the boundary line between the State of Iowa and State of Nebraska and the proposed bill included the following language:

> "* * * WHEREAS, there has for many years existed as between the State of Iowa and the State of Nebraska, a question as to the true and correct boundary line between said states; and
>
> WHEREAS, it would be expensive and practically impossible, in view of the conditions as they now exist, to locate the original boundary line between the State of Iowa and the State of Nebraska, the same having been established 'according to Nicollet's map'; [Emphasis supplied by Special Master] and
>
> WHEREAS, much of the land under dispute, except the Carter Lake district, is the harbor for criminals and squatters and is without police protection and educational facilities; and
> Nicollet's map'; and
>
> WHEREAS, said lands remain unplatted and are not subject to taxation by either state; and

WHEREAS, the Executive Council of the state of Iowa, in the year 1935, acting under authorization duly given by the Legislation of the state of Iowa, appointed what was known as the Iowa Boundary Commission, which commission has heretofore made its final report; and

WHEREAS, said final report of said Iowa Boundary Commission indicates that the Missouri River channel is now relatively stabilized by work done under the direction and supervision of the United States Army engineers, and that a boundary based on the present main channel of the Missouri River would be, in all probability, fixed and permanent; and

WHEREAS, under the law, each state must agree to any new boundary wherever established; and

WHEREAS, said agreement, if any, between the state of Iowa and the state of Nebraska must be sanctioned by an Act of Congress;

NOW, THEREFORE . . ."

The act would have placed the boundary in the middle of the main channel of the Missouri River (Ex. P-1805). This proposal was referred to committee and no further action is shown.

In 1939, in the Journal of the Senate of the State of Iowa, reference is made to a proposal authorizing appointment of the Iowa-Nebraska Boundary Commission, which matter was deferred (Ex. P-1806). This is similar to the resolution passed in 1941 by the Iowa legislature providing that the Governor should at once appoint a boundary commission of three disinterested, competent persons to ascertain and report the facts re-

lating to the existing boundary between Iowa and adjoining states and to report drafts of compacts or agreements to be entered into in settlement of the boundary (Ex. P-1807).

D. References in Newspapers and Periodicals Prior to the Compact

In addition to this legislative recognition of the boundary problems, references to the problems caused by the wild and unpredictable movements of the Missouri River have appeared in various publications and newspaper articles. The *Iowa Journal of History and Politics,* Volume XXI, published by the State Historical Society of Iowa in 1923 contained an article captioned THE LEGISLATION OF THE FORTIETH GENERAL ASSEMBLY OF IOWA, which article contained the following:

> "The Missouri River has always been notorious for its meandering and there are tracts of land which are first on one side of the river and then on the other. The people who live there are sometimes uncertain whether they are inhabitants of Iowa or Nebraska, and so are the tax assessors. To settle the question, the Fortieth General Assembly created a Boundary Commission to draft a compact definitely locating the boundary between the two States. This compact is to be submitted to the Governors and General Assemblies of Iowa and Nebraska for approval." (Ex. P-2696).

An editorial appeared in the Des Moines, Iowa *Register* on December 22, 1925, with the caption WAR ON NEBRASKA. The editorial stated that some fifteen thousand acres of land were in dispute and a commis-

sion had been appointed to work out a basis of settlement. It then continued:

> ". . . About 2,000 acres of former Iowa land now form a part of Dakota County, Nebraska and a corresponding area of former Nebraska land is in Woodbury County, Iowa. Homan's Island, opposite Onawa is on the Nebraska side of the river but is part of Iowa and its residents vote in Iowa. The D. D. Boyd farm in Harrison country, is completely surrounded by Iowa land and it is five or six miles from the river, yet Mr. Boyd is a resident of Nebraska. About 5,000 acres of land south of Council Bluffs also are involved, and there is an island comprising some 2,000 acres off Fremont County, Iowa, which is noman's land.
>
> All this is due to changes in the Missouri river channel. That is one thing which it is impossible to regulate effectively. The channel is likely to continue to change, but the human nature of which we hear so much has worked out governmental institutions which provide for orderly settlements of all the difficulties involved. The very difficulties have been minimized thereby. No one in Iowa is going to get excited over an impending loss of state territory; no one in Nebraska is going to demand forceful retention of the domain the river has alienated. We shan't have war between Nebraska and Iowa . . ." (Ex. P-2500).

An article appeared in the Cedar Rapids, Iowa *Republican* dated January 2, 1927, entitled "FAIL TO FIX IOWA-NEBRASKA BOUNDARY". The article commences:

"The boundary commission appointed by Gov. John Hammill to investigate border disputes along the Missouri river, between Iowa and Nebraska, yesterday reported it had failed to reach an agreement on definite recommendations with the Nebraska commission appointed to make a similar investigation. (Ex. P-2690).

In 1927, an article by the Iowa Historian, Eric McKinnley Erickson, appeared in 25 *Iowa Journal of History and Politics,* 233, 235, which stated:

"This decision [Nebraska v. Iowa] settled for a time the boundary difficulties between Iowa and Nebraska, but the fickle Missouri River has refused to be bound by the Supreme Court decree. In the past thirty-five years the river has changed its course so often that it has proved impossible to apply the court decision in all cases, since it is difficult to determine whether the channel of the river has changed by 'the law of accretion' or 'the law of avulsion'. Where it has been possible to apply the decision awkward situations have resulted. For instance, East Omaha is legally in Iowa—in fact it is included in the corporation of Council Bluffs—yet it is located on the West side of the river in close proximity to Omaha, with which city its interests are much more closely united than with Council Bluffs." (Ex. P-2691).

* * *

The *Omaha World Herald* of November 20, 1940, had an ediorial entitled "Let's Fix the Boundary" in which the following statements were made:

"But between Nebraska and Iowa the boundary line is vague and irrational. Originally, that line followed the Missouri river. The river changed its course, but the lines stayed where it used to be. Now all up and down the river chunks of Iowa lie westward of it and pieces of Nebraska to the east.

Why don't we fix up this boundary line the way it ought to be? Army engineers have stabilized the river now so that it will not change course again. Nebraska and Iowa, two good neighbors, ought to get together and fix the boundary in the center of this stabilized river, and settle it once and for all.

Beginning in January, both Iowa and Nebraska will have republican governors. This strikes us as an admirable opportunity to do what both states for a long time have talked of doing. Governors Wilson and Griswold, are sponsoring the necessary legislation, can put an end to this business of children crossing the river to go to school; of Iowa land paying taxes in Nebraska and vice-versa; of some land going untaxed because nobody knows where it belongs." (Ex. P-1534).

On December 24, 1940, the *World Herald* had another article entitled "Action on the Boundary" which indicated that Attorney General Walter R. Johnson had started the ball rolling and discussed revision of the boundary with Iowa officials. The article then continued:

"All up and down the river there are tracts on one side which belong on the other. Tax problems, school problems and law enforcement problems result; and all could be solved by the simple expedient of fixing

the boundary where it ought to be—in the center of the now stabilized Missouri river." (Ex. P-1535).

In the *TRANSACTIONS OF THE AMERICAN SOCIETY OF CIVIL ENGINEERS,* Volume 107, 1942, an article appeared entitled MISSOURI RIVER SLOPE AND SEDIMENT by William Whipple, Jr. His name also appears on the A. P. maps of the Missouri River. In this paper, he states:

". . . The shifts of the river channel have been so numerous and intricate that at many points land known originally to have been in Iowa now lies on the Nebraska bank, and vice versa; and for practically all land adjacent to the river no conclusive determination of either state or private boundaries has been possible." (Vol. XIII, p. 1860).

E. Corps of Engineers Reports Prior to 1943

A very general history of the Missouri River can be found in the Annual Reports of the Chief of Engineers of the United States Army, printed by the United States Government Printing Office. These reports, or extracts from them, have been offered as Ex. P-2686 for the years 1877 through 1890, Ex. P-2689 for the years 1891 through 1919, Ex. P-2687 for the years 1920 through 1945 and Ex. P-2688 for the years 1946 through 1966. The first regulation works on the Missouri River by the Corps of Engineers were constructed at Nebraska City, Nebraska and Saint Joseph, Missouri, under the provisions of the River and Harbor Act of August 14, 1876. The first work at Nebraska City is described in the annual report of the Chief of Engineers of the U.S. Army for the year 1877. In discussing the proposed plan to change the direction of the current in the bend above

Nebraska City, restoring it as nearly as possible to an old channel, Major Chas. R. Suter set forth a proposal to induce large deposits of sand by gradually obstructing and slackening the current and forming bars which would force the channel to follow the line desired and said:

> ". . . In carrying out this idea, I rely greatly upon the well-known instability of regimen of the Missouri River and the great rapidity with which natural causes are known to produce great changes . . ."

The 1878 report also made reference to improvement at Nebraska City, Nebraska and Eastport, Iowa and said:

> "The object of this improvement is to change the position of the river channel, in order to restore the water-front of Nebraska City, and to check a severe bank erosion of the Iowa shore near Eastport."

The 1878 report also contained the statement:

> "The survey made last year at this locality [Omaha, Nebraska and Council Bluffs, Iowa] showed that, owing to a recently formed cut-off, the banks of the river near Council Bluffs and Omaha were being eroded with very great rapidity, and that much valuable property, including the railroad-bridge over the Missouri at Omaha, was threatened with destruction. A plan and estimate were submitted for the protection of the exposed bank near Omaha, where the threatened and actual damage was the greatest."

Attached to the 1878 report is a map of the Missouri River in the vicinity of Nebraska City made from sur-

veys under the direction of Major Charles R. Suter in December, '76 & January, 1877 which shows Eastport Bend and the river going considerably away from Nebraska City and coming back towards Nebraska City from the East. It also shows Frazier's Island at attached to the Nebraska shore by accretion and the main channel is shown on the outside of a bend east of the island. Nebraska City Island is attached by accretion to the Nebraska side at that time. With reference to that work at Nebraska City is found the following:

> "We built out to a distance of 758 feet from shore, and, to judge from the heavy cutting of the bank and the bars opposite, it seems plausible to assert that with a dike of 1,200 feet the channel would have been turned into the slough on the Nebraska side."

* * *

Another map is attached to the 1879 report showing Nebraska City Island as accretion to the Nebraska shore and various shore lines on the Iowa side of the bend with the river considerably to the east of its present location.

There are miscellaneous references to cut-offs and shifting channels in these reports. In the report of 1880 (Ex. P-2686) Chas. R. Suter, states with reference to the situation between Omaha and Plattsmouth:

> "The situation in brief is this: The portion of the Missouri River under consideration is extremely tortuous and has a heavy slope, averaging 8/10 of a foot to a mile. The banks are very unstable and are subject to great erosion, the results of which is an excessive width of water way, with ever-shifting channels and small navigable depth. The incessant

erosion on the narrow necks between bends has already caused two cut-offs, one at Omaha and another at Saint Mary's, a few miles about the mouth of the Platte; and several others may be soon expected if measures are not taken to prevent them. The effect of cut-offs is to greatly increase bank erosion in the neighborhood and to impair the navigation over considerable distances. It is also desirable that a stable regimen be established through this stretch of river, as any changes here would have a very prejudicial effect upon the works of improvements now in progress at Omaha, above, and Nebraska City, below."

In the report for 1881 (Ex. P-2686) the Assistant Engineer at Brownville, Nebraska stated:

"That portion of the reach between Otoe City and Peru was in 1867 and 1869 the scene of two remarkable cut-offs. The first was the more southerly and produced the greater effects, shortening the river by about 14 miles. The concentrated slope has been gradually distributed in both directions, but the slope above and below this cut-off is still excessive, from Peru to Brownville 1.1 feet per mile.

I am indebted to Captain Carey who was the pilot of the first boat passing up the cut-off, viz., Colorado, for the following information: "The neck was very narrow for a distance of 1000 feet, during a longtime previous to the cut-off. Think it must have given way almost simultaneously throughout that distance. The cut-off occurred in the night. Left Peru the morning after the cut-off occurred. Knew nothing of the cut-off having taken place, and

noticed nothing unusual until off the former neck. The cut-off had the appearance of a low reef or wier. Succeeded in passing up by following a slackwater chute on the east side. The current above the cut-off was very strong all the way to Nebraska City, the boat making only about one-third ordinary headway. One boat was sunk by the cut-off and another, after having traversed the old bend, was forced through the cut-off on attempting to pass it. One week after the cut-off took place, no difference in current above and below the cut-off was noticed.'

The second cut-off was merely a cut-off of the old neck, and forming Hog-thief Island. It is noticeable that the river now runs in the channel east of Hog-thief Island in a direction opposite to that in which it ran before the cut-off took place. Had this second cut-off occurred prior to the date of the first one, it is probable but that one cut-off would have occurred, leaving the river in a much better condition than it now is. The second cut-off must have had little, if any, effect on the slope as the channel length was not thereby changed appreciably."

This is the area immediately below the Schemmel land and appears on Ex. P-211, which is the 1890 Corps of Engineers map showing the area from Nebraska City south to McKissock's Island.

* * *

In the 1889 report reference is made to the "old river-bed at the head of Nebraska City Island" and accompanying the 1889 Annual Report, is a map showing the designation "old river bed" going around the left side of "Nebraska City Island."

In the 1890 report appears a list of steamers plying the Missouri River enrolled at the Port of Omaha, Nebraska, during the year 1889. Thirteen steamers are listed with managing owners from Nebraska, the Dakotas, Iowa and Minnesota. Also, in this 1890 report is a series of maps under the title MISSOURI RIVER COMMISSION LOCATION OF BORINGS IN THE VICINITY OF BLAIR, NEB., SURVEYED 1883 BY GEO. S. MORISON, and one of these maps shows an oxbow area a considerable distance from the river just northeast of Blair and written in this area are the words "CUT-OFF 1881". This cut-off of 1881 shown in Ex. P-2686 is in the California Bend area and shows an old abandoned river bed considerably to the east, and the old Soldier River used to come in at the top and in the middle of Iowa Section 35. This same area is shown as a water and marsh area on the 1947 Corps of Engineer tri-color map (Ex. P-2667), and will be referred to later in the brief.

There is another map showing the old river bed around Nebraska City Island with the river next to the bluffs on the Nebraska side.

Exhibit P-1619, entitled Call for a Missouri River Improvement Convention at Kansas City, Missouri, on December 15, and 16, 1891, is a report by the Commercial Club of Kansas City and includes remarks by S. H. Younge, Division Engineer. Although he stated that his remarks referred to the reach extending from the mouth to Kansas City, he also said they were applicable in a general way to the whole portion of the river known as the sandy river which extends about 2,000 miles above its mouth. He mentioned the fact that one hundred and forty-six thousand acres lie between the high water

banks of the river between the bluffs from Kansas City to the mouth. The other five hundred thousand acres which were not river bed proper, were liable, sooner or later, to be washed away by the river unless the river is restrained by properly designed and constructed improvement works. He said:

> "There is probably not a square foot of land anywhere between the river bluffs that has not been accupied over and over again by the river in its meanderings."

Mr. Younge also mentioned that the width of the river below Kansas City between its high water banks varied from nine hundred to seven thousand feet with the low water widths varing from four hundred to two thousand feet. He discussed river structures and new land which would be made eventually and built up by improving the river as well as the safety of the additional land between the bluffs. He mentioned the land adjacent to the river which then had an average value of $25.00 per acre would be worth $75.00 to $100.00 per acre. He did state that he had not made an extended study of the reach between Kansas City and Sioux City, but the remarks he made in regard to the increased value of land, and the other benefits to be derived applied with equal force to the river between Kansas City and Sioux City.

In the 1891 annual report of the Missouri River Commission the following reference is made:

> "Soon after the passage of the appropriation act of September 19, 1890, the Commission decided on making a new shore-line survey of the river from Sioux City to the mouth. Since the topographic

survey of 1878 and 1879 was made, numerous and important changes in shore line have occurred; so that the published maps of that survey have become quite unreliable as to the present shore line. . . ."

A map appears as a part of the report showing the "OLD RIVER BED" around the eastern side of Nebraska City Island with the river back against the bluffs along the Nebraska side. Reference is also made to the fleet at Nebraska City.

The 1893 report contains commerce statistics and shows enrolled at Omaha thirteen boats in 1889, ten boats in 1890, twelve boats in 1891 and eleven boats in 1892.

The 1895 report contains the following:

". . . The natural channels on the Missouri are tortuous and exceedingly unstable, constantly shifting in position and difficult to run by boats of any size, and it is quite safe to say that the delays incident to these features are quite as much of a detriment to profitable navigation as any lack of depth of water . . ."

The reports also make several references to cutoffs which occurred along the Missouri-Kansas border.

The 1898 report contains additional history of the Nebraska City situation and an attached map again shows the river on the Nebraska side of Nebraska City Island, the location of dikes constructed by the Corps, and the old "RIVER BED OF 1881" around the eastern side of Nebraska City Island.

The 1901 report contains further reference to several cut-offs in recent years above Sioux City causing a large amount of erosion on the banks opposite Sioux City.

The Missouri River Commission ceased existence in 1902 and the 1902 report is its last annual report. It refers to the fact that there were some three hundred steamboats lying embedded in the sand of the river. It also stated that there were forty-two merchant steam vessels engaged in trade on the Missouri River below Sioux City which receive yearly inspections by the United States Inspector of Steam Vessels, and in addition fourteen or more gasoline boats.

The 1903 annual report of the Chief of Engineers commences:

> "The Missouri River has been navigated by steamboats since 1819; first boat to Council Bluffs, 1819; first to mouth of Yellowstone, 1832; first to head of navigation, 1859. . . .
>
> Government work on the river in the matter of removal of snags began as early as 1838 and continued thereafter, under annual appropriations (for the most part made jointly for the Ohio, Mississippi, Missouri, and sometimes the Arkansas Rivers) with occasional intermissions, for the next forty years. Prior to 1878 one or two small appropriations had been made for general improvement, but it was with the act of June 18 of the latter year that appropriations began on a large scale."

In 1904, reference is made to the falling off of commerce on the lower river, but an increase on the upper river. In 1905 is found the following:

> "St. Marys Bend, below Omaha, Neb.—By request of Congressman, Walter I. Smith, of Council Bluffs, Iowa, an examination was made of the river in the vicinity of St. Marys Bend in company with State Senator Shirley Gilliland, and Seth Dean, County Surveyor of Mills County, with a view of permitting a cut-off to be made through the sandbar on the right bank, to relieve the erosion of the left bank."

The 1913 annual report states that the existing project providing for a six foot channel between Kansas City and the mouth was adopted by Congress on July 25, 1912. It reiterates that government work on the removal of snags began in 1838 and a project for the river from Sioux City to the mouth was adopted in 1884 and in 1890 the project was modified to provide for systematic improvement of the first reach, from Jefferson City to the mouth. It stated that the results of the expenditures at separate localities have been beneficial locally by protecting the banks and forming good navigable water fronts and incidentally preserving private property from the ravages of the river, but has given little, if any, encouragement to navigation.

The 1915 report states that, during the past decade, a snag boat had operated regularly during a portion of each season on the part of the river between Kansas City and Sioux City; and mention is made in the 1916 report of a small boat line in operation be-

tween Omaha and Decatur, Nebraska and water transportation between Kansas City and Omaha initited in the spring of 1916 by small towboats.

In the 1919 report the statement is made that at Hamburg, Iowa, left bank, about mile 597:

> "A land improvement company set six current retards equidistant along 6,600 feet of bank at a cost of $8,292. These are floating log gratings 100 feet in length, anchored to concrete piling jetted below the river bed."

Ex. P-2687 contains the Annual Reports of the Chief of Engineers from 1920 through 1945. The 1920 Report states that the width of the river from Kansas City to the mouth in its original condition varied from five hundred feet to over one mile and the river shifted in location and destroyed many acres of valuable bottom land. The section from Kansas City to Sioux City was similar to the section below Kansas City and, before improvement, the river was navigable throughout this entire section. The first regulation work is stated as having been constructed at Saint Joseph and Nebraska City under the provisions of the River and Harbor Act of August 14, 1876. In the 1921 report, in the vicinity of the Missouri-Iowa state line at mile 597 a system of eleven retards is shown as having been constructed for bank improvement consisting of eight hundred and seventy linear feet at a cost of $30,563.38. This is at the lower end of the Schemmel land and, in fact, the testimony was that the most northerly revetment along the Iowa bank appearing on the 1923 Corps of Engineer map was approximately 1,600 feet north of Hamburg Landing Road whereas the bottom part of

Iowa's traverse of the Schemmel land which Iowa is claiming extends to within 1,000 feet of the Hamburg Landing Road.

During the years the reports often refer to a considerable amount of private construction along the river. Reference is also made to the fact that in the autumn of 1924 the Western Barge Line operated its steamer *Decatur* with cargo box barge between Sioux City and Omaha, but withdrew at the end of the season upon finding commercial boating unremunerative.

The 1934 report for the fiscal year ended June 30, 1934 shows work at Frazer-Otoe Bend and the 1935 report shows work at Frazers and Otoe Bends and Work at Tobacco and Rock Bluff Bends. From 1936 on, many entries give some general indication of the amount of work done on the Missouri River along the Iowa-Nebraska border. There are many references to dredging and canals. In the 1938 report, pilot canals are shown at Glovers Point Bend, mile 778.2; Papillion Bend, mile 638.8; Plattsmouth Bend, mile 637.1; Civil Bend, mile 616.7; Otoe Bend, improve existing canal, mile 601.3; Hamburg Bend, improve existing canal, mile 597.3; Hamburg Bend, 596.7 Omadi Bend, mile 796.6; Browers Bend, mile 788.2; Omaha Mission Bend, mile 764.3; and Little Sioux Reach, mile 725.1.

The 1938 report also makes reference to, ". . . one earth filled dam to divert the channel. . . ." in addition, it states:

> ". . . the cost of channel surveys made during the year *to determine results accomplished by the various works* was $25,281.20. . . ." (Emphasis supplied.)

The 1939 report refers to completion of two cut-offs at California Bend and at Peterson Bend and refers to three channel cut-offs having been effected under the existing project. The Chief of Engineers recommended adoption of a project for the Missouri River between Sioux City and the mouth so as to provide for a channel of 9 foot depth and width not less than 300 feet,

> "... to be obtained by revetment of banks, construction of permeable dikes to contract and stabilize the water way, cut-offs to eliminate long bends, closing of minor channels, removal of snags, and dredging as required...."

The 1940 report, in its summary of work done, includes:

> "... effecting three channel cut-offs, and removal of 49,641,454 cubic yards of material dredged from the channel to obtain project depth and width."

The 1941 report mentions Civil Bend Pilot Canal then under construction, and the 1942 report also mentions excavation at the Civil Bend Pilot Canal and nose protection at Omadi Bend Pilot Canal and Browers Bend Pilot Canal. It also shows work done at Rock Bluff — Frazers Bend and Otoe Bend and Tobacco Bend.

The 1943 report states that the work between Rulo and Omaha was approximately 99% completed and between Omaha and Sioux City approximately 78% completed.

F. The Iowa-Nebraska Boundary Compact of 1943

An article appeared in the *Omaha World Herald* of February 24, 1943 entitled "Offer Another Boundary Bill". This article states:

> "The Iowa attorney general's office has prepared a bill calling for establishment of the boundary between Nebraska and Iowa conforming, in the main, to the channel of the Missouri river.
>
> Attorney General John M. Rankin said the changing course of the river has left 12,500 acres of Nebraska land east of, and 6,700 acres of Iowa land west of the present channel."

The article states the bill would give Nebraska jurisdiction of all land west of the channel except the town of Carter Lake and would give Iowa jurisdiction over land on the east side of the channel. It continued:

> "The attorney general said considerable difficulty has been experienced in one Iowa consolidated school district whose boundaries include 800 or 900 acres west of the present channel."

The original bill in the Iowa legislature in 1943 to establish the boundary compact was offered as House File 437, dated February 26, 1943 (Ex. P-1618). It was similar to the Iowa-Nebraska Compact as finally agreed upon except that the original bill excepted the boundary line established and declared to be such in a judgment or decree entered in the Supreme Court of the United States and the bill identified the case of *Nebraska v. Iowa*. Attached to this bill is an explanation which states:

"This measure is intended to fix the boundary line between Iowa and Nebraska now that the channel of the Missouri river is under control. It will be observed that this measure retains the Carter Lake territory in Iowa.

Making the present channel of the Missouri river the boundary line will tend to simplify the question of jurisdiction over territory now in dispute."

The Journal of the House of the Fiftieth General Assembly, State of Iowa, 1943, shows an amendment was filed which specifically excepted Carter Lake from the agreement by metes and bounds description and which added the language of the compact presently found in the last paragraph of Sec. 1 which identifies the middle of the main channel as the center line of the proposed stabilized channel of the Missouri River as established by the United States Engineers' Office, Omaha, Nebraska, and shown on the alluvial plain maps (Ex. P-1548). The bill was then passed by the House on April 6, 1943 (Ex. P-1548), passed by the senate, and shown as signed by the President of the Senate on April 8, 1943 (P-1549) and sent to the Governor of Iowa on April 8.

The Nebraska Legislative Journal for the 102nd day, dated May 27, 1943, has a letter from B. B. Hickenlooper, Governor of the State of Iowa, dated May 25, 1943, to the Clerk of House of Representatives of Nebraska enclosing a certified photostatic copy of House File 437, Acts of the Iowa Fiftieth General Assembly (P-1547, P-2303) and the Iowa-Nebraska Boundary Compact was adopted by the Nebraska legislature with

the addition of Section 6 which repealed a 1941 proposed boundary compact bill and Section 7 which is the emergency clause (P-2302). It was passed by the legislature and signed by the Governor on May 7, 1943 (Ex. P-1008, P-1547).

The Compact as adopted by the State of Iowa appears as Exhibit "A" attached to the Complaint and was offered as Exhibit P-2605. After establishing the middle of the main channel as the boundary and identifying it as being the center line of the proposed stabilized channel of the Missouri River as established by the United States Engineers' Office, Omaha, Nebraska, as shown on the alluvial plain maps of the Missouri River which were then on file in the United States Engineers' Office at Omaha and copies of which maps were on file with the Secretary of State of Iowa and the Secretary of State of Nebraska, the Compact then provided:

> "Sec. 2. The State of Iowa hereby cedes to the state of Nebraska and relinquishes jurisdiction over all lands now in Iowa but lying westerly of said boundary line and contiguous to lands in Nebraska.
>
> Sec. 3. Titles, mortgages, and other liens good in Nebraska may cede to Iowa and any pending suits or actions concerning said lands may be prosecuted to final judgment in Nebraska and such judgments shall be accorded full force and effect in Iowa.
>
> Sec. 4. Taxes for the current year may be levied and collected by Nebraska or its authorized governmental subdivisions and agencies on lands ceded to Iowa and any liens or other rights accrued or accruing, including the right of collection, shall

be fully recognized and the county treasurers of the counties affected shall act as agents in carrying out the provisions of this section: *Provided,* that all liens or other rights accrued or accruing, as aforesaid, shall be claimed or asserted within five years after this act becomes effective, and if not so claimed or asserted, shall be forever barred.

Sec. 5 The provisions of this act shall become effective only upon the enactment of a similar and reciprocal law by the State of Nebraska and the approval of and consent to the compact thereby effected by the Congress of the United States of America. Said similar and reciprocal law shall contain provisions identical with those contained herein for cession to Iowa of all lands now in Nebraska but lying easterly of said boundary line described in section 1 of this act and contiguous to lands in Iowa and also contain provisions identical with those contained in sections 3 and 4 of this act but applying to lands ceded to Nebraska."

It should be noted Sec. 5 of the Iowa bill specifically required that Nebraska's Act should contain provisions identical with those contained in the Iowa bill for the cession of lands lying easterly of said boundary line ". . . and also contain provisions identical with those contained in sections 3 and 4 of this act but applying to land ceded to Nebraska."

The Nebraska act appears as Exhibit "B" of the Complaint (Ex. P-2606) and the bill was offered as Exhibit P-2302.

In the United States Congress Senate Calendar No. 401, Report 388, 78th Congress, First Session and the

Report No. 551 of the House of Representatives are the following comments referring to the Compact:

> "The purpose of the bill is to give the consent of Congress to the compact entered into by the States of Iowa and Nebraska establishing the boundary between Iowa and Nebraska.
>
> Congressman Howard H. Buffett, of Nebraska, author of the Bill, has advised the committee—
>
> If adopted this measure will settle a large number of jurisdictional disputes which have arisen over a long period of time. The States of Iowa and Nebraska, after lengthy negotiations, have entered into a compact satisfactory to both states. The measure, so far as I have been able to ascertain, is not controversial. The Honorable Ben F. Jensen and the Honorable Charles B. Hoeven, representing the affected Iowa districts and the Honorable Karl Stefan and the Honorable Carl T. Curtis, representing, along with myself, the Nebraska districts affected, have all expressed their approval of H. R. 2794 as well as the compact which it approves.
>
> Consent of Congress to the compact is required by reason of that part of Section 10, Article 1 of the Constitution which provides:
>
> 'No state shall, without the consent of Congress * * * enter into any agreement or compact with another State'." (Ex. P-1012, P-1015).

The A. P. maps as filed with the Secretary of the State of Nebraska were offered as Exhibit P-1770 and are of the scale of one inch equals one mile and show that they were filed with Frank Marsh on April 2, 1941.

These maps do not show all of the agricultural levees which appear on later A. P. maps and each of them has a stamped note in the corner:

> "Note: The area covered by the Missouri River on this map was compiled from aerial photographs taken by the U.S. Army Air Corps and field surveys made in 1939. The area landward from the Missouri River was compiled from uncontrolled mosaics of aerial photographs taken by the U.S. Department of Agriculture in 1936, 1937, and 1938."

They are dated January 30, 1940, and March 29, 1940, and all are shown as submitted by Wm. Whipple, 1st Lt. Corps of Engineers. There are no calls or distances given. The dikes on the A.P. maps are not all numbered. The designed channel is traced on the maps and, particularly north of Omaha, this design is shown as running through all kinds of bar and dry land area. Several cut-off lakes are shown. On A.P.—5 California Bend is clearly shown as a cut-off and at the top of the map Peterson Cut-off is shown, although neither of these is so labeled. This is also true of St. Mary's Cut-off on A.P.—8. Nottleman Island is shown on A. P. 8 and on A. P.—9 the river can be seen running through what was the bottom part of Goose Island and the top part of a lower island and this area later becomes what Iowa now describes as Auldon Bar. The Schemmel land appears on A. P.—10. It is particularly noteworthy that, at the very end of the long dike extending from the Iowa shore to the middle of Schemmel Island there is a trail dike extending downstream, and at the end of this trail dike there appears to be a clump of trees. This will be discussed later as land which was cut off by the con-

struction of the Otoe Canal by the Corps of Engineers. The Iowa Chute is also shown considerably to the east of the Schemmel land. Mule Slough can be seen on A. P. —9 immediately east of Nebraska City. There is no other identification of where Nebraska City Island may have been on this map.

These Alluvial Plain Maps will be discussed elsewhere. Suffice it to say at this time that they are obviously only general maps and are completely inadequate as surveys. It is impossible to lay out a line on the ground based upon the data in these maps and it is obviously impossible to determine the center of the designed channel as established by the Corps of Engineers from the information on these maps. It is also apparent from these maps that the river is shown in several places in other than the designed channel where designed channel is shown as going through land, bank, island or bar which on the A. P. Maps is dry ground. The maps also show the designed channel in a series of curves and they show many islands and bar areas on both sides of the designed channel.

* * * * * * *

In her proposed findings, Iowa also presented a pre-Compact history of the Missouri River which is likewise adopted as a finding and which follows:

IV. Pre-1943 History of the Missouri River as Submitted by Iowa

The first recorded navigation of that part of the Missouri River which now constitutes part of the western border of Iowa and the eastern border of Nebraska was by the Lewis and Clark Expedition during the first decade of the 19th Century. The annals of that expedition are available for all to read. Reading them, one must

be filled with admiration at the bravery, perserveranc and will of those hardy men. Probably the chief adver sary the expedition had to fight was the river itself.

The channel was clogged with snags; when the rive was at low stage, numerous sand bars appeared or la just beneath the surface; it was difficult to select channel among the snags and bars which would be navi gable; the course of the river was tortuous and meande ing; note is made that in one day, near where the citie of Onawa, Iowa, and Decatur, Nebraska, are now lo cated, the expedition traversed a great loop of the rive and arrived at night-fall little more than a mile fron their starting point of the morning.

In 1846, Iowa was admitted to statehood with par of its western boundary (between the Iowa-Missour boundary thence upstream to the mouth of the Big Siou River near Sioux City, Iowa) described as the "middl of the main channel of the Missouri River", and in 1867 Nebraska was admitted with its eastern boundary de scribed similarly. Thus, the two states came to be con tiguous along an approximate 200 mile segment of th Missouri River.

Since rivers are natural boundaries, many river have become the boundaries between many of the state of the Union. These boundaries became the subject o considerable litigation, from which "the rule of th thalweg" evolved. "The rule of the thalweg" may b succinctly described as follows: Whenever a boundary public or private, is defined as the "middle" of a stream the word "middle" shall mean "thalweg". Generally, th term "thalweg" refers to the deepest part of the stream which is generally the navigable channel. Two excep

tions to the rule of the thalweg have been generally recognized: First, whenever the thalweg of a stream suddenly shifts by the process known as "avulsion" from one side of a tract of land to the other, the boundary remains in the former and now abandoned channel, and does not move to the new channel. Second, whenever a stream is deep enough to be navigable in more than one place, and is in fact navigated along some course which is not the deepest, the thalweg and the boundary shall be the "boat track". But, both in fact and in law, it is considered that movements of the thalweg are usually and commonly by the process known as "accretion", which is the gradual process of the water washing away one bank and building new land behind its movement, and the boundary was considered to move as the thalweg moved in this manner.

The Iowa-Nebraska boundary would be governed by the rule of the thalweg, with its exceptions, modifications and refinements, until July 12, 1943.

The two states engaged in litigation one time before the instant case concerning a segment of their common boundary. The case was *Nebraska v. Iowa,* 143 U.S. 186, decree at 145 U.S. 519. The case involved a segment of the river near the Iowa town of Carter Lake, which is northeasterly a short distance from Omaha, Nebraska, then and now on the west side of the Missouri River. This Court applied the rule of the thalweg in that case, found that the town of Carter Lake had been cut off from Iowa by an avulsion, and that it was therefore in Iowa although west of the river. The Carter Lake locale is not one of the disputed areas in the present case.

Many locations up and down the Iowa-Nebraska boundary have been the subject of litigation in the state courts of both states and in the federal courts of original jurisdiction in both states, but these cases usually concerned the ownership of land as distinguished from location of the state boundary.

It seems that the business of commercial navigation has had two flowerings on the Missouri River, and that a third flowering of navigation is now taking place. First, there was considerable freighting on the river before the Civil War, ended by the Civil War when the War Department expropriated nearly all the river boats for use as troop transports, gun boats and material carriers on the Mississippi and other rivers where the fighting was going on. After the Civil War, a second flowering of river navigation occurred, which was ended when the railroads reached the area in the latter years of the 19th century. River transportation was so hazardous, uncertain and expensive that the steamers were unable to compete pricewise with the rails. Steamboating on the Missouri River remained in the doldrums until, in about 1952, the U. S. Army Corps of Engineers was able to assure a navigable channel to Omaha and Sioux City during about eight months each year.

Neither Iowa nor Nebraska appears to have paid much attention, as sovereign entities, to their common boundary along the Missouri River until about 1902, when there seems to have been a recognition by some citizens and officials in both states that the boundary was unsatisfactory and that a new one should be fixed and established. Negotiations for a new boundary went forward in a rather desultory manner until the mid-

1930's. The reason why the boundary had become unsatisfactory was that its precise location at many places had become doubtful and uncertain; this doubt and uncertainty was a handicap and hindrance in matters of law enforcement, taxation, and land ownership.

Prior to about 1930, the U. S. Army Corps of Engineers had been concentrating its efforts to develop the Missouri River for navigation and flood control on that reach of the river from its mouth near St. Louis upstream to Kansas City. In the late 1920's, the Corps began to receive authorizations and appropriations to develop the river upstream from Kansas City to Sioux City, Iowa. Planning went forward immediately and actual construction commenced in about 1933.

The Corps of Engineers found the same type Missouri River which Lewis and Clark had encountered more than a century before. It was wild, wide, sinuous, shallow, and choked with sand bars and snags. It was almost useless for commercial navigation. It usually flooded the valley regularly in April when spring came to Nebraska, Iowa, Minnesota and the Dakotas, and again in June when snow in the Rocky Mountains melted, and usually several more times each year from summer and fall rains.

The Corps had surveyed the entire river from Kansas City to Sioux City in 1923. They had caused aerial photographs of this entire reach to be taken in the winter of 1925-1926 and maps had been made from these photographs. The same was done in 1928 and again in 1930. The Corps apparently found that mapping from aerial photos was not sufficiently accurate for their purposes, so in 1931 and 1932, the river was again surveyed;

in this survey, elevations of land along the river were noted, topography was noted, the channels were sounded and depths of water noted, and control lines were laid out on each side so that dikes and other improvements could be located with surveying accuracy.

Corps personnel who worked on the design and construction of the project were witnesses before me. From this testimony and from the documents, maps and photographs in evidence, I ascertain that the Corps design and plan was to narrow and confine the river into one channel, 700 feet wide, which would be a series of curves or bends alternately from one side to the other. Within the 700 foot wide channel, they proposed to maintain a navigation channel with a minimum depth of six feet.

The precise alignment of the "designed channel" was dictated by a number of factors: For instance, the river had to pass under all existing bridges. In addition to bridges, there were "hard points", "bluff contacts" and cities and towns which it was desirable that the channel be close or contiguous to. Then there was an optimum degree of curvature to be attained as nearly as possible. Lengthy straight reaches were to be avoided. Economy dictated that the existing natural channel be utilized to the greatest extent possible.

At the outset, the river was trained to go into the desired curves by means of pile dikes, some of which were called "lead-off structures", some were called "baffles", and some were called "revetments". Work to cause the river to flow into a particular designed bend would generally commence at the upstream end of the bend. First, a lead-off structure would be built just upstream from the upper end of the designed bend, this so that the

river would not flank the structures later to be built in the bend; the lead-off structure was parallel to the designed channel. Then, downstream from the lead-off structure, a series of baffles were built out from the shore to force the river to curve in the desired direction. Finally, revetments were usually built on the outside of the bends to contain the river to a designed width of 700 feet.

After the work had gone forward by the above methods for about four years, several canals were dredged in locations where the river had not moved into the designed channel with alacrity deemed desirable by the Corps of Engineers.

By 1943 the Corps of Engineers reported that the project was 99% complete below Omaha and 78% complete between Omaha and Sioux City. The river was entirely within the designed channel except for three segments, totaling about 2000 feet in length, where it was not entirely within the design. The entire project had been accomplished by the pile dike method, except canals had been dredged at 11 locations.

* * * * * * *

Iowa has submitted to the Special Master for use in drafting this Report a statement on jurisdiction. Nebraska contends that this Court's Order entered on February 1, 1965 granting her motion to file the complaint in the instant case settles the issue of jurisdiction of this Court to hear this controversy. Iowa on the other hand takes a contra position.

V. Jurisdiction — Statement by Iowa

Nebraska asserts that this Court's jurisdiction to hear and determine this matter arises from Article III, Section 2, Clause 2 of the Constitution of the United States and 28 U. S. C. Sec. 1251 (a) (1). She further asserts that the matter of jurisdiction has heretofore been settled and adjudicated by this Court's prior order wherein her motion for leave to file her Complaint was sustained and Iowa's resistance to said motion was overruled.

Iowa, on the other hand, asserts that this Court must examine its jurisdiction at all stages of the case and, if at any stage it appears that there is no justiciable controversy between the states, or that Nebraska has no real interest in the controversy which would entitle her to maintain the action, the case should be dismissed.

Although Nebraska offered evidence tending to show that the boundary fixed and established by the 1943 Boundary Compact is described in such a manner that it may now be difficult or impossible to precisely locate it in the water or on the ground today, she seeks no relief in this case arising from such fact. In other words, location of today's boundary line between the two states, being the boundary line fixed by the 1943 Compact, is not an issue in this case. In any event, having heard and considered the evidence concerning location of the boundary line fixed by the Compact, your Special Master believes and finds that said boundary line can be located accurately today at all points where accurate location may be required, although diligent effort may be required in order to do so.

The real issue in this case is concerning where the boundary line between the two states *was* immediately prior to July 12, 1943, the effective date of the Boundary Compact. One might ask: Why should this question of where the pre-1943 boundary line was be a matter of importance to the two states now, some 28 years later? Briefly stated, the matter is of importance because on this question of where the pre-1943 boundary line was, hangs the ownership of a number of tracts of land along and in the vicinity of the boundary. Ownership of lands, river beds and abandoned river beds which were in the State of Nebraska prior to 1943 was determinable by the law of Nebraska. Likewise, ownership of tracts which were in Iowa prior to 1943 was determinable by the law of Iowa. In many cases, the answer as to ownership would be different because of difference between the state laws of the two states. This Court has consistently held that each state may have and apply within its own borders whatever system of land title laws she may see fit. As stated in *Arkansas v. Tennessee,* 246 U.S. 158, at page 176:

> "How the land that emerges on either side of an interstate boundary stream shall be disposed of as between public and private ownership is a matter to be determined according to the law of each state, under the familiar doctrine that it is for the states to establish for themselves such rules of property as they deem expedient with respect to the navigable waters within their borders and the riparian lands adjacent to them. (Citing cases.) Thus, Arkansas may limit riparian ownership by the ordinary high-water mark (Citing cases.) and Tennessee, while extending riparian ownership upon nav-

igable streams to ordinary low-water mark, and reserving as public the lands constituting the bed below that mark, (Citing cases.) may, in the case of an avulsion followed by a drying up of the old channel of the river recognize the right of former riparian owners to be restored to that which they have lost through gradual erosions in times preceding the avulsion, as she has done in *State v. Muncie Pulp Co.,* 119 Tenn. 47, 104 S.W. 437. But these dispositions are in each case limited by the interstate boundary line from where otherwise it should be located."

The laws of the two states regarding ownership of accretion lands, river beds and abandoned channels are similar but there are two important differences: (1) In 1856, approximately 20 years before Nebraska was admitted to statehood, it was determined in Iowa that private land titles to riparian lands along navigable streams would extend only to the ordinary high water mark and that the beds of the navigable streams in Iowa were state-owned. *McManus v. Carmichael,* 3 Iowa 1. In 1906, 50 years later, it was determined that private land titles to riparian lands in Nebraska would extend to the thread of the contiguous stream. *Kinkead v. Turgeon,* 74 Neb. 573, 104 N.W. 1061. (2) It has been the law of Nebraska from very early in her history that title to land may be acquired by adverse possession as a result of ten years of open, peaceable and notorious possession, even though the possessor entered upon the land as a trespasser. In Iowa, on the other hand, the law is and for many years has been that title cannot be gained by adverse possession unless the possessor entered upon

the land and possessed it with claim of right or color of title.

In the beginning, the Iowa-Nebraka boundary was the middle (or thalweg) of the Missouri River from a point opposite the mouth of the Big Sioux River near Sioux City, Iowa, thence downstream to a point where the middle or thalweg was intersected by the Iowa-Missouri boundary line near the town of Hamburg, Iowa. Movements and changes of the boundary prior to 1943 were governed by the "Rule of the Thalweg" as promulgated by this Court and many state courts, including the state courts of both states. Generally stated, the "Rule of the Thalweg" was and is that wherever a boundary is described as the "middle" of a river, the term "middle" shall mean the "deepest part" or "navigation channel"; whenever the thalweg moved by the gradual process of "accretion", the boundary moved with it; but whenever the thalweg shifted from one channel to another by a sudden "avulsion", the boundary did not move to the new thalweg, and the boundary remained in the abandoned channel.

In prior litigation between the two states (*Nebraska v. Iowa,* 143 U.S. 359, 36 L.Ed. 186, 12 S.Ct. 396) it was determined that an avulsion had occurred in the vicinity of Omaha, Nebraska, and Carter Lake, Iowa, whereby the thalweg suddenly shifted from a channel to the west of the town of Carter Lake, Iowa, to a new channel east of the town, with the result that Carter Lake, Iowa, remained in Iowa and did not become part of Nebraska even though it was and still is west of the Missouri River. Special provision in the 1943 Boundary Compact preserved Carter Lake's status as being in

Iowa, and there is no issue in this case concerning Carter Lake or any land in that immediate vicinity.

Carter Lake is the only site along the boundary where it had been judicially determined in litigation between the two states that there had been an avulsion so that the boundary was not the thalweg of the river in and prior to 1943.

From the general statements hereinabove made concerning the internal title laws of the two states it will be seen that, if accretion land formed along the Missouri River, or a former channel became an abandoned channel, or an island arose from the river bed west of the thalweg and in the State of Nebraska, its ownership was determinable by the law of Nebraska. There has been much litigation in the state courts of Nebraska down through the years, both before and since 1943, wherein ownership of these lands has been the issue. Generally, the courts of Nebraska have held that accretion lands which formed contiguous to the shoreline of a riparian owner became property of such riparian owner, and when a channel became an abandoned channel, the riparian owner became the owner to the former thread of the stream, and when an island arose from a stream the riparian owner became the owner of such island, depending on which side of the thread of the stream it arose. The salient fact at this point is that the State of Nebraska has never been found to be the owner of any such lands because by her law, she elected to make all such lands and river beds, islands and abandoned beds privately owned. In some of the Nebraska cases, ownership of river lands was determined by application of the

Nebraska law of adverse possession. *Burkett v. Krimlofski,* 167 Neb. 45, 91 N.W.2d. 57.

There has also been much litigation in the state courts of Iowa concerning ownership of river lands. The Iowa courts have generally held that accretion land which forms contiguous to the riparian shore of a private riparian landowner becomes property of such riparian owner; the state loses its title to that spot under the sky which was formerly river bed but which is now covered by the private riparian landowner's accretions; the state gains title to the new riverbed in Iowa. If the bed of a navigable river becomes abandoned by an avulsion, property boundaries remain unchanged so that the state continues to own the abandoned bed to the ordinary high water mark. If a island arises from the state owned bed of a navigable river in Iowa, it is considered to be in the nature of an accretion to the state-owned bed and the island is therefore state-owned. *Holman v. Hodges,* 112 Iowa 714, 84 N.W. 950. *Payne v. Hall,* 192 Iowa 780, 185 N.W. 912; *Iowa v. Raymond,* 254 Iowa 828, 119 N.W.2d 135.

During the pre-trial phase of this case, it was established that the State of Iowa now claims to own some thirty-two tracts along the boundary. All of these tracts are presently in Iowa. Some of these tracts are land; some are sand bar; some are marsh; some are still inundated by Missouri River water; some are a mixture of land, sand bar, marsh and land under water. Some of these tracts formed and came into existence in their present forms before 1943 and some since 1943. She claims some of them by operation of the Iowa law of state ownership of navigable river beds, islands and

abandoned channels; some of them by exchange with various individuals; some of them by purchase from various individuals; some of them by quiet title decrees; and some of them by a mixture or combination of theories or claims. In addition to the 32 specific tracts, she claims to own all that part of the bed of the present day Missouri River which is in Iowa.

The State of Nebraska does not claim to own any of these tracts. The State of Nebraska claims to own nothing by operation of her common law because, as pointed out above, her law provides no basis for any such claims of ownership.

There is not any tract or parcel of land, river bed, marsh or abandoned river bed which the State of Iowa claims to own and which the State of Nebraska also claims to own. Nebraska's complaint is limited to the proposition that Iowa violates the 1943 Boundary Compact by claiming to own tracts which were *privately* owned in Nebraska prior to 1943 and tracts which have formed since 1943 in such manner that they became privately owned. Nebraska brought and seeks to maintain the instant case on behalf of these private parties; she claims power to do so because she was a signator to the Compact; her claim of power is under the doctrine commonly known as "parens patriae".

Iowa asserts that Nebraska has no real or present interest in the controversy; that Nebraska is not the "real party in interest"; that necessary elements for "parens patriae" are absent; and that her action, the instant case, should therefore be dismissed and denied. Since all tracts which Iowa claims to own are admittedly in Iowa, and Nebraska doesn't claim to own any of them,

Nebraska's territorial integrity is not threatened, Nebraska's tax base is not threatened; it is clear that Nebraska's right to maintain and prosecute the instant case does in truth and in fact depend upon the doctrine of "parens patriae" alone.

A succinct but accurate review of the "parens patriae" doctrine was written by Chief Judge Pence of the United States District Court of Hawaii in the recent case of *State of Hawaii v. Standard Oil Company,* (1969) 301 F. Supp. 982. (Opinion on appeal at 431 F.2d 1282). Judge Pence's conclusions concerning parens patriae (which were undisturbed on appeal) were that, where a state seeks to maintain an action in its parens patriae capacity, two prerequisites must be met: (1) The facts must show that the state has an interest independent of and apart from the titles of her citizens, and (2) The facts must show that a substantial portion of its inhabitants are adversely affected by the challenged acts of the defendant.

The evidence here clearly demonstrates that the State of Nebraska has no interest in this case independent of and apart from the titles of her citizens.

Nebraska made no proof as to the number of private parties who are or may be claiming to own the 32 tracts which Iowa claims to own along the boundary. Suffice to say that this number can only be an infinitesimal fraction of the population of Nebraska, and the people of Nebraska generally have no real interest in this matter.

After an obviously thorough search by good and diligent counsel for Nebraska, no case or precedent has been cited to this Special Master wherein a state has ever attempted to prosecute an original action in this

Court against a sister state under the facts and circumstances which are here shown to exist. In all of the many cases heretofore wherein two states have contested in this Court concerning a boundary, both states have had a clear, present and real interest in the matter. Always, in cases heretofore, the contest has been concerning where the disputed boundary *is*, not where the boundary *was* in some prior time.

Operating against Nebraska throughout this case was the rule stated by Mr. Justice Roberts in *Colorado v. Kansas*, 320 U.S. 383, at page 393:

> "* * * Not every matter which would warrant resort to equity by one citizen against another would justify our interference with the action of a State, for the burden on the complaining State is much greater than that generally required to be borne by private parties. Before the court will intervene the case must be of serious magnitude and fully and clearly proved. * * *"

The conclusion is inescapable that Nebraska has failed to establish either of the prerequisites restated by Judge Pence from prior authorities cited in his opinion.

Another objection to this Court's exercising original jurisdiction in the case at bar is raised by Iowa: There is no evidence that Iowa has ever advanced its claim of ownership to any tract by forcibly dispossessing any adverse claimant; rather, the evidence is that at all locations where there were or are disputed claims, she has simply sought resolution of such disputes in the courts of competent jurisdiction. Usually the court of com-

petent jurisdiction was the Iowa District Court of the County in which the tract was situated (since all tracts claimed by Iowa are now in Iowa) but on three occasions, the issue has arisen in the Federal District Courts of Iowa in eminent domain cases where the United States, at the behest of the Corps of Engineers, was seeking to obtain right-of-way for Missouri River improvement projects. The cases in state courts have generally been Quiet Title cases, sometimes commenced by the State of Iowa as Plaintiff, sometimes commenced by others against her which she has defended, and in one case at least, she has intervened in a case pending between private parties.

On the question of whether or not Iowa has violated the 1943 Boundary Compact hangs the answer as to whether or not Nebraska has tendered to this Court a justiciable controversy over which this Court should exercise its original jurisdiction. Iowa says, at this point, that since the evidence discloses only that she has sought to have her claims determined in courts of competent jurisdiction, Nebraska has failed to prove violation of the Compact by Iowa, because such conduct by Iowa though proved and admitted does not constitute violation.

Indeed, it seems to me that this Court or any court should be very cautious about enjoining any party from prosecuting or defending any action in any court of competent jurisdiction which would involve valuable rights to real estate claimed or owned by such party. Free access to the courts is a basic principle of our system.

Nebraska seeks to buttress her claim for such an injunction against Iowa by asserting that it is not fair for Iowa to litigate these matters in her own state courts, the implication being that the Iowa courts are or may be biased where the state is a party. Nebraska further asserts that it is unfair and inequitable for Iowa, with her great resources for investigation and research, to be permitted to use those resources against the individual adverse claimants. Nebraska further asserts that the Iowa law, as promulgated by her courts, is unfair and inequitable to the adverse claimants of these river areas which Iowa claims to own; Nebraska particularly complains about application of the Iowa rule that there is a presumption in favor of accretion and against avulsion which can only be overcome by clear, satisfactory and convincing evidence of avulsion.

Let it be said first that there is no evidence of bias in the state courts of Iowa where the State of Iowa has been a party claiming to own river land. Two cases involving ownership of river land have reached the Iowa Supreme Court for decision: *State of Iowa v. Raymond, et al.,* 254 Iowa 828, 119 N.W.2d 135; and *Dartmouth College v. Rose, et al., State of Iowa, Intervenor,* 257 Iowa 533, 133 N.W.2d 687. In the*Raymond* case, Iowa's title to the disputed area was quieted; in the *Dartmouth College* case, Iowa's claim to the disputed area was rejected. A third case involving ownership of a river area with Iowa as a claimant reached appellate court, namely: *Tyson v. Iowa,* 283 F.2d 802; the Court of Appeals for the Eighth Circuit held that Iowa was entitled to the damages for taking of an easement across a disputed area and it inhered in the decision that Iowa was the owner of the area in dispute.

The above mentioned cases were not re-tried before me in the instant case, but some evidence of the underlying facts in them was introduced before me. Suffice to say that there is no evidence of bias on the part of any of the courts involved, and there is no evidence tending to indicate that the three results were anything other than fair, equitable and correct.

It has never been held that a party cannot pursue his legal or equitable rights or remedies in courts of competent jurisdiction merely because that party may have more financial and manpower resources at his command than the opposing party. If this were the rule, all of our states, and the United States itself, and many large corporations would be barred from the courts most of the time.

Whether or not the courts of Iowa have been applying proper rules to determine ownership of river lands admittedly within her own borders is not for this Court to say because, as hereinabove pointed out, the several states are each and all entitled to apply their own title laws within their own borders, subject only to the requirement that such laws be constitutional.

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VI. SPECIAL MASTER'S FINDINGS ON PRE-COMPACT HISTORY

A. Situation at the Time Negotiated

In this report the Special Master has set forth the pre-1943 history of the Missouri River in considerable detail. An understanding of the river history is essential in the construction of the Iowa-Nebraska Boundary Compact of 1943. It is to be emphasized there is no substantial dispute whatsoever between the states as to the history of the river or as to the problems which were created by the characteristics of the river. According to the 1943 Annual Report of the Chief of Engineers, the work between Rulo, Nebraska and Omaha, Nebraska was approximately 99% completed in 1943 and the work between Omaha, Nebraska and Sioux City, Iowa was approximately 78% completed.

Under the assumption that the channel of the Missouri River was then under control, the two states entered into the Iowa-Nebraska Boundary Compact of 1943. The original bill in the Iowa Legislature was passed by the Iowa House and Senate and sent to the governor of Iowa on April 8, 1943. It was approved by the Governor of Iowa on April 15, 1943 and then transmitted to the Clerk of the Nebraska Legislature and passed by the Legislature and signed by the governor of Nebraska on May 7, 1943.

The reported legislative history is very sketchy in the Journals of both states. From the evidence offered I find the following:

1. At the time the states negotiated the Iowa-Nebraska Boundary Compact of 1943 each state recognized that the shifts of the river channel, both in its natural state and as a result of the work of the Corps of Engineers, had been so numerous and intricate that for practically all land adjacent to the Missouri River, no conclusive determination of either state or private boundaries was considered possible. This is applicable to the entire river boundary except for the boundary around Carter Lake, Iowa which had been definitely fixed by decree of the United States Supreme Court.

2. Both states recognized that the boundary was not located in the Missouri River at many places and that the boundary line in those places had not been determined and was almost impossible of determination.

3. Correspondence between certain county officials at the time establishes that, if a compromise could not be worked out, the determination of the fixed boundary where the river had moved by avulsion in any particular area would be extremely complicated and expensive.

4. The states intended by the Compact to settle all problems along the boundary arising from the indefinite nature of the boundary and the actions of the Missouri River and the Corps of Engineers in channelizing the Missouri River.

5. At and immediately prior to the adoption of the Compact, the State of Iowa was making no claim to abandoned river beds or islands arising in the Missouri River under the state's common law claim of title to beds and abandoned beds of the Missouri River. South of Omaha the river had been almost completely confined to

its designed channel and all land area or so-called islands remaining on the Iowa side were in existence during the negotiations for and adoption of the Compact. Iowa was making no claim to such islands at those times.

6. There were abandoned Missouri River channels and cut-off lakes or ox-bow remnants all along the Missouri River Valley and the State of Iowa had made no claim to these abandoned channels.

7. Although Iowa now claims that abandoned beds of the Missouri River and islands arising in Iowa's portion of the bed of the Missouri River have always belonged to the State of Iowa under her common law, Iowa in fact was not applying this doctrine along the Missouri River and the evidence is not persuasive that Iowa ever considered that she owned the specific islands and abandoned channels which are identified today. Any application of the principle by the State of Iowa at or prior to the time of the Compact amounted to nothing more than lip service to a principal without any application to the specific factual situation which existed. In this context, there is nothing in the history or negotiations leading up to the Compact indicating that Iowa ever intended to protect herself in the making of future claims of common law ownership to islands or abandoned beds of the Missouri River then in existence as against private title claimants.

8. The States of Iowa and Nebraska could have determined through action in the Supreme Court of the United States where the boundary was located in all disputed areas along the river but the states intended to avoid the necessity of such a determination by entering

into a Compact which avoided that requirement, recognizing the existing situation along the Missouri River, and intending to settle all of the states' problems.

9. The Compact was adopted in general terms to accomplish a general purpose of settling and laying to rest all boundary and jurisdictional problems which existed between the states. It was done in a context in which the State of Iowa was making no claims of any kind to abandoned river beds or islands in the Missouri River of the character now claimed and the express conditions of the Compact were to recognize and provide protection to the individual landowners in spite of the many uncertainties concerning the actual location of the prior boundary. The States recognized these many problems and attempted to avoid the requirement of making a determination of where the actual boundary was and the attendant expense. At this late date, neither State should now be able to require someone else to make this determination of where the boundary was located prior to the Compact in order to preserve a claim of title.

10. The Iowa Code required the Secretary of State to keep records of all property pertaining to the State Land Office and that separate tract books be kept for all such lands as the State "now owns or may hereafter own, so that each description of state lands shall be kept separate from all others, and each set of tract books shall be a complete record of all the lands to which they relate." However, Iowa had no official record of "state-owned land" held or claimed by the State of Iowa on January 1, 1943 or on July 12, 1943, the date of approval of the Compact, which showed the islands or abandoned channels which Iowa was to claim

at the present time and which are described in Part 1 of the Missouri River Planning Report of January, 1961.

11. The Iowa Code pertaining to the Iowa Conservation Commission has provided since 1923 that "The commission shall at once proceed to establish the boundary lines between the state-owned property under its jurisdiction and privately owned property" and in 1931 the language "when said commission deems it feasible and necessary" was added. However, the Iowa State Conservation Commission had not marked any of the island areas or abandoned channels described in Part 1 of the Missouri River Planning Report of January, 1961 at the time of the Compact and has not marked the boundaries on many of the areas claimed even to the present time. Consequently, at the time of the Compact, the State of Iowa was not making any claim to these lands and there was no record of any such claim in spite of the statutory requirements which would have required a record and the marking of such lands. Anyone inquiring of the State Land Office or the Iowa Conservation Commission in 1943 would have failed to find any claim of record to these so-called islands or abandoned channels along the Missouri River.

12. Both states agree that there is no record of lands ceded or actually transferred from one state to the other by the Compact. The States did not provide for the identification by survey or otherwise of land ceded. They did not make any provision to facilitate by payment of costs or otherwise the recordation of title of lands ceded by the Compact.

13. The testimony of the Iowa Conservation Commission officials made it clear that no one from the

State was paying any attention to the islands, and abandoned channels of the Missouri River at the time of the Compact and for more than a decade thereafter. The first interest expressed in these lands by the Iowa Conservation Commission was not until the latter part of the 1950's. Prior to that time, the State was not interested in these areas and no official action had been taken. The first public record of Iowa's interest was not until after January 1, 1961 when the Iowa Conservation Commission published Part 1 of the Missouri River Planning Report which shall be hereinafter referred to and when newspaper articles then related some of the contents of the Report.

14. The Compact did not consider areas separately and the only boundary area specifically referred to in the Compact was that around Carter Lake, Iowa which had been fixed by decree of the United States Supreme Court. All areas were treated generally with recognition to private titles to be given general application.

15. The states did not know where the boundary was located and they really did not care. They were not concerned about whether they were going to lose or gain anything. However, they did state that titles, liens, or mortgages good in one state would be good in the state in which the land was to lie following the Compact. This is a classic situation where the following language by Mr. Chief Justice Marshall in the case of *Handly's Lessee v. Anthony,* 5 Wheat. 374 is applicable:

". . . in great questions which concern the boundaries of states, where great natural boundaries

are established in general terms, with a view to public convenience, and the avoidance of controversy, we think the great object, where it can be distinctly perceived, ought not to be defeated by those technical perplexities which may sometimes influence contracts between individuals."

16. The states clearly evidenced the fact that they did not care where the boundary was, but if an individual had what was then considered a good title, lien or mortgage, then the states must recognize and could not attack it. The states relinquished by the Compact the right to question any title, lien or mortgage on the grounds that the land to which it applied was not within the jurisdiction of the state through which such title, lien or mortgage arose.

17. The states made no attempt to determine what private title claims existed along the Missouri River but intended to recognize all private claims as against the states without further investigation.

18. At and immediately prior to the time the states entered into the Compact, there were land areas on the left bank side of the Compact line which were taxed in Nebraska. It was generally recognized by the local officials of each state and individuals in the vicinity that such areas were originally in Nebraska and were transferred to Iowa by the Compact, whether or not in fact such was possible of proof in a court of law.

19. Under Nebraska law a person may obtain title by ten years open, notorious and adverse possession under claim of right without any requirement of a record title. Under Iowa law a person must claim under

"color of title" which requires some type of record title to commence the period of adverse possession. Consequently, at the time of the Compact, there may have been titles to lands East of the designed channel which were in Nebraska or considered as a part of Nebraska to which the individual owner did not have a record title but could have had title at the time of the Compact under the Nebraska law of adverse possession.

* * * * * * * *

(B) Text of the Compact—In Part

The Iowa-Nebraska Boundary Compact as enacted by the State of Iowa provides:

IOWA-NEBRASKA BOUNDARY COMPACT
Ratification by Iowa Legislature

AN ACT

To Establish the Boundary Line Between Iowa and Nebraska by Agreement; to Cede to Nebraska and to Relinquish Jurisdiction Over Lands Now in Iowa but Lying Westerly of Said Boundary Line and Contiguous to Lands in Nebraska; to Provide that the Provisions of this Act Become Effective Upon the Enactment of a Similar and Reciprocal Law by Nebraska and the Approval of and Consent to the Compact Thereby Effected by the Congress of the United States of America and to Declare an Emergency.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF IOWA:

Section 1. That on and after the enactment of a similar and reciprocal law by the State of Nebraska, and

the approval and consent of the Congress of the United States of America, as hereinafter provided, the boundary line between the States of Iowa and Nebraska shall be described as follows: [Then follows a metes and bounds description of the Carter Lake area which is deleted.]

The text of the Compact then continues:

The said middle of the main channel of the Missouri river referred to in this act shall be the center line of the proposed stabilized channel of the Missouri river as established by the United States engineers' office, Omaha, Nebraska, and shown on the alluvial plain maps of the Missouri river from Sioux City, Iowa, to Rulo, Nebraska, and identified by file numbers AP-1 to 4 inclusive dated March 29, 1940, which maps are now on file in the United States engineers' office at Omaha, Nebraska, and copies of which maps are now on file with the secretary of state of the State of Iowa and with the secretary of state of the State of Nebraska.

Sec. 2 The State of Iowa hereby cedes to the State of Nebraska and relinquishes jurisdiction over all lands now in Iowa but lying westerly of said boundary line and contiguous to lands in Nebraska.

Sec. 3. Titles, mortgages, and other liens good in Nebraska shall be good in Iowa as to any lands Nebraska may cede to Iowa and any pending suits or actions concerning said lands may be prosecuted to final judgment in Nebraska and such judgments shall be accorded full force and effect in Iowa.

Sec. 4. Taxes for the current year may be levied and collected by Nebraska or its authorized governmental subdivisions and agencies on lands ceded to Iowa

and any liens or other rights accrued or accruing, including the right of collection, shall be fully recognized and the county treasurers of the counties affected shall act as agents in carrying out the provisions of this section: *Provided,* that all liens or other rights accrued or accruing, as aforesaid, shall be claimed or asserted within five years after this act becomes effective, and if not so claimed or asserted, shall be forever barred.

Sec. 5. The provisions of this act shall become effective only upon the enactment of a similar and reciprocal law by the State of Nebraska and the approval of and consent to the compact thereby effected by the Congress of the United States of America. Said similar and reciprocal law shall contain provisions identical with those contained herein for the cession to Iowa of all lands now in Nebraska but lying easterly of said boundary line described in section 1 of this act and contiguous to lands in Iowa and also contain provisions identical with those contained in sections 3 and 4 of this act but applying to lands ceded to Nebraska.

Sec. 6. [This Section contains a statement that an emergency exists and the signatures to the Compact, and is deleted.]

* * *

The Compact as enacted by the State of Nebraska is identical in terms except that it is reciprocal with the names of the states reversed. Section 5 is changed slightly to take into account that Iowa has enacted its act and Sections 6 and 7 pertaining to local state formalities have been changed.

The Compact must be read in its entirety since it is a unified document. Section 5 of the Compact as

enacted by the State of Iowa made specific mention that the law enacted by Nebraska must contain identical provisions to those contained for the cession to Iowa of all lands now in Nebraska but lying easterly of said boundary line described in Section 1 and also contain provisions identical with those contained in Sections 3 and 4 of the act but applying to lands ceded to Nebraska. Sections 3 and 4 were integral parts of the Compact and the Compact must not be construed in such a manner as to render them meaningless.

Section 1 fixes the boundary around Carter Lake, Iowa by metes and bounds in accordance with the decree of this court in the case of *Nebraska v. Iowa,* 143 U. S. 359, 145 U. S. 519 and provides that the remainder of the boundary shall be the middle of the main channel of the Missouri River which is further defined as the center line of the proposed stabilized channel of the Missouri River as established by the United States Engineers' Office, Omaha, Nebraska and shown on the alluvial plain maps of the Missouri River from Sioux City, Iowa to Rulo, Nebraska and identified by File Nos. AP-1 to 4 inclusive, dated January 30, 1940, and File Nos. AP-5 to 10 inclusive, dated March 29, 1940, which maps were then on file in the United States Engineer's Office in Omaha, Nebraska and copies of which maps were on file with the Secretary of State of Iowa and the Secretary of State of Nebraska. With regard to these provisions the Special Master finds:

1. The AP maps or alluvial plain maps referred to in the Compact were dated approximately three years prior to the date when the Compact was adopted and below Omaha show the Missouri River confined to

its designed channel. Above Omaha, much of the Missouri River is not yet confined to the designed channel and the designed channel at places bisects islands, bar area, and bank land.

2. A stamped notation appears on each of these maps indicating that the area covered by the Missouri River on the map was compiled from aerial photographs taken by the U. S. Army Air Corps and field surveys made in 1939. The area landward from the Missouri River was compiled from uncontrolled mosaics of aerial photographs taken by the United States Department of Agriculture in 1936, 1937, and 1938.

3. The overwhelming weight of the testimony is that these AP maps are analogous to a highway or road map and were prepared to facilitate the employees of the District Office and of the field office in driving to various locations along the river. They were primarily used for gaining access to various jobs which were under construction along the river and would be similar to a highway map. They were also described as "a glorified road map." They were not intended for any engineering results; they did not contain any distances, calls, angles or measurements which would enable a surveyor to find the center of the designed channel on the ground. The information on the AP maps as to section lines and other information landward from the river is extremely inaccurate. There were areas where the features shown on the maps are at least one-quarter mile in error.

Several communications from the U. S. Army Corps of Engineers, Omaha District, have stated that the present state boundary between Iowa and Nebraska

cannot be located throughout on the ground from the Alluvial Plain maps since they are too small a scale (1″ equal to 2,640′) and do not contain sufficient detail for a surveyor to accurately locate the boundary. At one time it was possible to locate the state boundary from their 1″ equal to 400′ construction maps as the river alignment as shown on these maps conforms to the alignment as shown on the Alluvial Plain Maps. Since the present Boundary Compact was ratified, numerous channel realignments have been made and the basic 1″ equals 400′ tracings have been revised to show these realignments. Copies of 1″ equals 400′ maps which show the alignment in accordance with the alignment shown on the Alluvial Plain Maps were not retained and it is not possible to locate the boundary on the ground throughout from any maps on file in the Corps' office.

The Alluvial Plain Maps on file with the offices of the Secretary of State of Nebraska and Iowa are of the scale of 1″ equals 5,280′. Other Alluvial Plain Maps on file with the Corps of Engineers are of the scale of 1″ equals 2,640′. Some of these have had material added to the maps which did not appear on the original AP maps of the scale of 1″ equals 5,280′ as on file with the Secretaries of State. However, these maps have the same date as the AP maps referred to in the Compact although there is no indication on the maps of the date or dates that the additional material was added. This is not atypical of many of the Corps photographs and maps relating to the Missouri River which have been altered or changed over the years. The Nebraska State Surveyor testified that his office, which was the only office in Nebraska which carries official land survey

records, had no information on file when he became State Surveyor in 1960 which would help determine the location of the center of the designed channel as shown on the Alluvial Plain Maps.

The evidence and the testimony lead to the inescapeable conclusion that the Compact was prepared in general language and adopted or fixed the new boundary in general terms with no anticipation that either state would use it as a property line or require that it be located with the preciseness required for property surveys.

The State of Iowa contends that the boundary can be located with preciseness through the utilization of other data and maps available from the Corps of Engineers. However, the Corps communications negate this claim and the evidence further shows that Iowa's surveyors have used different and inconsistent methods in locating the Compact line on the ground. In the Nottleman Island area, three surveyors, two employed by the State of Iowa and the Nebraska State Surveyor located the Compact boundary in three different places. This results from the fact that data which does not appear on the AP maps must be utilized and each surveyor used different data in making his determinations. There is no official supporting data available. However, both Iowa's and Nebraska's expert surveyors who testified admit that approximately the westerly 50 feet of the land claimed by the State of Iowa in the case of *State of Iowa v. Babbit, et al* is presently in the State of Nebraska and is west of the center line of the proposed channel of the Missouri River as established by the alluvial plain maps referred to in the Iowa-

Nebraska Boundary Compact. This land is not within the jurisdiction of the Courts of the State of Iowa, is not owned by the State of Iowa, is within the jurisdiction of the State of Nebraska, and Iowa's attempt to quiet title to this land constitutes an encroachment upon the sovereignty and territory of the State of Nebraska. Nebraska does not contend that this in and of itself is determinative of this case but has raised the point to illustrate the practical problems if the Compact line is to be used as a line to determine boundaries of proprietary claims of the States.

The State of Iowa contends that the construction maps by the Corps of Engineers which are of a scale of 1″ equals 400′ contain adequate data to locate the Compact line but the testimony and the communications from the Corps of Engineers indicate that such information adequate to locate the Compact line throughout is not available and has not been retained by the Corps. Testimony also indicated that it is frustrating to obtain information from the Corps of Engineers as concerns their previous projects and the situations of the river at the time of the Alluvial Plain Maps. Documents and information might be available at one time and not be available at another. Information has been destroyed or lost and there was no reason for the Corps to be particularly interested in keeping their old records. Attempts to obtain information from the Corps are time consuming and consequently expensive.

Although the Corps of Engineers has also informed the State of Iowa and its officials that the 1943 state boundary between Iowa and Nebraska cannot be located throughout on the ground from the Alluvial Plain Maps and that the 1″ equals 400′ construction maps have not

been retained and it is not posible to locate the boundary on the ground throughout from any maps on file in the office of the Corps of Engineers, the Iowa Conservation Commission and Attorney General's office have continued to assert that the boundary can be located from data obtained from the Corps of Engineers. Other branches of Iowa's government, such as Iowa's Governor's Advisory Committee on the Iowa-Nebraska Boundary have accepted this determination by the Corps of Engineers that it cannot be located from the construction maps.

Neither state contends that the gravamen of this action is the actual location of the Compact boundary at any particular point along the Missouri River. Nebraska has interjected the issue of the difficulty in finding the boundary as illustrative of the meaning and intent of the Compact as being indicative of the fact that neither state ever intended to conduct itself in such a manner that the location of the Compact boundary on the ground would be necessary to determine either State's property rights. The states assumed the boundary would be located in the middle of the Missouri without being concerned about its precise location there.

At the time the states entered into the Iowa-Nebraska Boundary Compact, it was generally believed that the Missouri River had been stabilized in the designed channel or would be moved into the designed channel where the river would remain stabilized. During World War II, the activity by the Corps in maintaining the stabilization works was curtailed and the river escaped from the designed channel above Omaha and reverted to its wild natural state. This has resulted in a situation where both banks of the river are com-

pletely in Nebraska at the present time for approximately 21 miles between Omaha and Sioux City. Both banks of the river are entirely in Iowa for approximately 14 miles.

The present situation was described in the Iowa Governor's Advisory Committee Report dated December 1, 1964 as:

> ". . . industrial firms are faced with uncertain title and tax structures not knowing what state they are in, retarding the potential development of this area."

The record also makes reference to activity by both legislatures and recognition by the Iowa governor that the settlement of the Iowa-Nebraska Boundary dispute was recommended ". . . in order to settle long-pending questions of land ownership and to open up the Western Slope of Iowa to commercial, industrial and recreational development." The Special Master finds that a determination of the meaning and application of the Iowa-Nebraska Boundary Compact is of paramount interest to both states and is essential if the two states' boundary problems are ever to be solved.

In those places where the Missouri River might still have beeen the boundary in 1943, the Compact changed the boundary from the movable navigable channel or thalweg to a fixed line. The change abrogated the application of the common law principle relating to a movable navigable stream as the boundary between the states. The testimony and navigation charts have established that the navigable channel tends to follow the outside of the bends and was not coincident with a line midway between the banks except at those places where

it crossed from one curve to the other. Consequently, land within the bed of the Missouri River, was "ceded" along the entire boundary.

(a) COMPACT: SECTION 2

Section 2 of the Compact provides:

> "The State of Iowa hereby cedes to the State of Nebraska and relinquishes jurisdiction over all lands now in Iowa but lying westerly of said boundary line and contiguous to lands in Nebraska.
>
> "The State of Nebraska hereby cedes to the State of Iowa and relinquishes jurisdiction over all lands now in Nebraska but lying easterly of said boundary line and contiguous to lands in Iowa."

It is clear from the evidence that the states did not know what specific land areas actually were in Iowa but were in the western side of the Missouri River and this general language was used to make it clear that the new state boundary was to become effective and Iowa was to have no further jurisdictional claim to any areas to the west or on the right side of that boundary. By the same token, the states did not know what specific areas lying on the left bank or eastern side of the new boundary had previously been within the jurisdiction of Nebraska. They both accepted the fact that any possible such areas were "ceded" to the other state by this general language.

The word "cede" as used in the Compact must be read as a part of the whole document. The following principle is applicable:

> "A writing is interpreted as a whole, and all writings that are part of the same transaction are interpreted together." Restatement of the Law Sec-

ond, Contracts, Tentative Draft No. 5, §228(2), p. 68.

"Meaning is inevitably dependent on context. A word changes meaning when it becomes part of a sentence, the sentence when it becomes part of a paragraph. A longer writing similarly affects the paragraph, other related writings affect the particular writing, and the circumstances affect the whole." Restatement of the Law Second, Contracts, Tentative Draft No. 5, §228(2), comment d, pp. 72, 73.

The cardinal rule of construction is that we seek to determine and to give effect to the intentions of the parties. In this case, it is clear as to what the parties had in mind. They intended to settle their differences and at that time the State of Iowa had raised no issue concerning its ownership of beds or abandoned beds of the Missouri River and the States clearly were desirous of avoiding expensive determinations as to where the river had previously moved by avulsion and as to the location of the pre-1943 boundary. They accepted the fact that it was not located in the river at many places and that it was almost impossible of determination.

"Words and other conduct are interpreted in the light of all the circumstances, and *if the principal purpose of the parties is ascertainable it is given great weight.*" Restatement of the Law Second, Contracts, Tentative Draft No. 5, §228(1), p. 68. (Emphasis supplied.)

If effect can be given to the intention of the parties it should be done rather than exalt a "literal" reading of

the word "cede" as being applicable only to lands which it must be proven were in fact transferred, as the requirement of such proof was something which the States attempted to avoid and is inconsistent with the remainder of the Compact. A literal reading of the word "cede" in a restrictive manner would relegate the word to a higher status than the understanding and agreement of the parties themselves. Such a literal reading would result in the court's making a contract for the parties which they did not make. This possibility is explained by Professor Corbin:

> "The primary and ultimate purpose of the interpretation is to determine and make effective the *intention of the contracting parties.*" (Emphasis by the author.) * * *
>
> "No party to a contract should ever be bound by an interpretation that is determined exclusively by the linguistic education and experience of the judge. * * *
>
> "When a court enforces a contract in accordance with an interpretation that seems 'plain and clear' to the court and excludes relevant convincing evidence that the parties intended a different interpretation, it is 'making a contract for the parties', one that they did not make.
>
> "No word or group of words in any language has an 'objective' meaning separate from and independent of its actual use by some person to convey his thought to another person." 3 Corbin on Contracts, 1964 PP., §572B.

(b) COMPACT: SECTIONS 3 AND 4

Sections 3 and 4 of the Compact as adopted by the Iowa legislature provide:

> "Sec. 3. Titles, mortgages, and other liens good in Nebraska shall be good in Iowa as to any lands Nebraska may cede to Iowa and any pending suits or actions concerning said lands may be prosecuted to final judgment in Nebraska and such judgments shall be accorded full force and effect in Iowa.
>
> "Sec. 4. Taxes for the current year may be levied and collected by Nebraska or its authorized governmental subdivisions and agencies on lands ceded to Iowa and any liens or other rights accrued or accruing, including the right of collection, shall be fully recognized and the county treasurers of the counties affected shall act as agents in carrying out the provisions of this section: *Provided,* that all liens or other rights accrued or accruing, as aforesaid, shall be claimed or asserted within five years after this act becomes effective, and if not so claimed or asserted, shall be forever barred." (Emphasis theirs.)

These two sections must be considered in light of the conditions as they existed at the time of the Compact and the purpose and intent of the parties to the Compact.

The navigation charts and testimony have established that the navigable channel of the Missouri River in the designed channel tends to follow the outside of the bends or curves. This navigable channel, or what would be the "thalweg" or boundary if it should be as-

sumed that there had been no prior avulsions, was not coincident with a line midway between the banks of the designed channel as established by Section 1 of the Compact as the Compact boundary, except at those places where the navigable channel crossed the center from one curve to another. Consequently land within the bed of the Missouri River was "ceded" or transferred from one state to the other all along the entire boundary in addition to the land which had been stranded on opposite sides of the river by the natural cut-offs and man-made canals or prior avulsions. The states had recognized that the river necessarily had to have been entirely in Iowa or entirely in Nebraska at many places. The states desired to avoid the expense of determining these specific places and the states took the easier course of attempting to accomplish the general purpose of settling and laying to rest all boundary and jurisdictional problems which existed between the states by agreement. The references to "titles, mortgages and other liens good in Nebraska" had to necessarily refer to all claims of title, mortgages, and other liens claimed to lands which were east of, or on the left bank side of, the Compact line as these were the same lands which the states were accepting as having been "ceded" or transferred.

There is no record of any determination of what suits or actions concerning said lands might be pending at the time of the Compact but the language authorizing them to be prosecuted to final judgment in Nebraska and requiring Iowa to afford such judgments full force and effect necessarily had to refer to any pending suits in the Nebraska courts which concerned lands which would be on the eastern or left bank side of the new Compact boundary. Any requirement which would im-

pose a duty upon the individual claimants to establish which state the land was in prior to the Compact would be inconsistent with the intent and conduct of the states in avoiding that requirement.

Section 3 was intended to protect the rights of private property claimants against the claims by either state and is a broadly phrased clause which should be liberally construed to effect this purpose. As such, neither state should be able to attack any private titles or claims emanating from the other state as of the date of the Compact.

The only parties to the Compact were the two states and individuals who were not parties to the Compact but who are effected by it should not be penalized by the State's conduct.

It was the intent of Section 3 to recognize and protect property rights which would necessarily be affected by the Compact by the mere determination of a fixed and definite boundary which, prior to the Compact had admittedly been vague, uncertain, indefinite, and almost impossible of determination.

Section 3 imposed an affirmative requirement upon the States and assurance to the other contracting state that titles, mortgages and other liens claimed under one state's jurisdiction would be recognized and good and valid under the jurisdiction of the state in which the property would lie after the Compact.

At the time of the Compact, the main conduct by either state which was affecting lands along the Missouri River was the taxation of these lands. The states recog-

nized that there was a great deal of uncertainty in the taxation of the lands along the Missouri River, some areas being taxed in both states, some areas not being taxed in either state, and in several places lands being taxed by a state although they were located upon the opposite side of the Missouri River. Section 4 authorizes the state or its authorized governmental subdivisions or agencies to tax lands "ceded" for the current year and required that any liens or other rights accrued or accruing, including the right of collection, should be fully recognized and the county treasurers of the counties affected were authorized to act as agents in carrying out the provisions of that section, provided that all liens or other rights accrued or accruing should be claimed or asserted within five years or be forever barred.

This section constituted a clear limitation upon claims by the State for tax purposes and these were the only claims which were being asserted by the states at that time. Since there was no determination of lands "ceded", this section obviously could only refer to areas against which taxes were levied at the time and constituted a recognition insofar as the states were concerned, that such areas on the opposite sides of the Missouri River which were being taxed by a state were considered as having been ceded as the term was used in the Compact. This is another recognition of the fact that all areas along the Missouri River, which after the Compact were definitely established as being located in one of the state's jurisdictions, were considered as having been ceded as that term was used in the general language of the Compact.

Section 4 provided a five year limitation for the assertion of rights of any liens or claims arising out of taxation of the lands by the states or their authorized governmental subdivisions and agencies. This constituted a clear limitation upon such claims arising from the governmental authority of the states and complimented Section 3 which was a clear recognition of existing private claims. There is nothing in the Compact reserving the right of either state to make additional claims of title under any other doctrine of sovereignty. Nothing preserves to the states the right to make any further claims and, as the Compact was intended to settle all problems along the border, it is to be construed to include all claims made by either state which might be asserted under any common law claim of sovereign ownership of beds or abandonded beds of the Missouri River, especially since Iowa had not claimed these areas theretofore.

The provisions of compacts become the law of the contracting states and state statutes or laws which conflict with an interstate compact are invalid and unenforceable. *Green v. Biddle,* 8 Wheat 1, *The Interstate Compact since* 1925 by Zimmerman and Wendell, p. 32; *U. S. v. Bekins,* 304 U. S. 27; *Poole v. Fleeger,* 11 Pet. 185, 209; *Rhode Island v. Massachusetts,* 12 Pet. 657, 725; *Hinderlider v. LaPlata River & C. C. Ditch Co.,* 304 U. S. 92.

In the construction of agreements or compacts the fundamental rule is to ascertain the substantial intent of the parties and, in making this inquiry, it is proper to examine into the state of things existing at the time and the circumstances under which the agreement was

made. The history leading up to the Compact is relevant in determining the proper construction and the effect of the Compact as applicable to titles along the Missouri River. It is the substance of the agreement, as contradistinguished from its mere form, which is essential in order that a fair and just construction may be given to the agreement and the court must ascertain the substantial intent of the parties which is the fundamental rule in the construction of all agreements. *Chesapeake & Ohio Canal Co. v. Hill,* 15 Wall. 94. See also *In re Ross,* 140 U. S. 453.

As Mr. Justice Stone stated in *Massachusetts v. New York,* 271 U. S. 65, 87:

> "In ascertaining that meaning, (of the Treaty of Hartford) not only must regard be had to the technical significance of the words used in the grants, but they must be interpreted 'with a view to public convenience, and the avoidance of controversy', and 'the great object, where it can be distinctly perceived, ought not to be defeated by those technical perplexities which may sometimes influence contracts between individuals.' Marshall, C. J. in *Handly's Lessee v. Anthony,* 5 Wheat. 374, 383-384. The applicable principles of English law then well understood, the object of the grant, contemporaneous construction of it, and usage under it for more than a century, all are to be given consideration and weight. *Martin v. Wadell,* supra."

All parts of a treaty are to receive a reasonable construction with a view of giving a fair operation to the whole. *Sullivan v. Kidd,* 254 U. S. 433, 439. Narrow and restricted interpretations are not favored and

treaties are to be liberally construed so as to effect the apparent intention of the parties. See *Nielsen v. Johnson,* 279 U. S. 47, *Jordan v. Tashiro,* 278 U. S. 123 and *In re Ross,* 140 U. S. 453, 475.

It is not unusual for a country, in ceding territory, to stipulate for the property of its inhabitants. *U. S. v. Chaves,* 159 U. S. 452, 457.

Nebraska contends that the Iowa-Nebraska Boundary Compact was adopted in general terms with a view to public convenience and the avoidance of controversy and this great object should be effectuated. The language stipulating for the property of the inhabitants should be liberally construed so as to effect the apparent intention of the parties to secure the people along the Missouri River in their rights and to give them protection from the states in whose respective jurisdictions the property would lie after the Compact insofar as claims emanating from such other state were concerned. The Compact intended to leave the individuals secure in their property rights as recognized immediately prior to its adoption. At that time Iowa was not contesting these property rights.

Any technical construction of the word "cede" in the Compact to require a land owner to now prove that his land was in fact transferred from one state to the other and which would also require this land owner to prove the location of the boundary prior to the adoption of the Compact is clearly inconsistent with the purpose, object and intent of the Compact and would be a restrictive reading which would destroy the purpose of the boundary compromise. It would be placing a burden upon the land owner which the states themselves refused

to undertake in 1943 and agreed would not be necessary. The states would in effect be saying to the land owners, "we could not prove where the boundary was in 1943 but now, after we have waited 27 years, we are going to make you prove where it was at your expense even though we know it is impossible."

(C) Nebraska and Iowa Common Law

Under Nebraska law, title to the beds of navigable streams is in the riparian owner subject to the public easement of navigation, each owner owning to the thread of the stream. The leading case is *Kinkead v. Turgeon,* 74 Neb. 580, 109 N. W. 744 (1906), reversing 74 Neb. 573, 104 N. W. 1061 (1905). The Nebraska rule is based upon the equitable principles that, where a person is subject to having his property added to by gradual movement of the river, he also suffers the possible loss which might result. Under Nebraska law the Nebraska owner's right extends to islands, bar areas or beds which are on his side of the thread of the stream. However, the Nebraska owner's title to the bed is subject to the public easement of navigation.

The Iowa courts have followed the principle that the state owns title to the beds of all navigable streams within the State of Iowa to the high water mark and that any islands arising out of the beds of navigable streams in the state belong to the State of Iowa. The leading case is *McManus v. Carmichael,* 3 Ia. 1 (1856).

In 1956, just prior to the time the Conservation Commission commenced its activity investigating lands along the Missouri River, an article appeared in 42 Iowa Law Review 58 entitled DETERMINATION OF

RIGHTS TO REAL PROPERTY ALONG THE MISSOURI RIVER IN CONNECTION WITH RIVER STABILIZATION which discussed prior treatment by the Iowa courts of Missouri River lands and stated that the Iowa courts had vascillated in determining whether sand bars were islands or accretions to the high bank. The article suggested that if such sand bars in the Missouri River are deemed islands, then there was reason to believe that the State of Iowa might lay claim to them as state property. However, there had been no determination by the courts that the State of Iowa would have a right to such sand bars or new lands added to the territorial domain of Iowa through the process of avulsion or by stabilizing work done by the Corps of Engineers. The article indicated such claims may develop on account of the substantial amount of new land that would be added to Iowa by reason of such channel stabilization work and the determination of the state boundary along the center line of such stabilized channel. It was following this article that Iowa's activities and claims began and this article has been cited by the Iowa Supreme Court. See *State of Iowa v. Raymond,* 254 Iowa 828, 119 N. W. 2d 135.

The State of Iowa, in the preparation of Part 1 of the Missouri River Planning Report, January, 1961, and in the prosecuting of quiet title actions, has proceeded under the Iowa common law principle of state ownership to the bed of the Missouri River. Iowa has utilized Section 1 of the Compact to establish that the land is in Iowa and then proceeded to apply her common law.

* * * * * * * *

VII. CONDUCT OF THE STATE OF IOWA FOLLOWING THE COMPACT AS ALLEGED BY NEBRASKA

Following the adoption of the Compact in 1943, individuals possessing land on the easterly or Iowa side of the Missouri River under Nebraska titles or claims continued in the peaceful use and enjoyment of their land without any claim of ownership by Iowa governmental authorities during the 1940's and 50's.

Much of this land had formerly been of little value, consisting of scrub timber, willows, and heavy undergrowth and not immediately suited for farming or other productive use. A great deal of money and labor was spent by these owners in the clearing of this land and it has, through their efforts, become useful, productive land with values ranging from approximately $400 to $600 per acre.

Some lands were placed on the tax roles in the counties in Iowa adjacent to the Missouri River and taxes were assessed and collected on such lands.

In 1956, when the State of Iowa was joined as a defendant in an action to quiet title to land which included abandoned bed of the Missouri River, as a result of an avulsion known to the State of Iowa, the State of Iowa acknowledged that it had no claim of ownership of the land which was an abandoned channel of the Missouri River located to the east of the Compact line.

The State of Iowa made no claim whatsoever to certain other lands which were abandoned channels of the Missouri River and the Iowa State Conservation

Commission has even purchased land which was in abandoned channels from landowner claimants.

The Iowa State Conservation Commission first showed an interest in lands along the Missouri River when it was brought to their attention that people were occupying these lands in some instances and the decision was made by the Commission to find out what and where the public did "own" lands, based upon the Iowa doctrine of state ownership of beds or abandoned beds of the Missouri River. Generally all the activity by the Conservation Commission in connection with the Missouri River started about 1958. Mr. Lloyd Bailey, the Chief of the Land Acquisition Section of the Iowa Conservation Commission, testified that when he took that office in 1958 the records of state-claimed lands were very poor along the Missouri River and there was very little record of anything in that office. There was no other office where an outsider could go to determine what lands were claimed by the State. It was some time after he took office that the big investigation started to turn up lands that could be included as state-claimed lands in the 1961 Missouri River Planning Report.

A study was undertaken by the Iowa Conservation Commission and areas were selected and the decision to attempt to acquire title by quiet title proceedings was made in the Iowa Conservation Commission. People claiming such lands were not given an opportunity to be heard by the Commission in any official hearing.

Final decision as to whether or not the State Conservation Commission would claim areas selected as

abandoned river channels or ox-bow lakes was to be with the Attorney General's office.

The determination of the ordinary high water mark by the State of Iowa to delineate the point from which its ownership of an abandoned channel or islands commenced was based on the location of the ordinary high water mark just prior to the diversion of the waters into the new channel by the Corps of Engineers. They made no investigation in going back of that for their present purposes. Consequently, any previous ordinary high water marks or abandoned channels of the Missouri River prior to this time were overlooked or ignored by the Commission.

Mr. Jerry Jauron testified that he was given special duty by the Conservation Commission as Missouri River Coordinator in 1958 and was assigned the task of making a survey and investigation of the entire stretch of the Missouri River which constitutes the western boundary of Iowa for the purpose of determining existence or nonexistence of "state-owned lands." He would find areas and select them, research them primarily at the Corps of Engineers for their maps, pictures and photos and give this information to the Attorney General's office. This would then be discussed with the Attorney General's Office and representatives of the Commission and the effort culminated in the published Part 1 of the Missouri River Planning Report.

Four of the five areas south of Omaha claimed by the State of Iowa were extensively cleared and a portion of the fifth area had been cleared to a limited extent at the time the Iowa Conservation Commission

published Part 1 of the Missouri River Planning Report in January, 1961.

Most of the areas north of Omaha resulted from work done on the river by the Corps of Engineers after 1943. Where the Corps had redesigned the channel following the Compact, Iowa claimed the area which had just come into existence as the Corps moved the river as "state-owned land". This was claimed as abandoned river channel. Iowa also claimed all of the new bed of the channel lying east of the Compact line. The State of Iowa in its investigation did not examine county records or, if any examination was made, it was very little or nothing to speak of.

The project by the Commission to find the so-called state lands was commenced because of the redesigning of the Missouri River from Council Bluffs to Sioux City by the Corps of Engineers. If Mr. Jauron rejected any area as a state-claimed area it was never brought to the attention of the Attorney General's Office or the Iowa Conservation Commission and the State made no claim to it.

The representatives of the Attorney General's Office and Conservation Commission rejected three or four areas out of an original approximately 25 areas which had been selected by Mr. Jauron. If Mr. Jauron had recommended in Des Moines that they did not want an area for some reason or other, it would not have received any consideration.

Mr. Jauron testified that the State of Iowa did not claim all river beds of the Missouri River valley and he could not explain why some of them are ignored and some of them are claimed. The evidence fails to

show any consistency or logic in the selection of areas Iowa claims. If certain areas were under water the first time Mr. Jauron saw them, he would have claimed them for the State of Iowa.

Consequently, the areas claimed depended in part upon whether they were under water within the memory of the witness and in part upon whether the specific documents examined by Mr. Jauron happened to indicate an abandoned channel. However, many of the documents offered by the Plaintiff show the river in various areas and abandoned channels which were not claimed by the State of Iowa.

Mr. Jauron testified that in his mind there was absolutely no doubt that certain areas were old river beds but no exhibits or witnesses who might state that they were old river beds existed. Consequently, whether or not the State would claim areas depends in part upon the remaining available evidence as of the present date and whether the individual researching such areas had done an extensive investigation.

When asked whether Iowa claimed lands on the west side of the 1943 Compact line as abandoned channels, Mr. Jauron testified that at the time they started, the Attorney General in charge instructed them to claim no lands on the other side of the boundary compact line. However, this policy was changed in another Attorney General's administration. Mr. Jauron testified that his answer would have to change three or four times because they changed attorney generals three or four times. The evidence shows that Iowa's conduct was determined by particular attitudes by the various

Attorney Generals and not by any rule of law concerning the meaning or effect of the Compact.

Mr. Jauron did not know of any discussions concerning whether or not the lands selected as property of the State of Iowa were on the tax rolls. During the meetings to determine areas which the State claimed, if individuals lived on the areas or were occupying these lands, the Iowa officials automatically assumed that they were trespassers.

In the determination of the boundaries of the areas Iowa claimed, in some instances the Attorney General's Office instructed the surveyors as to what to survey. In other instances the evidence indicated that the Conservation Commission officials instructed the surveyor where to place his line. In some of the areas which Iowa claimed, there were bank lines further to the East from where Iowa was making claim and in both the Nottleman and Schemmel areas the eastern line of Iowa's traverse, which normally would have followed the ordinary high water mark, followed no such geographical feature but crossed water area, cultivated fields, and along level land with no bank or physical feature visible.

In one instance, two islands were bisected by canals with portions of the upstream and downstream islands being placed on the right bank as a result of the work of the Corps and the portions of the two islands which were placed on the left bank as the result of the construction silted together and became one area. Iowa is claiming that area as abandoned channel in the Planning Report but Iowa did not, at that time, claim the portions of the two islands which were placed in Nebraska.

Iowa claims other areas where the river was completely in Nebraska in 1943 because of prior avulsions. In at least two instances, the river then escaped from its designed channel and moved back to the East. Then the Corps placed it in the designated channel by subsequent canals. Iowa is claiming the area where the river escaped following 1943 as abandoned channel because that land "is in Iowa" as the state-line is defined by the Compact of 1943. Had it not been for the Compact, the land would be in Nebraska.

At Decatur, Nebraska, the Missouri River moved outside of its designed channel to the East following 1943 and a bridge was built upon dry land over the designed channel. The Corps then moved the river back under the bridge by the digging of a canal and the State of Iowa has claimed the area where the river was to the East as well as the portion of the present designed channel where the river is now located which is in Iowa. Iowa has not claimed ownership of the bridge and has not exacted any tribute for a pipeline which crosses the area Iowa claims at that point.

In most places where the Missouri River is confined to the designated channel as described in the AP maps, the State of Iowa claims ownership of all that portion of the channel which is presently East of the Iowa-Nebraska Compact line. Iowa makes this claim even in those areas where the river had been entirely in Nebraska as the result of the construction of canals or natural avulsions prior to 1943. Iowa contends that when the new state line was established, under Iowa common law the State immediately became the owner of any part of the channel of the Missouri River or any abandoned chan-

nels of the Missouri River which were to the East of that Compact line, notwithstanding the fact that such areas, were in Nebraska up until the date of the Compact. Nebraska contends that the Compact requires Iowa to recognize Nebraska titles and this includes the title to the bed of the river which in many places was entirely in Nebraska claimants. Nebraska also contends that the Compact could not deprive individual proprietors of their vested riparian rights which includes the right to accretion and to abandoned beds in the case of avulsion. Nebraska further contends that when the states agreed to a new boundary they, in stipulating to recognize all titles along the Missouri River without necessity of determining where the former boundary had been, necessarily changed Iowa's common law in such a manner that the State of Iowa must recognize it has no further claim of ownership to the bed of the Missouri River but only has an easement for the use of the public such as exists in Nebraska. Otherwise, owners are penalized by having to establish where the boundary was prior to 1943 in order to protect their vested rights, a requirement which the states avoided and attempted to obviate by entering into the Compact and providing safeguards to protect individual property rights.

Iowa argues that the lands along the Missouri River which Iowa claims as beds or abandoned beds are trust lands and the State of Iowa has a duty to claim them. Iowa has no explanation for the fact that Iowa went for years without claiming these areas except that her officials may have been derelict or she is not responsible for the acts of her former public officials. Iowa has no explanation for the fact that Iowa has not claimed other abandoned channels along the Missouri River or why

Iowa waited so long after the Compact to make her claim. The evidence indicates that Iowa was not interested in these lands until they became valuable land with an economic potential or recreational potential to the state. It is neither fair nor equitable for Iowa to delay as long as she has in claiming these areas and to ignore other such areas of like character along the Missouri River and now allow the state to selectively claim certain areas against individual land owners and particularly those claiming through Nebraska titles.

(A) Part 1 of the Missouri River Planning Report

The Iowa State Conservation Commission published a document dated January 1, 1961 entitled PART 1 OF THE MISSOURI RIVER PLANNING REPORT, and it is this document which first publicly disclosed a concerted effort on the part of the Iowa State Conservation Commission to assert claims of title to lands along the Missouri River under the doctrine of state ownership to the beds and abandoned beds of the Missouri River. This report listed 25 potential recreation areas, of which 21 were based upon claims by the State of Iowa under its "common law" to areas as beds or abandoned beds or islands arising in the bed of the Missouri River. Of the other four areas, one was obtained by the state by purchase and three are highway access areas. All of the 21 areas claimed were immediately adjacent to the Missouri River. This report recognized that:

> "In years past the Missouri has been a fast running river, subject to regular flooding and often carrying heavy silt loads.

"The uncontrolled river moved about freely, cutting new channels, abandoning old, always adding to and subtracting from the shoreline on both banks."

It also recognized that:

"The past violent fluctuations in river water levels have been so frequent that changes in channels, bank location, sand bars, etc., made it virtually impossible to describe the state boundary or to determine land ownership on the Iowa side. It hasn't been necessary to tie down the line between state and private ownership because development for recreation was not considered feasible because of constant change."

The report further recognized that project development was hampered by the cloudy title to lands on the Iowa side of the state boundary and "a lack of knowledge of exact ownership lines also prevents the State of Iowa from acquiring lands needed for access to water or for other shore line developments."

It also recognized previous avulsions along the Missouri River:

"The 1943 compromise became necessary because by that time a great deal of channel stabilization has been completed. Because the new channel did not always follow the old river bed it became necessary to re-define the location of the state's boundary."

It suggested that development of the Missouri River for recreational use would be expedited to a large degree if the state boundary is set as the center of the new channel. It considered the 21 areas and in most of them recognized and recommended that a quiet title action

must be necessary. It then used such language as "If state is granted title", "if title is granted to State of Iowa" or if the state "gains title" certain recommended actions should be taken.

The Planning Report recognized the many uncertainties along the Missouri River and even recognized the occupancy of other individuals because of the necessity for quiet title proceedings. The report further recognized the ownership problems which the State of Iowa might have. This indicated an uncertainty in the status of the law and that Iowa's claims had not been determined prior to this time.

Part 1 of the Missouri River Planning Report represents the present policy of the State of Iowa concerning acquisition of or proof of interest in lands referred to in the report.

This activity by the Iowa Conservation Commission along the Missouri River and the resulting Part 1 of the Missouri River Planning Report and Iowa motives are explained by a letter from the Attorney General of Iowa to the Governor of Iowa in 1964 which stated:

> "For many years of Iowa's history, the state did not zealously protect its ownership of these islands, particularly islands forming in the Missouri River, because for many years islands in the Missouri River were considered transitory in nature, subject to excessive flooding and of little value.
>
> "In recent years, U. S. Army Corps of Engineers works in the Missouri River Basin have changed this picture entirely. Channel stabilization work has made it so that the islands are no longer transitory.

Upstream impoundments have made it so that they are no longer subject to frequent flooding. These areas now have substantial value to the people of Iowa, both monetary and in some cases, recreational."

(B) Iowa's Statement of the Post-1943 History of the Missouri River

Before the Kansas City-Sioux City navigation, bank stabilization and flood control was completed, the country became involved in World War II. During the war, the Corps of Engineers turned its attention, manpower and resources almost entirely to prosecution of projects which were directly concerned with the war.

Fort Peck Dam had been constructed on the Missouri River in Montana. But other upstream dams, later to be known as Garrison Dam, Oahe Dam, Big Bend Dam, Ft. Randall Dam and Gavin Point Dam, in North and South Dakota had not been constructed. Therefore, control of river stages had not been achieved and floods continued.

During and for a time after the war, the river ravaged the bank stabilization structures which the Corps had installed along the river between Kansas City and Sioux City. Below Boyer Bend, which is about 22 miles upstream from Omaha, although the structures were damaged, the river remained in the designed channel. Upstream from Boyer Bend to Sioux City, the river reverted to the wild, escaping from the designed channel in many places.

The most disastrous flood in history occurred in early 1952. (The great flood of 1881 still holds the

record for having produced the highest river stage, but the 1952 flood far exceeded it in terms of dollar damages.)

Later in 1952, after the flood, the last of the Dakota dams was closed (Gavins Point Dam) and nothing comparable to the 1952 flood has occurred since, although minor flooding of lands near the river still occurs as a result of ice jams and local heavy rainfall.

At about the time that the Corps was gaining control over river stages by the upstream dams, they also began giving their attention to repairing the damage to their navigation channel downstream from Sioux City. Downstream from Boyer Bend, because the river had not escaped from the 1943 designed channel, the Corps elected to simply repair and restore the structures so as to stabilize the channel in the same designed channel which had been designed in 1943. Therefore, from Boyer Bend downstream to the Iowa-Missouri state boundary, the mileage today is about 84 miles as it was in 1943, and the Nebraska-Iowa boundary line is still entirely in the river now as it was then, except only at Carter Lake.

Upstream from Boyer Bend to Sioux City, a distance of about 97 river miles, the Corps found it impractical to restore the river to the "state line designed channel" in its entirety. Some segments were restored to the former design, but a new designed channel was laid out for many other segments. This is demonstrated by the fact that mileage from Boyer Bend to Sioux City was approximately 109 miles by following the center line of the 1943 designed channel which is the state boundary, whereas it is now only 97 miles by follow-

ing the present river. The Corps explains the change of design between Boyer Bend and Sioux City on two bases: (1) It would have been excessively expensive to restore the river to the old design in its entirety. (2) It was felt that some of the bends in the old design were too sharp and that the river should be generally less curvaceous.

About 50 miles of the river between Boyer Bend and Sioux City is in the same channel as was designed for it in 1943; in other words the state boundary is still in the river today for these 50 miles. For a total of about 29 miles in 12 segments, the present river is entirely in Nebraska; at these 12 locations, there is land subject to the sovereignty of Nebraska situated east of the river. For a total of about 18 miles in eight segments, the present river is entirely in Iowa; at these eight locations, there is land subject to the sovereignty of Iowa situated west of the river. For a distance of about 29 miles in 12 segments, the state boundary is not in the river and is to the east of the river. For a distance of about 18 miles in eight segments, the state boundary is west of the river.

I recite these statistics to show the total effect of what the river did and what the Corps did to the river, after 1943, as regards the state boundary now being substantially different from the Missouri River between Boyer Bend and Sioux City.

The new design for the stabilized channel between Boyer Bend and Sioux City did not emerge from the drawing boards of the Corps of Engineers' offices at Omaha until about 1955. Until then, nobody knew where it would be; nobody knew what lands then ex-

isting would be destroyed to make way for the river; nobody knew what areas then in the river would become abandoned channel; nobody knew what construction methods the Corps would employ to move the river from wherever it then was to wherever the Corps might want it to be. Actual construction to place the river in the new design in 1948 at isolated spots was completed in 1960.

When the river reverted to its wild natural condition between Boyer Bend and Sioux City, it washed away lands and created new lands. Then, when the Corps stabilized it to the newly designed channel, they caused it to wash away lands and create new lands. Fresh questions arose as to the ownership of these newly formed areas, some of which are lakes, some of which are marshes, some of which are bars or islands, and some of which are land.

But one question which had always been present as regards areas farmed prior to 1943 had been eliminated by the 1943 Iowa-Nebraska Boundary Compact. As regards areas formed before 1943, there was nearly always a question as to whether they formed in Iowa or Nebraska, because the pre-1943 state boundary was a moving line, governed by the rule of the thalweg. The 1943 Boundary Compact had created a fixed state boundary line which remained at the center line of the state line channel as that channel had been designed in 1943, and as that channel was produced on certain maps on file in the office of the Secretaries of State of both states, and the post-1943 boundary has not moved with movements of the channel and is not governed by the rule of the thalweg. There may be and are questions as to who may own some of these areas which have

formed since 1943; but there can be no question as to which state they formed in; they formed in the state in which they now are located.

It is Iowa's position that ownership of all areas which have formed since 1943 in Iowa must be determined by Iowa law and that the proper forum to make these determinations is the Iowa courts. Nebraska denies both of these propositions and the issues thus existing between the parties will be dealt with in a later division of this Report.

As a result of events that have transpired along the river, both before and after 1943, the State of Iowa presently claims to own some 32 separate areas of land, water, marsh or mixture of the tress. During the trial of this case, these areas were referred to by names as follows (from Sioux City downstream): Dakota Bend, Omadi Bend, Between Omadi and Browers Bends, Snyder Bend, Glover's Point Bend, Winnebago Bend, Rabbit Island, Upper Monona Bend, Monona Bend, Blackbird Bend, Tieville Bend, Upper Decatur Bend, Middle Decatur Bend, Lower Decature Bend, Louisville Bend, Blencoe Bend, Deer Island, Little Sioux Bend, Ballard Bend, Soldier Bend, Sandy Point Bend, Tyson Bend, California Bend, Rand Access, Rand Bar, Wilson Island, St. Mary's Bend, Nottleman Island, Auldon Bar, Copeland Bend, Schemmel Island, and State Line Island. Two of the above listed areas are claimed by Iowa entirely by conveyance and not by operation of her law, and I therefore eliminate these two areas from the instant discussion; the areas thus eliminated are Rand Access and Rand Bar.

Eight of the 30 remaining areas formed before 1943; they are: Deer Island, Wilson Island, St. Mary's

Bend, Nottleman Island, Auldon Bar, Copeland Bend, Schemmel Island, and State Line Island. Twenty-one areas have formed since 1943; they are: Dakota Bend, Omadi Bend, Between Omadi and Browers Bends, Snyder Bend, Glover's Point Bend, Rabbit Island, Upper Monona Bend, Monona Bend, Blackbird Bend, Tieville Bend, Upper Decatur Bend, Middle Decatur Bend, Lower Decatur Bend, Louisville Bend, Blencoe Bend, Little Sioux Bend, Bullard Bend, Soldier Bend, Sandy Point Bend, Tyson Bend, and California Bend. Iowa's claim of ownership at Winnebago Bend includes purchased land, land and water area formed before 1943, and land and water area formed since 1943. All 30 of the areas are in Iowa, undisputedly, because all are east of the boundary fixed and established by the 1943 Boundary Compact.

I am satisfied from the evidence adduced before me that each of the 30 areas along the river which Iowa claims to own by operation of its comon law has its own individual history. Although some areas have points of similarity, it cannot be said that there is any typical set of facts common to any or all of them.

As previously mentioned, the immediate proximate cause for Nebraska's commencement of the present case appears to have been the filing by Iowa of two quiet title cases in 1963: In one, Iowa claimed ownership of Nottleman Island in Mills County; the case is entitled *State of Iowa v. Babbitt, et al.,* in the Iowa District Court for Mills County. In the other, Iowa claimed ownership of Schemmel Island in Fremont County; the case is entitled *State of Iowa v. Schemmel, et al.,* in the Iowa District Court for Fremont County. These cases are still pending, further proceedings in

them having been suspended until there is a final decision in the case at bar.

It is Nebraska's claim that Iowa violates the solemn commitment she made in the 1943 Boundary Compact by commencing and prosecuting these two cases because, Nebraska says, both Nottleman Island and Schemmel Island were in Nebraska prior to 1943, both were ceded to Iowa by operation of the Compact, and Iowa promised to recognize as good all titles to ceded lands which were good in Nebraska. I shall deal with the problems relating to Nottleman Island and Schemmel Island in later divisions of this Report.

Then, Nebraska wishes the Court to proceed, on the basis of evidence adduced relative to Nottleman and Schemmel Islands and on the basis of limited and incomplete evidence adduced relative to other areas, to pronounce what might be termed a declaratory judgment and issue permanent injunctions which would lay down rules and prevent or severely inhibit Iowa's future conduct as regards all areas she claims to own in the vicinity of the river. This portion of the case I will also deal with in another division of this Report.

Since 1943, because numerous segments of the boundary line fixed and established by the 1943 Boundary Compact are no longer in the Missouri River, the two states have commenced new negotiations for another new boundary compact. No new agreement has yet been reached. Nothing concerning this proposed new compact is at issue in this case because it is well recognized that power to make a new compact rests exclusively with the two states, subject only to Congressional approval.

* * * * * * * *

THE SPECIAL MASTER ACCEPTS IOWA'S POST 1943 FACTUAL HISTORY AS RECITED HEREIN.

Comment: During the course of the trial while receiving evidence as to the formation of Nottleman and Schemmel Islands and their exact location in 1943, I became satisfied that neither state nor The United States Government at any time were interested in the thalweg of the river. During the 15 years or so previous to 1943, the Engineers were engaged in stabilization work. During this period there was no commercial boat channel as that term is defined in many river decisions, notably *Iowa v. Illinois,* 147 U.S. 1. The problem of the Engineers was to create a main channel, not to locate one. They were concerned because the river was wild and untamed. The United States Engineers, as do most government departments, publicize their activities. Two documents have application in this case. The first is a brochure, **"MISSOURI RIVER, BANK STABILIZATION AND NAVIGATION PROJECTS,** SIOUX CITY TO THE MOUTH, 1960." This brochure shows photographs of the structural types used to stabilize and to control the river. Some 60 of these brochures will be forwarded to the Court with this Report. From my observation during 2 days spent in a U. S. Engineers inspection boat on the river, and from shoreline observations, the Special Master is of the opinion that the Engineers are to be commended in the excellent management and control of the Missouri River from Sioux City to Rullo, Nebraska. The U.S. Army Engineers by their stabilization work have shortened the river by 72 miles from Sioux City to the mouth of the river at St. Louis. The river was 804 miles long in 1890. The 1960 measurements show the river to be 732 miles long. The photographs introduced

into evidence in this case, many in color, illustrate the uncontrolled and the controlled sections of the river at a number of the points in controversy in this case. The second is a leaflet entitled, "**NAVIGATION PROJECTS UNDER WAY,** MISSOURI RIVER STABILIZATION AND NAVIGATION PROJECT, (1968)." The first sentence reads:

> "The unimproved Missouri River was a wild, unpredictable stream, many-channeled and meandering, virtually useless for commercial navigation, and a constant threat to any improvements along its banks."

It seems appropriate at this point to mention again the great professional skill of counsel for each of these states in their discovery of evidence which was presented at trial and in their preparation of summaries of the evidence and written briefs on the applicable law. Finally, at my suggestion for my convenience in the preparation of this Report, each state has submitted proposed findings for use in the Report. The presentation of these post-trial documents is of inestimable value to the decision in this case.

Nebraska in her proposed findings has carefully summarized the evidence which was introduced relative to Notleman Island and Schemmel Island. Nebraska's counsel were well aware of the lawsuits filed by Iowa in her state courts claiming ownership of these two islands. Iowa's claim of ownership of these two islands based on her common law is, of course, the nub of this whole controversy. Iowa's position in this respect bears repeating. She says at page 3 of her proposed findings:

"The real issue in this case is concerning where the boundary line between the two states *was* immediately prior to July 12, 1943, the effective date of the Boundary Compact."

Iowa says this matter is of importance because on this question of where the pre-1943 Compact line was hangs the ownership of Nottleman and Schemmel Islands. Although Nebraska contends that she is not bound to prove the pre-1943 boundary line was east of these two islands and thus in Nebraska and ceded to Iowa under the Compact, she did assume that burden and claims to have met that burden by the fair preponderance of the evidence.

The Special Master finds for Nebraska on the issue of Nottleman and Schemmel Islands.

Her findings as submitted are, therefore, adopted and made a part of this Report. Those findings cover p. 51 et seq. to p. 102 of the proposed findings submitted by Nebraska. As will be indicated in my recommendations, it is the view of the Special Master that these findings are unnecessary to the correct decision in this controversy, as in my view the case should be decided on the construction of the Compact. But because the main contention of Iowa is as stated above that the real issue is where the boundary line between the two states was immediately prior to July 12, 1943, and this issue was tried and is the basis for the admission of hundreds of exhibits and in large part the reason for the extensive record, these findings are made in the event the Court disagrees with the construction of the Compact as suggested by the Special Master.

VIII. NOTTLEMAN ISLAND — THE CASE OF STATE OF IOWA v. BABBITT, ET AL.

On March 18, 1963 the State of Iowa filed a Petition in Equity in the District Court of Iowa in and for Mills County captioned "State of Iowa, Plaintiff v. Darvin Merrit Babbit, et al., Equity No. 17433" attempting to quiet title to the Nottleman Island land in Mills County, Iowa. This petition alleged that the State of Iowa was the absolute and unqualified owner of the land and that all claims of the defendant were "spurious and wholly without right." The petition further alleged that ". . . one or more of the defendants have stated or published remarks to the effect that any attempt by any agent or employees of plaintiff to view, inspect or survey the subject real estate of this case, such agents and employees would be physically and violently stopped and prevented from so doing." The Petition gave no grounds as the basis for Iowa's contentions, merely alleging that Iowa was the absolute and unqualified owner.

The landowner claimants testified that no one from the State of Iowa discussed Iowa's claim with them prior to the filing of this law suit.

The State of Iowa, in Answers to Interrogatories, claimed that its ownership was not based on any acts or instruments, taking the position that the land area formed as accretion to the state-owned bed of the river. Iowa made no investigation concerning exactly who was in possession of the disputed area adversely to them and Iowa claimed that she should not be required to make an investigation concerning possession. The state also claimed that the matter of possession is irrelevant and immaterial. Iowa further claimed that defendants' pos-

session was irrelevant as the land was in the public domain and not subject to being adversely possessed by private parties or persons. Iowa had no information as to how long the various tracts in the area had been cultivated or by whom this had been done. Iowa had never filed anything in the office of the Mills County Recorder of Deeds asserting its claim.

Iowa stated that the State Conservation Commission was not a party in interest in any capacity in the litigation but also stated that the Iowa State Conservation Commission was the political subdivision or department of the state possessing the power, authority and duty of managing and controlling the area involved in the litigation "if it be determined that same is owned by plaintiff."

Iowa denied that the land was at any time in the State of Nebraska and denied that the State Conservation Commission had ever relinquished claim to the land. She further denied that the land was subject to the provisions of the 1943 Boundary Compact. Iowa asserted that the collection of taxes was irrelevant and immaterial "because any taxes which any of the defendants (landowners) may have paid to plaintiff (Iowa) on the land involved in this case were infinitesimal". Iowa said the matter only became material if the defendants elected to plead some affirmative defense based thereon and that it was an illegal, improper and unauthorized attempt by the landowners to shift the burden of proof from themselves to the state on an issue which was not then an issue in the case and which, if it became an issue, placed the burden of proof on the landowners. Iowa further took the position that the State should not

be subject to the burden of researching, investigating and proving the facts concerning taxation unless and until some burden was cast upon the state by pleading and proof offered by the landowners. The only persons which Iowa listed as having information or knowledge concerning the formation of the land were R. L. Huber, formerly of the U. S. Army Corps of Engineers, by reason of having studied books, records, maps and photographs; Gerald J. Jauron, employee of the plaintiff who had studied maps and records; and Ivan Windenberg, an employee of the State of Iowa, who surveyed the area. Iowa presumed there were residents who had some information but did not interview the persons prior to their filing of the suit.

Iowa also took the position that the instruments through which the defendants claimed title were "spurious, fictitious instruments" and of no force or effect in Iowa.

Although the evidence is that in 1946 the Iowa Attorney General's office had knowledge of a law suit against the officials of Mills County to have the landowners' Nebraska titles placed on record in Iowa, Iowa took the position in 1963 it was not a party to the action and "had no notice or knowledge thereof."

The evidence has established that at the time Iowa filed the law suit against the owners of Nottleman Island, the state officials disregarded all matters of record concerning the land, all matters of possession by the landowners, the payment of taxes by the landowners upon the land, and all eye witness knowledge concerning formation of the land. They took the position that the State was not required to make any further investiga-

tion into these matters and that the instruments of record were "spurious and fictitious" instruments.

The extent of Iowa's knowledge or investigation appeared to be the mere study of certain selected records, maps, and documents from the Corps and an examination of the records of Mills County, Iowa to obtain names of possible parties defendant, with some limited investigation into the records of the Secretary of State in Des Moines and the Mills County ASC office and in the Mills County Courthouse. The Nebraska records were completely ignored and when the Nebraska titles were raised, Iowa arbitrarily took the position that they were invalid. As in the Schemmel case, this is another situation where Iowa merely filed a quiet title action against the landowners without investigation of their titles and where Iowa has attempted to shift the tremendous burden of tracing and proving the past history of this land to the individual farmers, ignoring everything that has happened in connection with the land except certain assumed facts or conclusions by a few officials or employees of the State of Iowa concerning its formation.

Mr. Babbitt first received notice that Iowa might be claiming his land when a friend called him from Council Bluffs, Iowa and told him about an article in the Council Bluffs newspaper of February 19, 1961 entitled "Missouri River Could Become A 'Playground' ". This article referred to the areas mentioned in the Missouri River Planning Report. The very fact that Iowa announced that they were claiming the title to the land made it impossible for Babbitt to borrow money on his land in order to finance his agricultural operations. He was twice refused loans because in the opinion of the finan-

cial institutions or their counsel, the State of Iowa's claim clouded the title. When Mr. Babbitt spoke with the Assistant Attorney General of Iowa concerning their claims and their plans he received a letter dated November 2, 1961 which stated that it was impossible to give him an absolute definite answer to his questions at that time but that he might assume for the present that the State of Iowa through the State Conservation Commission did in fact claim title to so much of the property as was physically located within the State of Iowa.

The mere claim of title by the State of Iowa constitutes a hardship upon the farmer as he can no longer borrow funds or use his land as he might if his title were good. The State of Iowa by merely making a claim to the land clouds the title and is in violation of Section 3 of the Compact requiring it to recognize titles which had been good in Nebraska.

(A) Nebraska Exercises of Jurisdiction Prior to the Compact

The Nottleman Island or Babbitt Island area was surveyed by the Cass County, Nebraska surveyor as a separate island on August 18-25, 1933 and the survey was filed in the office of the Register of Deeds of Cass County, Nebraska as well as the office of the Cass County Surveyor. The tax records of Cass County, Nebraska show that the island area was surveyed and reported to the County Assessor for assessment on September 7, 1933. The island was taxed in Nebraska as part of Rock Bluff Precinct, Nebraska from 1933 up until the adoption of the Compact. In 1952 the property was removed from the Nebraska tax records by the

Board of County Commissioners of Cass County, Nebraska for and after the year 1943 upon recommendation of the Cass County Attorney who at that time stated that his independent investigation revealed that under the Nebraska-Iowa Compact of 1943, this island became a part of the State of Iowa and was then taxed in the State of Iowa.

A considerable volume of evidence was introduced by plaintiff showing that individuals who lived on Nottleman's Island in the 1930's filed personal property tax returns in the State of Nebraska, registered their motor vehicles in the State of Nebraska, and sent their children to school in the State of Nebraska as Nebraska residents and without the payment of tuition. Testimony indicated that parents of two of these children inquired in Iowa whether they should send their children there but were informed that they could not. The school records of Cass County kept pursuant to Nebraska statute showed the children from families which lived on the island in attendance at the Rock Bluff school during the years 1935 through 1938. Three children attended school in Nebraska, two from the family of Ernest L. Shipley and one from the family of Cleo Baker. A child of the Ernest Shipleys was born on the island in 1936 and the birth certificate was filed with the State of Nebraska, Department of Health, Division of Vital Statistics and there was a Certificate of Death filed with the Division of Vital Statistics of the Nebraska Department of Health showing the death of a daughter of Ernest Shipley in 1935 while the Shipleys lived on Nottleman Island. One of these witnesses, Mrs. Ruth Dooley, first stayed on Nottleman Island in 1929 when she spent the whole summer there with her uncle and grandparents. The

evidence shows that from 1929 until the adoption of the Iowa-Nebraska Boundary Compact of 1943, Nebraska residents were farming the island and during most of that period Nebraska residents lived upon the island. The two witnesses who had lived upon the island testified that they considered themselves citizens of Nebraska and the other people on the island considered that they were residents of Nebraska; this was common knowledge in the Rock Bluff area that these people were considered Nebraska citizens. This was fairly common knowledge in the whole Rock Bluff and Plattsmouth vicinity.

There is in evidence a considerable volume of records substantiating these facts which again illustrates the tremendous amount of research, effort and expense in the collection of this type of data from old records in order to establish a factual situation which was well recognized between 30 and 40 years ago. The passage of time, death of witnesses, and loss or destruction of any of these records would obviously prejudice the landowner claimants in an action of this nature brought by the State of Iowa.

None of the witnesses who testified concerning the actual formation of Nottleman Island or the movements of the Missouri River in that area testified that it was Iowa land or considered to be in the State of Iowa prior to the Compact whereas several witnesses from Nebraska indicated that Nottleman Island was considered to be a part of the State of Nebraska prior to the Compact.

The records of the office of the Register of Deeds of Cass County, Nebraska show deeds as having been re-

corded in the 1930's conveying portions of the island in Nebraska. One of these deeds carried the recitation that it was to supplement a conveyance made in November, 1928, which conveyance was in writing and properly signed, witnessed and acknowledged but never filed for record.

The Nebraska courts also exercised jurisdiction over Nottleman Island.

In 1940 an action to quiet title to the north half of Nottleman Island was filed in the District Court of Cass County, Nebraska captioned *Harvey Shipley, et al, v. Frank G. Hull, et al.* This was a quiet title action with publication of notice in a legal newspaper in Nebraska which was contested by a Nebraska riparian owner who alleged that the lands were accretion to his lands and were attached to his lands as accretions until the government engineers changed the channel in the Missouri River so that the channel cut off a large portion of said accretion. The court entered two decrees in the case, one quieting title as against certain defendants on August 1, 1940 and the other quieting title to the remaining defendants on June 19, 1941. The court found that the plaintiffs had been in actual, uninterrupted, continuous, notorious, peaceable, adverse and exclusive possession of the land for more than 10 years and quieted title in the plaintiffs. A finding in the decree indicated that the island had been in private possession since 1926. This case was tried in the District Court of Cass County, Nebraska which is a court of general jurisdiction in Nebraska.

The south half of Nottleman's Island was included within the property of the Estate of John H. Nottleman,

deceased which was probated in the County Court of Cass County, Nebraska, the Nebraska Court of probate jurisdiction. The County Court records show that John Nottleman died on March 31, 1940 and this part of Cass County, Nebraska was described by Nebraska description in the inventory as being property of the estate. The estate rented this island land to Mr. D. M. Babbitt. The administrator then filed a Petition in the District Court of Cass County, Nebraska for a license to sell the real estate, alleging that the deceased had died "seized and possessed" of the land on Nottleman's Island and praying for authority to sell it. The District Court entered an Order to Show Cause ordering that all persons interested in the Estate of John Nottleman appear to show cause, if any, why license should not be granted to sell the real estate and there was publication for three successive weeks in the Plattsmouth Journal, a Nebraska legal newspaper, in 1940. There is also a Notice of Sale published for three consecutive weeks in January of 1941 and the land was sold to J. L. Jones and D. M. Babbitt. The sale was confirmed and the executor was ordered by the court to deliver a deed to the purchasers. An Administrator's Deed from the administrator to J. L. Jones and D. M. Babbitt was filed on February 13, 1941 in the office of the Register of Deeds of Cass County, Nebraska conveying the south half of Nottleman's Island by Nebraska description as Nebraska land.

There were many Nebraska public records offered and a large volume of testimony which established that at the time of the Iowa-Nebraska Boundary Compact and for a considerable period prior thereto, the State of Nebraska exercised jurisdiction over Nottleman Island and there were no exercises by the State of Iowa of

jurisdiction over the island. Had the two states investigated the status of Nottleman Island at that time they could have come to no other conclusion than that it was considered to be a part of the State of Nebraska and following the change in channel by the Corps of Engineers was considered as being within the category of "ceded" lands or lands transferred to Iowa by the Compact.

(B) Ownership and Possession of Nottleman Island

Individuals have exercised all the rights and obligations of ownership and possession of Nottleman Island from 1929 to the present, a period of over 40 years and there is evidence that there was an individual in possesson of the island from 1926 to 1929. Consequently, there were individuals in posession of the land for at least 35 years before the State of Iowa filed a quiet title action in the District Court of Mills County, Iowa making claim to the land.

Mr. D. M. Babbitt obtained his claim of record to the property through his purchase along with a Mr. Jones of the property through the administrator's sale in the District Court of Cass County, Nebraska. On February 13, 1941, the same date as his deed, Mr. Babbitt filed a mortgage to J. L. Jones with the Register of Deeds of Cass County, Nebraska. This mortgage was outstanding at the time of the Iowa-Nebraska Boundary Compact and was satisfied by Mr. Babbitt in 1949. It was a mortgage entitled to be recognized by the State of Iowa under the terms of Section 3 of the Compact.

The owners of the north one-half of the island all claimed their record title through the quiet title pro-

ceedings in the District Court of Cass County, Nebraska in the case of *Shipley v. Hull;* and Margaret T. O'Brien claimed through the Treasurer's Deed from the County Treasurer of Cass County, Nebraska which was filed on January 3, 1945 and through a subsequent warranty deed from Katherine Julia O'Brien, one of the plaintiffs in the case of *Shipley v. Hull.*

William and Mason Watts had obtained a deed in 1937 to the northeast portion of the island and were parties to the quiet title action of *Shipley v. Hull.* Harvey Shipley conveyed the lower portion of the north one-half of the island to George Troop who later conveyed it to Lee A. Sargent and it has been in the Sargent family since 1953.

There was considerable testimony to illustrate the open, public and notorious occupation and use of the land by the landowners. People lived on the island, it was fenced, had houses upon it, had been cleared extensively, had general farming facilities such as feed lots, loading chutes, hog pastures, and was sowed with crops such as alfalfa, soy beans and corn. There was a farm sale on the island in 1956 advertised in Nebraska and Iowa newspapers. The land was taxed in Nebraska up to the time of the Compact and was taxed in Iowa following a lawsuit brought by the individuals in 1946. There were articles in the Omaha Sunday World Herald in 1954 and 1955 with photographs of the Babbitts with reference made to either the clearing of the island or the crops taken from the island. Mr. Babbitt testified that he put every dollar he ever made after his living expenses into this farm to make a good farm of it. He also put an Inland steel bin on the island which was mortgaged to

the Commodity Credit Corporation. He obtained a storage bin loan and in his dealings with the United States Department of Agriculture, Agricultural Stabilization and Conservation Service and with the Commodity Credit Corporation, those governmental agencies raised no question as to his title. The farm was leased for part of the time and Mr. Babbitt had the property surveyed and the survey filed of record in Mills County. The individuals had filed affidavits of possession in Iowa pursuant to the advice of the attorneys. Mr. Babbitt's land presently has about 620 acres of crop land. Over 400 acres were cleared between 1944 and 1957 at a cost of at least $100 an acre, not including the burning and reburning and discing. The Babbitts hired 20 or 25 people at one time or another to assist with the clearing. The land was posted with "no trespassing" signs by Babbtt and by the Deputy Sheriff or Sheriff. The State of Iowa Conservation Commission or any agency of the State of Iowa never posted any signs around Nottleman Island designating it as Iowa state land.

The Troop land which was approximately 370 acres had about 70 acres cleared in 1945 and Troop farmed there. In 1953 he sold the land to Lee Sargent who died in 1957 and since then the land has been farmed by Sargent's sons. The Sargents farm around 355 acres on Nottleman Island and there is some land which they have not cleared as yet.

When the Sargents obtained the property there was approximately 80 acres cleared and in the three year period from 1953 to 1956 they cleared about 300 acres. They have had crops on the island every year since 1953 barring 1967 when everything was lost in a summer

flood. The land was mortgaged by the Sargents to the Travelers Insurance Company who accepted the Sargents' title. Steel grain bins have been built on the property. In Mr. Merrill Sargent's opinion, the land would bring $600 or $700 an acre for most of the 350 acres. There is an additional 40 acres which has not been cleared which is worth $200 or $300 per acre.

The northwest corner of the island is owned by Mrs. Margaret T. O'Brien, the widow of an attorney. This property was conveyed in 1939 to Katherine Julia O'Brien, her sister-in-law. Mrs. O'Brien had received a tax deed from the County Treasurer of Cass County, Nebraska in 1945 and testified that her husband, who was an attorney, had represented her. The O'Briens have claimed land on Nottleman's Island from shortly after the deed in 1939. 200 acres have been cleared at a cost of at least $10,000, according to her records. This was done by a corporation from Des Moines, Iowa and some by an individual from the area. The land is presently farmed and has been leased since about 1950 or 1952. Her share of the crop for one of the years prior to her testimony amounted to about $8,000 under the crop sharing arrangement.

The northwest corner was originally acquired by Albert Mason Watts and William Watts who purchased it from Harvey Shipley in 1937 in Cass County, Nebraska. They paid taxes on this land in Nebraska for several years and then were participants in the suit in Iowa to have the land transferred and placed on the Iowa tax books. William Watts passed away and the property passed to Mason Watts. It was appraised by the Iowa State Inheritance Tax appraisers and an in-

heritance tax was paid to the State of Iowa. The land has been fenced and posted against trespassers. There are 238 or 240 acres which belonged to the Watts with about 79 acres cleared. It is farmed by a tenant who has been renting it for two or three years. The previous year, Mr. Watts' share of the crops was a little better than $2,000.

There is no question from the evidence but that the individuals were exercising all of the incidents of ownership and possession of the property without interference from the State of Iowa and are presently still in complete control of the land. This was a matter of public notoriety in both Cass County, Nebraska and Mills County, Iowa and was accepted by the local Iowa officials. It was also accepted by the Iowa State Inheritance Tax authorities and the officials of the Iowa Conservation Commission in 1951.

All of the individuals paid taxes in Iowa continuously from 1947 until the present date, which total taxes over the years through 1966 were in excess of $27,000. Those taxes have been increased in recent years since 1966. Even while the State was attempting to quiet title to the land, the County officials of Mills County were collecting taxes under the threat of tax sale if they were not paid.

The area is no longer an island but can be reached by a road leading to the island across the abandoned channel on the east. An appraiser testified that in his opinion the Nottleman Island tracts had a value of $607,900 as of December 29, 1967 and since that time the trend with regard to values of land of this character

had been upward. He appraised some of the land as being worth approximately $500 per acre.

The State of Iowa paid no attention to the land until it had been made valuable farm land by the occupants. Iowa made no claim to the area in 1943 and at no time until indication in the Planning Report of 1961 that they intended to file a quiet title action to the land. The Iowa Attorney General's office had notice of the status of the land in 1946 and 1951 and the Iowa Conservation Commission disclaimed any claim to the island and accepted the fact that it was the private property of the occupants in 1951.

(C) Conduct of the State of Iowa Following the Compact; Recognition of the Titles to Nottleman Island

On march 22, 1946 Mrs. O'Brien attempted to file a deed, conveying a portion of Nottleman Island to her, with the Mills County, Iowa, Recorder's Office. The Recorder's records show the deed was not recorded and was returned to the O'Briens.

Mr. Lewis S. Robinson, County Auditor of Mills County, Iowa in March of 1946, testified that the Recorder did not have any place to record the O'Brien deed and the Recorder returned it to the Auditor's Office because she had no record books in which she had this area designated. The description on the deed carried section, range, and township designations which were not Iowa descriptions but which were Nebraska descriptions. Mr. Robinson then contacted the Mills County Attorney and the two of them made a detailed study of how the matter should be handled. They first went to the Clerk's Office

in Cass County, Nebraska and found that this same piece of land was carried on their real estate rolls. They then visited the area Corps of Engineers Office in Omaha to see how the land was described and from there went to other Iowa river county officials and found that these officials had the same problems and had found no solution for them. The Mills County Attorney then wrote a request to the Attorney General of the State of Iowa requesting an opinion and Mr. Robinson and the Mills County Attorney went in person to Des Moines and talked to a Deputy Attorney General of Iowa and left the question with him. The witness never heard of any answer to that question. He substantiated that there was a great deal of confusion concerning treatment of these lands along the river.

Mr. Robinson then wrote the General Land Office in Washington by letter dated April 25, 1946 and explained that due to the change brought about by the 1943 state legislatures, Mills County, Iowa had acquired a certain area of land of approximately 1,500 acres which was formerly of Cass County, Nebraska and was known as "Nottleman's Island." His letter commenced with the following:

> "In 1943 the Legislatures of the two States of Iowa and Nebraska passed an act establishing the center of the channel of the Missouri River as the boundary line between the two states. This was done because the river had changed its course in previous years putting lands of each state on either side of the river adjoining lands of the other state."

His letter pointed out that Nebraska township and section lines will not join with Iowa lines when projected,

and he inquired as to how the land should be identified. His letter also stated that counties other than his had similar difficulties but none they had contacted had arrived at any satisfactory solution. The reply from the Department of the Interior General Land Office recognized that the Compact transferred the jurisdiction from Nebraska to Iowa but did not affect the ownership of the land and suggested that the land descriptions used in disposing of the lands would be appropriate for the purpose of assessment and taxation.

In 1946 some of the owners of the land on Nottleman Island contacted Mr. Whitney Gillilland because they wanted the official records of Mills County, Iowa to show their title and ownership. They had sought to record their title papers with the Mills County officials and had been refused the right to have them recorded. Mr. Gillilland was an experienced Iowa attorney, having previously to 1946 served for a period of time on the District Bench in southwestern Iowa, a court of general jurisdiction in Iowa. In 1946 he would have been in the general practice of law at Glenwood, Iowa for a period of about 17 years. He has been a member of the Civil Aeronautics Board since 1959 and has had other governmental positions such as Chairman of the Foreign Claims Settlement Commission of the United States, Chairman of the War Claims Commission and Assistant to the Secretary of Agriculture. Mr. Gillilland made a personal examination of the tract books in the County Auditor's office and determined that there were no descriptions for the area. He prepared a lawsuit filed in the District Court of Mills County, Iowa with the Watts, Shipley, O'Brien, Babbitt, and Troops as plaintiffs and

the County Auditor, County Recorder, and Mills County, Iowa as defendants. The petition was filed in November, 1946 and alleged the facts concerning the derivation of the titles of the various plaintiffs through the Nebraska quiet title action, administrator's sale and county treasurer's tax deed. The petition alleged that prior to the Boundary Compact the tracts were located in Cass County, Nebraska and were transferred to and became a part of Mills County, Iowa by the statutes which created the Compact. It alleged that uncertainty had arisen as to the manner and method of indexing the lands and that the owners were entitled to have these instruments recorded in the office of the County Recorder. An answer was filed by the County Attorney for Mills County, Iowa which admitted the Compact and that the land was acquired by the change of boundary and further alleged that on May 6, 1946 the County Attorney had written to the Attorney General of the State of Iowa for an opinion as to the proper procedure in correctly describing this additional land for taxation purposes and in setting up the necessary plats and transfers and he had not received any opinion. The decree was filed on January 6, 1947 in which the court found the allegations and statements of the Petition were true and the plaintiffs were entitled to the relief prayed for. The court further found ownership of the land in the plaintiffs and ordered the Clerk of the Court to file a copy of the plat in the Plat Book and Index Book and other books referred to under the applicable statutes of the Code of Iowa. Mr. Gillilland testified that the landowners were actually physically in possession of the land in 1946 and it was open and notorious and neither the landowners nor he, as their attorney, had any idea that

the State of Iowa had any claim to Nottleman's Island in 1946.

In 1950 an Iowa State Conservation Commission employee living in Glenwood, Iowa, came to see him and told him that the Conservation Commission had an application before it to purchase the land. The employee had searched the records and the county officers had referred him to Mr. Gillilland. A few days later Mr. Gillilland was in Des Moines and talked to the Iowa Attorney General, Robert Larson, who is presently a member of the Iowa Supreme Court, about the matter. The Iowa Attorney General suggested that Mr. Gillilland write the Iowa Conservation Commission concerning the matter and Mr. Gillilland did so by letter of March 20, 1950.

Mr. Ray W. Beckman, Chief of the Fish and Game Division of the Iowa Conservation Commission testified that he remembered this letter and he answered it on April 19, 1950 stating:

> "Please be advised that the island you referred to is not State property. The information we have is that this island belongs to four parties as follows:
>
> Wm. Watts — M. Babbitt
>
> Margaret O'Brien — Jones & Babbitt"

Mr. Beckman testified that as Chief of the Fish and Game Division he was responsible among other things for all the lands that were under the supervision of the Fish and Game Department. He remembered being handed the letter by the Director of the Iowa Conservation Commission and testified that he was instructed to make that answer by the Director. The office of Director is a statutory office under the Iowa Code.

This answer was then related to the owners and they relied upon it pursuant to the advice of their attorney, Mr. Gillilland.

The Babbitt land was subject to another lawsuit filed in the District Court of Iowa in and for Mills County on June 8, 1961 when Mr. Babbitt brought suit against the members of the County Board of Review of Mills County, Iowa and the County Assessor of Mills County, Iowa, alleging that he was the owner of real estate on the island which had been assessed for taxation but that the assessment was unjust and excessive and that his taxes should be lowered. The Mill County Attorney filed an answer admitting the ownership of Mr. Babbitt and the court entered a judgment and decree on November 30, 1961 in which it found that the assessment was not illegal, excessive, unfair, unjust or inequitable and was not contrary to law.

When Lee Sargent died in 1957, the Nottleman Island land was included within his estate and the Iowa State Tax Commission assessed an inheritance tax upon the estate including the valuation of this land, and an inheritance tax was paid to the State of Iowa. William Watts died in the 1960's and the land was included within his estate and assessed for Inheritance Tax purposes and a tax was paid to the Iowa State Tax Commission on the estate.

Mr. Watts further testified that at one time Mr. Stiles, head of the Conservation Department, was visiting them and the Watts brothers tried to sell the land to Iowa for practically nothing or give it to Iowa if they would make a game preserve out of it, but Stiles refused to have any part of it and wanted nothing to do with it.

The record clearly indicates a complete acceptance by the local officials of Mills County, Iowa and recognition by the Iowa Attorney General's office and Conservation Commission in the late 1940's and early 1950's that Iowa had no claim to the land and that there were titles good in Nebraska which were good in Iowa pursuant to Section 3 of the Compact. It is neither fair nor equitable for Iowa to change its position and claim title in light of these past recognitions and the continuous period of taxation of the land by the Iowa officals. (See *United States Gypsum Co. v. Grief Bros. Cooperage Corp.*, 389 F. (2d) 252 (8th Cir. 1968).

Regardless of how land along navigable rivers may have formed, there is another well established principle applicable to the boundary between states. The land may become a part of a state as a result of long and continuous exercise by that state of sovereignty and jurisdiction over the land with the acquiescence of the other state. The principle of prescription and acquiescence has as its primary object and underlying basis "the creation of stability of order" and "there is no controversy in which this great principle may be applied with greater justice and propriety than in the case of disputed boundary." *Arkansas v. Tennessee,* 310 U. S. 563. See also *Indiana v. Tennessee,* 310 U. S. 563. See also *Indiana v. Kentucky,* 136 U. S. 479, *Rhode Island v. Massachusetts,* 4 How. 591, *Michigan v. Wisconsin,* 270 U. S. 295, *Maryland v. West Virginia,* 217 U. S. 1, *Virginia v. Tennessee,* 148 U.S. 503, and *Louisiana v. Mississippi,* 202 U. S. 1.

Another significant concept in the consideration of cases involving boundary disputes is the recognition by public officials and inhabitants of the location of the

boundary. See *Minnesota v. Wisconsin,* 252 U. S. 273, *Handly's Lessee v. Anthony,* 5 Wheat. 374.

The history of taxation by two states in respect to a disputed area is also of substantial weight in indicating acquiescence by one of the states in the boundary line restricting her jurisdiction. *Vermont v. New Hampshire,* 289 U. S. 593.

The exercises of jurisdiction by the State of Nebraska over the Nottleman Island area by having surveyed the land, taxed the realty, taxed the personal property of the inhabitants, registered births and deaths, quieted title and conveyed title through estate proceedings and the issuance of a license to sell real estate issued through the District Court, and the fact that the inhabitants in the area all considered it to be in Nebraska, coupled with a complete lack of exercise of any jurisdiction over the area by the State of Iowa would seem to be conclusive that this was in Nebraska prior to the Compact. Iowa's acquiescense for an additional 20 years following the Compact and Iowa's taxation of the land supports this conclusion.

Nebraska contends that Iowa disregarded all of this evidence and that Iowa should not be able to bring an action requiring the landowner to establish his title by making this showing. The individual defense of such a case by a landowner places a tremendous expense upon him. This includes the difficulties of searching out records and landmarks which may have been destroyed by the passage of time and of obtaining witnesses to facts or occurrences in years long past. As the court said in *Rhode Island v. Massachusetts,* 4 How. 591, 639:

> "No human transactions are unaffected by time. Its influence is seen on all things subject to change. And this is peculiarly the case in regard to matters which rest in memory and which consequently fade with the lapse of time, and fall with the lives of individuals. For the security of rights, whether of states or individuals, long possession under a claim of title is protected. And there is no controversy in which this great principle may be involved with greater justice and propriety than in a case of disputed boundary."

This statement has been cited several times in boundary cases. If there is to be any stability of order along the Missouri River, the Compact must be construed in such manner as to prevent the State of Iowa from contesting the title of landowners such as in the Babbitt and Schemmel cases and all other areas which were in existence at the time of the Compact. This is certainly consistent with the intent of the Compact and effectuates its purpose.

(D) History of the Movements of the River in the Nottleman Island Area and Formation of the Land

Although the court has found that the recognition testimony and the conduct of the states is determinative of the fact that the Nottleman Island or Babbitt Island area must be recognized by the State of Iowa as having had a title good in Nebraska at the time of the Iowa-Nebraska Boundary Compact and the State of Iowa must recognize that title regardless of how the land actually formed or in what jurisdiction it formed, the court makes the following findings of fact concerning

information of the land in the event that it shou'd finally be held that the burden does lie upon the landowner to prove how his land formed and that the land was actually in Nebraska prior to the Compact:

The evidence shows that when Nebraska was admitted into the Union the Missouri River was originally in approximately the same position which it presently occupies in the Nottleman Island area but that, from the time the two states were admitted into the Union, the river commenced to work easterly and cut away land on the Iowa side. Behind this movement, an island originally platted as Nebraska land which was immediately north of the area involved and referred to on early Corps' maps as Tobacco Island, began to enlarge both to the east and downstream on the Nebraska side of the river.

A study of the original government surveys and maps from the U. S. Army Corps of Engineers and Missouri River Commission document this eastward movement. It is further substantiated by an 1895 survey by the County Surveyor of Mills County and a 1920 Soil Survey.

Several witnesses who lived along the Missouri River on the Iowa side and were familiar with it testified concerning the movements of the river to the east at various times commencing shortly after 1900. Some of them had to move away from the river because it was cutting toward them and houses and farms were cut into the river on the Iowa side.

Records dated September 25, 1922 in the Mills County, Iowa Auditor's office indicate that from 1851 to 1895 the river carried away about 1,140 acres of land in

Mills County and that since 1895 there had been 1,296 acres more taken making a total of 2,436 acres taken by the river by September 25, 1922. As a result of the concern on the Iowa side, a river protection district was established pursuant to the Iowa statutes and retards were constructed on the Iowa side commencing in about 1922 or 1923 to attempt to halt this cutting of the river. According to a comparison of the 1922 map prepared in connection with this Missouri River Protection District and a 1923 Corps of Engineer map, between 1922 and 1923 the river cut through the accretion area which had been on the Nebraska side and following 1923 the various maps indicate a distinct island with water on both sides.

Testimony by Mr. Harry Weakly, Nebraska's tree expert or dendrochronologist, verified that trees which commenced growing on what was the Nebraska accretion area remained on the island after a channel of the Missouri River had cut back to the west upstream between 1922 and 1923 leaving the island as a substantial land area. Mr. Weakly testified that one tree on the island commenced to grow in 1900. This tree was located to the west of the 1890 thalweg which appears on the Missouri River Commission and Corps of Engineer's maps. Even one of Iowa's experts who testified as to the age of the trees on the island, though differing in count from Mr. Weakly, stated that two of the trees commenced to grow on the island prior to 1923.

Witnesses who lived in the Rock Bluff area on the Nebraska side also testified concerning how the river had cut to the east and how, at various times the river bank was considerably to the east of its original location with chutes on the Nebraska side which at times

would be dry. People could wade to the Nottleman Island area across some of the shallow water at times. Captain Otto Neuhauser of Kansas City testified that he had been on boats on the Missouri River ever since 1910 and made his first trip as far as the Rock Bluff area in a river boat in 1915. He was a pilot on the Missouri River from 1913 until 1957 and the first time that he came up the Missouri River he described the water on the west side of Nottleman Island as quite wide and shallow and he could not bring his boat up it. Consequently, he had to go around the east or left bank side of the Nottleman Island area where the main channel flowed. He verified that the main channel was also on that east side when he worked for a construction company in 1921 placing retards and again in 1931 when working for the Corps the main navigable channel was on the left or east side of Nottleman Island. Workers for the Corps of Engineers including a steersman on one of the Corps boats, who was also a boat pilot, testified that before the Corps of Engineers commenced their river work, the main channel was on the east side.

Witnesses called by the State of Iowa to attempt to counter this mass of evidence indicated a lack of familiarity with the Missouri River in the Rock Bluff vicinity and only casual acquaintance with the situation there. Some of the witnesses called by Iowa recognized the river had moved considerably to the east and also were somewhat familiar with the cutting of the river towards the east into Iowa. No witnesses, however, testified that the island formed in Iowa or was considered as in Iowa prior to the Compact.

The evidence shows that from the time of the original Nebraska survey in 1857, the Missouri River had

moved to the east in the Rock Bluff area more than one mile and the island formed in Nebraska. The Corps of Engineers' channel stabilization work placed the main channel to the west of the island, and the Iowa-Nebraska boundary at the time of the Compact was in the abandoned channel approximately a mile east of the Compact line.

(E) Movement of the Missouri River by the Corps of Engineers Into the Designed Channel

Commencing in about 1934 the U. S. Army Corps of Engineers began work in the Nottleman Island area. Testimony of several knowledgeable witnesses familiar with the vicinity or who worked for the Corps of Engineers established that the main channel was on the east of Nottleman Island with a subsidiary channel to the west of Nottleman Island. The Corps commenced work at Plattsmouth and came downstream, shutting off the channel on the west side of the island to the north of Nottleman Island. The designed channel was to come under the Plattsmouth Bridge and then go around the east side of the island north of Nottleman Island, swing back and come around the west side of Nottleman Island, and then start around the east side of an island immediately downstream which was bisected by a canal and the river was then brought back to the west and continued in its design of sinuous reverse curves. In that whole stretch of river the maps showed divergent channels on the east and west sides of various islands and the Corps at Nottleman Island reversed the main channel from what it previously had been.

The Corps commenced driving the dikes on the east side at the upstream end of Nottleman Island in order

to divert the channel to the west. The Corps had some difficulty in holding these dikes and in the spring of 1935 the river came down the west side of the upstream island and cut through the old channel on the east of Nottleman Island, washing out the dikes, with 25 to 30 feet of water going through. The channel was finally successfully transferred from the east side to the west side of Nottleman's Island in around 1938. During this river work by the Corps Nottleman's Island remained as an island and did not disappear. Even in 1938 there was testimony by workers from the Corps that they had to place rock along the dikes on the east side and even at that time, although the dikes were in place, there was more water running along the east side of Nottleman Island than on the west side which was the designed channel. The Corps maps from 1937 to 1941 called the island "Noddleman Island".

The court finds that the Corps of Engineers moved the main navigable channel of the Missouri River from the east side of Nottleman Island to the west side into the designed channel, thereby creating an avulsion. The Iowa-Nebraska Boundary immediately prior to the adoption of the Iowa-Nebraska Boundary Compact of 1943 remained in the east abandoned channel of the Missouri River and the thread of that channel constituted the boundary between Iowa and Nebraska prior to the Compact. At that time, the entire Missouri River was located in the State of Nebraska with both the right and left bank a part of Nebraska and title to the bed of the Missouri River in that place was in the Nebraska riparian owners subject to the public easement of navigation under Nebraska law. The east abandoned channel carried flowing water for several years and eventually

ceased to flow and presently the island can be reached by road leading into the island from the east.

Iowa's traverse of Nottleman Island in addition to being admittedly by the State of Iowa in error on the western side in that it extends approximately 50 feet into Nebraska across the Compact Boundary between the two states, also had no basis in fact along the eastern side of Nottleman Island and, as in the Schemmel case, it followed no geographical feature marking the left bank ordinary high water mark as contended by the State of Iowa. The traverse goes through water, low swamp, and brush and across flat land. It is another indication of the lack of precision in the work of the State of Iowa, inadequate investigation and the arbitrary approach of her officials.

IX. THE SCHEMMEL ISLAND AREA

(A) Nebraska Exercises of Jurisdiction Prior to Compact

Commencing in 1895, Nebraska assumed jurisdiction of all of the land in the Schemmel area and exercised jurisdiction continuously until the Iowa - Nebraska Boundary Compact of 1943.

In 1895 the Otoe County Commissioners ordered lands added to the tax rolls of Otoe County, Nebraska which included the Schemmel area as accretions to Nebraska surveyed by the Otoe County Surveyor. Generally, the land was taxed in Nebraska continuously from 1895 through 1943, a period of 49 tax years. A few discrepancies in the records were explained by the testimony. The tax records for each year taken from the records of the Otoe County Treasurer's office offered by Plaintiff illustrate the tremendous amount of work and difficulty in tracing the tax history of land along the Missouri River. This is obviously a tremendous burden and is expensive and time consuming.

In 1908 a Treasurer's Deed from the County Treasurer of Otoe County, Nebraska was filed for record in the office of the Register of Deeds of Otoe County which was issued pursuant to public sale of the real estate under a decree of the District Court of Otoe County, Nebraska quieting title to some of the land which is included within the description of the Schemmel land. There were also some conveyances of the land recorded with the Register of Deeds of Otoe County, Nebraska.

Henry Schemmel's initial claim to the land arose from a tax sale certificate in Otoe County and from

three deeds dated January 11, 1938. These deeds completed a chain of title to the Schemmels tracing back to the 1908 Treasurer's Deed. Mr. Schemmel originally acquired the land in partnership with a Dan Hill, but the Schemmels later acquired the Hill interest. These deeds were recorded with the Register of Deeds of Otoe County, Nebraska in 1938 and were filed of record with the Recorder of Fremont County, Iowa in 1939. Consequently, record notice was given in both states prior to the Compact of the conveyance of this land as Nebraska land and of the Nebraska title.

Mr. Henry Schemmel is and has been a Nebraska resident in the Nebraska City area since 1934.

At about the same time that Mr. Schemmel filed his deeds in Iowa, he wrote a letter in 1939 to the Fremont County, Iowa officials advising them that some of his land was now on the Iowa side of the canal dredged by the Corps of Engineers in Otoe Bend. This letter was recorded with the Fremont County, Iowa Recorder on August 22, 1939 and the letter stated that the Federal Government Improvement Program from 1933 to 1939 had changed the Missouri River by levees and dikes so that this land would be on the Iowa side of the river but was Otoe County land.

There were two quiet title actions in the Otoe County, Nebraska District Court, which is a court of general jurisdiction in Nebraska, quieting title to a large portion of the Schemmel land and the quiet title decrees were entered on May 28, 1941. After these decrees were entered, Mr. Schemmel notified the Fremont County, Iowa officials of that fact by a letter originally sent on June 5 or 6, 1941 and returned without recording. Mr. Schem-

mel later recorded the letter on March 1, 1956 in the Fremont County Recorder's Office. The letter stated that due to the changing of the Missouri River by the construction of pile dikes, dredging and revetment works by the United States Government Corps of Engineers, a large part of what is presently called Schemmel Island would be on the Iowa side of the main channel of the Missouri River. One of the quiet title decrees was filed by Mr. Schemmel with the office of the County Recorder of Fremont County, Iowa on August 25, 1941.

At the time of the Iowa-Nebraska Boundary Compact, there was a title to the Schemmel land which was good in Nebraska as recognized by the Nebraska court decrees and notice of the Nebraska title was on record in Fremont County, Iowa with Iowa's proper recording officials.

The Schemmel land was bisected by the Otoe Canal dug by the Corps of Engineers in 1938, and Mr. Schemmel's title to the land which remained on the right bank or Nebraska bank of the Missouri River following the Compact has subsequently been recognized in Nebraska by private individuals and by the Nebraska courts. Mr. Schemmel's claim of title to the land on both sides of the Missouri River, some of which became located in Iowa as a result of the Compact, emanated from the same Nebraska deeds, actions, and indicia of ownership. Some of this land is to the east of the land Iowa claims, but Iowa has made no claim to this area.

No witness testified that the Schemmel Island area had been in Iowa prior to the Compact whereas several of the Nebraska witnesses testified as to how the land was severed from Nebraska by the canal dug in Ne-

braska and the Nebraska witnesses recognized this area as originally being in Nebraska.

(B) Conduct of State of Iowa Prior to Compact With Reference to Schemmel Island

The records of the County officials of Fremont County, Iowa substantiate that the Missouri River moved easterly up until immediately prior to 1905 and that the geographical feature known in the area as the "Iowa Chute" marks the abandoned channel of the Missouri River. In the Schemmel area, the Iowa chute is located approximately two miles east in some places of where the designed channel of the Missouri River is today. Records from the Fremont County Treasurer's office and the Journal of Board of Supervisors of Fremont County, Iowa which were offered by Plaintiff for years between 1866 and 1905 show a progressive history of removal of portions of what previously had been Iowa land in the Schemmel area from the Iowa tax rolls as the river moved to the east into the location of the Iowa chute. The tax records of Fremont County, Iowa reflect that in 1899 and 1901 the Missouri River was located in the Iowa chute. This was confirmed by plaintiff's eye witnesses.

The Fremont County records establishing the Knox Drainage District in 1909 found in the Fremont County Courthouse establish the boundary of the district as a levee along the east bank of the Missouri River, which coincides with the location of the Iowa chute.

An Iowa State Highway Commission Official Map of Fremont County, Iowa filed on February 14, 1914 in the office of the Fremont County Auditor also shows the

Missouri River with the left or Iowa bank being located in the general configuration and location of the Iowa chute. This constituted another recognition by Iowa officials that the river had been located there and that the left or east bank represented the limits of Fremont County, Iowa.

Other records on file with the Auditor of Fremont County recognized the bank along the Iowa chute as being the high bank of the Missouri River and as the abandoned Missouri River bank and the limits of the drainage districts. These records are dated 1920, 1922, 1923 and 1931. Even in 1931 the Fremont County officials recognized the Iowa chute as being the abandoned Missouri River bank. The major portion of Schemmel Island is described as section 15-67-43 in Iowa and the Iowa tax records indicate that no part of Section 15 is found on the Iowa tax rolls after 1880. During most of these years no tax books were found but the tax records indicate that there was no listing of this section in 1881, 1882, 1884, 1885, 1887, and in 1934, 1935 and 1936, which records were available. Consequently, the Iowa tax records did not show taxation of the Schemmel land at and prior to the Iowa-Nebraska Boundary Compact and Iowa was exercising no incidents of jurisdiction over that area at and immediately prior to the Compact.

None of the Schemmel Island area was on the Iowa tax rolls in the 1930's or 1940's up until the time of the Iowa-Nebraska Boundary Compact.

The evidence does show that some of the area east of Schemmel Island and west of the Iowa Chute did appear on the Iowa tax rolls commencing in approximately

1934 and from 1934 to 1943 this area was on the tax rolls of both states. However, the Iowa records failed to show the systematic taxation and exercise of jurisdiction over the area to the east of the Schemmel land between it and the Iowa chute as is shown by an examination of the Nebraska records, and the Iowa records show no taxation or exercise of jurisdiction by Iowa over the Schemmel land.

Testimony of witnesses called by Iowa and residing on the Iowa side of the river recognized that the Iowa Chute was abandoned bed of the Missouri River.

It was generally recognized by the residents in the vicinity that the Iowa Chute marked the abandoned main thread of the Missouri River.

At the time of the Iowa-Nebraska Boundary Compact of 1943 the State of Iowa, its subdivisions and instrumentalities, were exercising no incidents of jurisdiction over Schemmel Island. The State of Iowa was making no ownership claims to Schemmel Island and the State of Iowa was exercising no incidents of possession of Schemmel Island.

(C) Ownership and Possession of Schemmel Island

The Schemmel family (reference to the Schemmel family includes Dan Hill who initially purchased the land with Henry Schemmel but whose interest was subsequently conveyed to the Schemmels) have exercised all the rights and obligations of ownership and possession of the land from 1938 to the present, a period of approximately 33 years to the present date and approximately 25 years before the State of Iowa filed a quiet title ac-

tion in the District Court of Fremont County, Iowa making claim to the land.

The Schemmels acquired the first Nebraska deeds to the land in 1938 which trace back to the 1905 court sale and 1908 Otoe County Treasurer's Deed and approximately a year previously had purchased a tax sale certificate in Nebraska to the land. In 1939 "no trespassing" signs were posted and much of the land was seeded to grass.

Mr. Schemmel made his Nebraska title of record in Iowa in 1939 by recording various documents including deeds and by notifying county officials of Fremont County, Iowa by letter stating ownership to this Nebraska land which had been placed on the east side of the Missouri River by the work of the Corps of Engineers.

In 1941 Mr. Schemmel and the Schemmel family had their title quieted by two Nebraska quiet title actions, and a Nebraska quiet title decree to some of the land was filed of record in Fremont County, Iowa and Mr. Schemmel again notified the Fremont County officials by letter of his ownership and that the land was in Nebraska. The Iowa officials took no action to counter this claim that it was Nebraska land.

Fremont County, Iowa officials were on record notice at and prior to the Compact of 1943 that there was a good Nebraska title claimed to the Schemmel area. There was no record claim whatsoever by the State of Iowa to the Schemmel land.

The Schemmels paid taxes in Nebraska from 1938 through the adoption of the Iowa-Nebraska Boundary Compact of 1943 and were paying taxes in Nebraska

when the Compact was adopted. No such taxes were being levied at that time in Iowa.

In 1939 none of the land on the Iowa side was under cultivation but in the years previously, someone had been farming the land on the Nebraska side of the area which Henry Schemmel acquired and which remained in Nebraska after the dredging of the Otoe Bend Canal. From 1939 until 1943 the Schemmels seeded the island to grass and south of that put down a well and put in a tent which washed away in the first flood. In 1943 Mr. Schemmel went into the service and his partner took care of the real estate; and when Mr. Schemmel returned he found that the land on the left side of the present channel was in the State of Iowa by virtue of the 1943 Boundary Compact. He asked the Auditor of Fremont County in Sidney to place the property on the tax records so that the Schemmels could pay taxes in Iowa. Sometime after January of 1947, the County Auditor and County Treasurer of Fremont County, Iowa came to the Otoe County, Nebraska Courthouse to consider the transfer of the land and told Mr. Schemmel that there had been a court action in Mills County, Iowa and that they were required to put the land on the tax books. Mr. Schemmel, who at that time was Otoe County Treasurer, referred them to the Clerk's office to check the plats and verify the location of the land. After that, the land was placed on the Iowa tax records and Mr. Schemmel and Mr. Hill commenced paying taxes in Iowa in 1949.

The land was placed on the Iowa tax rolls under Iowa description. Consequently, following the Compact, the Fremont County, Iowa officials recognized after in-

vestigation that the land had been ceded to Iowa from Nebraska.

The Schemmels continued to post the land with no trespassing signs in the 1940's and also continued the seeding of the area with grass. Since placing the first "no trespassing" signs in 1939, the Schemmels have continuously excluded trespassers and no one other than the Schemmels or their tenants have ever been in possession. The Iowa Conservation Commission has never put up signs around the land.

The Schemmels contacted a contractor in 1948 concerning the clearing of trees and vegetation from the island so that it could be farmed but the east channel was still quite active at that time and a decision was made to wait.

Because the Auditor of Fremont County, Iowa had given the land a different description from the Nebraska surveys and because Mr. Schemmel wanted to obtain title with an Iowa description for the same land in order to clarify and establish the rightful ownership in case he should decide to sell or mortgage the property, he allowed the land to be sold at Iowa tax sale on advice of his counsel. He then purchased the land at tax sale and assigned the tax certificate to his daughter and tax deeds were issued to her. Three tax deeds are in evidence dated November 2, 1955 from the Fremont County Treasurer to Mary Leah Persons conveying the greater portion of Schemmel Island. These deeds were issued by the treasurer by virtue of the authority in him vested by law and indicated that the land had been sold at regular sale at public sale. This sale was made pursuant

to Iowa statutes which provide that the title conveyed includes "all the right, title, interest, and claim of the state and county thereto." (Sec. 448.3, Code of Iowa).

Mr. Schemmel had a garden on the island in approximately 1954 and the first clearing of the island was done in 1955 to 1956. The first crop was grown on the island in 1956. The land has now been almost completely cleared, leveled and a levee constructed, making it valuable and highly productive farm land.

From 1957 to approximately 1965 the land was rented out by the Schemmels to various tenants and since approximately 1965 the Schemmels have farmed it themselves. On the main island today there is presently around 400 to 450 acres in cultivation. In 1968 the corn yield averaged 105 bushels to the acre of corn and 40 bushels to the acre of beans. The Schemmels have had the land in the government farm program since 1957 with the exception of one year.

The Schemmels started building corn cribs in 1957 on the land immediately to the east of the island on the protected side of the levee and from then until about 1962 they were either building cribs, quonsets, or round bins. The Schemmels have stored and sealed grain in those cribs since commencing in 1957.

The Schemmels have paid real estate taxes on the land since 1949 in Iowa. Iowa has also taxed and assessed the Schemmel buildings.

The Schemmels spent approximately $50,000 to $60,000 in clearing the land. Their 1968 taxes to the State of Iowa were approximately $1,200.

The area is no longer an island but the Schemmels have a crossing across what was the old channel so that they can drive to the island.

The clearing, picking up of sticks, girdling of trees and discing the land to get it ready for production would cost approximately $200 an acre. This land is now valuable and productive farmland with some of it worth approximately $400 per acre or more and the Schemmel land was appraised at $180,500 as of December 1, 1967. Some of the witnesses also testified to their opinion of the value of the land which was higher than the appraiser's.

The State of Iowa paid no attention to the land until it had been made valuable farm land by the Schemmels. Iowa had been placed on notice by filing in her Recorder's office in 1939, four years prior to the Compact, of the Schemmel family claim under a Nebraska title to the land. Iowa made no claim to the area in 1943 and at no time until indication in the Planning Report of 1961 that they intended to file a quiet title action to the land. Then in 1963 Iowa filed an action to quiet title to the land in the District Court of Fremont County Iowa, almost 20 years following the Compact. From 1949 up to the present, the Schemmels have paid real estate taxes in Iowa and are paying them at the present time even though Iowa is making a claim that Iowa is the owner of this land.

Iowa acquiesced in the Schemmels' claim of title by making no claim on behalf of the state within a reasonable period of time following the Compact, and by her taxation of the land and the general recognition of the Schemmel possession and title. It is unjust and in-

equitable to allow Iowa to accept taxes on the land for such a period of time and then claim that the land has always belonged to the State of Iowa in this type of situation. (See *United States Gypsum Co. v. Grief Bros. Cooperage Corp.*, 389 F. (2d) 253 (8th Cir., 1968).

(D) The Case of the State of Iowa v. Henry E. Schemmel, et al.

On March 26, 1963 the State of Iowa filed a petition in the District Court of Iowa in and for Fremont County, captioned "*State of Iowa v. Henry E. Schemmel, et al.*, defendants, Equity No. 19765." This petition merely alleged that Iowa was the absolute and unqualified owner in fee simple of the real estate described consisting of approximately 660.944 acres and that all other claims to the real estate were wholly without merit or right. There was nothing else in the petition to indicate the theory under which the State of Iowa was claiming the land.

Prior to the filing of this quiet title action no official from the State of Iowa had discussed the claim with the Schemmels and no one had inquired of the Schemmels as to what the basis of their claim to the property was. When the defendants claimed that the State of Iowa was in violation of the Iowa-Nebraska Boundary Compact of 1943 in failing to recognize the Schemmels' title and rights to the land under Nebraska law, the State of Iowa denied that the land in controversy was ever located within the State of Nebraska. Iowa then alleged that the land formed in Iowa and has been in Iowa continuously since it came into existence and alleged that the common law of Nebraska is irrelevant and immaterial to any issue in the case. Trial was commenced

and Iowa called only two witnesses, the surveyor who made the traverse around the Schemmel area for the State of Iowa and Mr. Raymond Huber, a former employee of the Corps of Engineers. Iowa only traced the history of the river back into the 1920's ignored all previous history of the river, and relied upon the presumption concerning avulsions and that all previous movements of the river had been gradual or by accretion. Iowa placed the burden on proving an avulsion upon the defendants or land owners and had no proof, "except incidental proof that there was no avulsion in the first instance, being our intention to rely on the presumption in the first instance, at least."

Consequently, Iowa put in only a minimum of evidence and placed the entire burden of showing the history of the land upon the defendants. Iowa did this apparently knowing that the Corps of Engineers had dug a canal in Nebraska during the time that the Corps was moving the channel into its design in the Otoe Bend area.

Iowa took the position that she had physical possession of the land. Iowa interviewed no persons concerning the formation of the land prior to the filing of the suit. She had no discussions concerning formation of the land with any of the defendants named in the action. The only persons having knowledge of the relevant facts concerning the formation of the land where members of the Attorney General's office, Mr. Huber and Mr. Gerald Jauron, a Conservation Commission employee. Iowa had not pursued any investigation with any individuals who purported to have some recollection of the Otoe Bend of Schemmel Island area running back to the 1930's because it was the state's *opinion* that relevant

facts were "all fully, clearly and indisputedly established by the available records, maps, plats and photographs inspected with investigation and study of the area itself. Any other evidence based on human recollection as to the matter would be clearly cumulative, or if in conflict with the documentary proof would be unworthy of belief."

Iowa made no investigation into the records of the Register of Deeds of Otoe County, Nebraska or the records of the District Court of Otoe County, Nebraska prior to the filing of its case against the Schemmels. Her officials did investigate the records of Fremont County, Iowa to obtain names of possible parties defendant and their only other investigation was in maps, plats and photographs of the Corps of Engineers office in Omaha and the Secretary of State's office in Des Moines and the Fremont County A.S.C. Office and the Fremont County Courthouse. The mass of evidence offered in this case concerning Nebraska titles and exercise of jurisdiction prior to the Compact was ignored, as was Iowa's taxation of the land and the general recognition in the area of the Schemmel title. As in the Babbitt case, Iowa utilized Section 1 of the Compact to establish that the land was in Iowa, but she completely ignored Section 3 of the Compact regarding private titles.

The same principles of acquiescence, prescription, and general recognition of boundary applicable to the Babbitt land and the Nottleman Island area are also applicable to the Schemmel land. The exercise of jurisdiction by the State of Nebraska by having surveyed the land, taxed the realty, quieted title, Nebraska conveyances and the fact that the inhabitants of the area all considered it to be in Nebraska, coupled with a complete

lack of exercise of any jurisdiction over the area by the State of Iowa together with concurrent removal of the land from the tax rolls from the State of Iowa and recognition by the State of Iowa of the abandoned Missouri River channel in the Iowa chute to the east of the Schemmel property, would seem to be conclusive that this was Nebraska land prior to the Compact. The taxation of the land by the State of Iowa, issuance of Treasurer's tax deeds, and recognition by the county officials and Iowa inhabitants following the Compact substantiate the fact that it was Nebraska land ceded to Iowa under the terms of the Compact. Just as in the Babbitt case, the State of Nebraska asserts that the burden placed upon the Schemmels to have to establish this history is unconscionable and they should not be subjected to this type of attack by the State of Iowa. The tremendous mass of evidence substantiating these exercises of jurisdiction and recognition over the years was obviously extremely difficult to obtain, expensive, and time consuming because of the long passage of time. Obviously, it is extremely difficult in 1969 to find eye witnesses who can place the location of the Missouri River in 1900. Iowa should not be allowed to make claims which place this burden on an individual landowner in this type of situation.

(E) History of the Movements of the River in the Schemmel Island Area and Formation of the Land

Although the court has found that the recognition testimony and the conduct of the states is determinative of the fact that the Schemmel area must be recognized by the State of Iowa as having had a title good in Nebraska at the time of the Iowa-Nebraska Boundary Com-

pact and the State of Iowa must recognize that title regardless of how or where the land actually formed, the court makes the following findings of fact concerning formation of the land in the event that it should finally be held that the burden does lie upon the landowner to prove how his land formed and that the land was actually in Nebraska prior to the Compact.

The evidence shows that when Nebraska was admitted into the Union, the Missouri River was originally in approximately the same position which it presently occupies in the Schemmel Island area but that, from the time the two states were admitted into the Union, the river commenced to work easterly and cut away land on the Iowa side. The evidence consisting of many old maps, surveys, Corps of Engineer records and the county records in Otoe County, Nebraska and Fremont County, Iowa, all substantiate that the river developed a pronounced easterly bend following admission of the two states into the Union. In the development of this bend the land was cut away on the Iowa side and accretions were added to the Nebraska right bank. By the turn of the century, the river had moved easterly to a location later called the Iowa Chute by the area residents, approximately two miles east in some places of where the river was originally and where the designed channel is today.

Between 1900 and 1905 the Missouri River cut through the bend or point bar, leaving Nebraska land on the left bank of the Missouri River located between the Iowa Chute and the 1905 location of the Missouri River. This movement constituted an avulsion, leaving the Iowa-Nebraska State Boundary in the abandoned channel described as the Iowa Chute until 1943.

Physical evidence in support of this avulsion can be found by the location of a tree which Nebraska's expert testified commenced to grow in the year 1895. The location of this tree was on the Nebraska or right bank according to the 1895 Pierce Survey by the Otoe County Surveyor pursuant to direction by the Otoe County, Nebraska Board of Supervisors. This was a cottonwood tree growing on the Nebraska bank while the river was to the east, the tree survived the movement of the river to the west which shows the land in the bend was cut off. Had the lateral migration of the river been gradual, the soil supporting the roots of the tree would have been eroded and the tree would have been washed away. Instead, the tree remained strong and growing up until the time of this lawsuit when it was cut down in 1965. Iowa's expert witness, Ruhe, stated that the river could have moved across the place where this tree was located without destroying the tree. There is some dispute among the experts, as Iowa's tree experts testified that the tree commenced to grow in approximately 1903, but even this merely narrows the period of time in which the avulsion occurred to between 1903 and 1905.

This movement of the Missouri River across the bend was described by Nebraska's expert geologist, Dr. William Gillilland, an eminent and well qualified expert in the field of geology, as typical of a meandering stream. Dr. Gillilland explained that the Missouri River in this particular area moved in the same fashion that typical meandering streams moved, basically by erosion on the outer portion of the meander causing a shifting of the meander towards the outside with simultaneous deposition on the inside of the bend on the point bar. Dr. Gillilland used several maps and comparisons to demon-

strate the movement of the river and testified that the only possible way that it would have come back from its 1895 position to the position in 1905 was through an avulsive change by means of a neck cut-off or chute cut-off. He knew of no other manner by which the river could have moved from its indicated 1895 location to its indicated 1905 location other than by an avulsive change.

Dr. Gillilland explained how when the river goes around a bend, the distance between the top of the bend and the bottom of the bend is shorter across the bend although the elevation is the same so there would be a steeper path across the bend than around the bend. Because of the steeper path the water would flow more rapidly and more rapidly flowing water erodes more easily. Consequently, in a time of high water it is not unusual to find the water flowing through the shorter path across the neck of the bend or along a chute through the bend. Such water tends to flow more rapidly and erode away a new channel. The 1905 channel flowed through a natural chute or slough across the accretion area or point bar as observed on the 1890 map.

Dr. Gillilland's testimony was based upon a two-fold analysis:

(1) A succession of maps showing a succession of positions of the river and

(2) Confirmation by the experimental and other empirical data typifying this as a typical meander consistent with the movement of meanders in other areas.

The avulsive change caused the river to flow in an area considerably west of the maximum eastward location of the river, leaving part of the land which had been built up on the Nebraska point bar, or accreted to the

point bar, exposed. The 1895 tree was growing on this area. In all subsequent maps, the river has not extended as far east as it did in the most easterly position prior to 1905. It also did not extend as far east as the 1895 tree. Schemmel Island is located in the area that was a point bar in Nebraska prior to the avulsive action.

Although Iowa had expert testimony tending to attempt to establish that the river moved gradually to the west from its position in the Iowa Chute, the evidence completely discredited this position.

Dr. Gillilland's explanation is consistent with the theory utilized by the Corps of Engineers in their construction works along the river and is consistent with basic geological data submitted. His expert testimony is entitled to great weight. This avulsion, leaving the boundary in the abandoned channel of the Iowa Chute, has a remarkable similarity to the "Ike Chute" and the classic example of an avulsion described in the case of *Arkansas v. Tennessee,* 397 U. S. 88, Decree at 26 L. Ed. 2d 537.

The Iowa Chute was generally recognized as abandoned channel of the Missouri River both by witnesses and records in the Fremont County, Iowa courthouse.

There was also eye witness testimony that in 1911 or 1912 the river made a natural jump to the west in the Schemmel area, leaving an area three miles long and a mile wide. This constituted another avulsion consistent with the principles explained by Dr. Gillilland, placing the entire river further into Nebraska.

The Iowa Chute marks the thread of the abandoned channel of the Missouri River which marked the bound-

ary between Iowa and Nebraska immediately prior to the adoption of the Iowa-Nebraska Boundary Compact of 1943.

It should also be noted that most of the land between the Schemmel area and the Iowa Chute has been cleared of trees and the 1895 tree discovered by the plaintiff is the only tree in that vicinity and was located on a fence line or property line. Otherwise, it, too, might have been destroyed and the physical evidence helpful to the establishment of the Schemmels' claim might easily have been destroyed merely because of the passage of time.

(F) Movement of the Missouri River by the Corps of Engineers and the Otoe Bend Canal

An avulsion of the Missouri River to the west occurred in the Schemmel area as a result of the construction work by the Corps of Engineers between the years 1934 and 1938.

In 1934, the Corps of Engineers commenced work in the Schemmel area to place the river in a designed channel of 700 feet. Immediately prior to commencement of the work the principal flow of water or the main thrust of the water and the path which the boats used was along the east or left bank. Pile dikes were driven from the east bank across water and then across land and bar area. The Corps experienced some difficulty in diverting the water due to an easterly tendency of the flow. Because of this difficulty, the Corps was required to dig the Otoe Bend Canal in 1938 in order to place the river in the designed location. This canal was dug through Nebraska bank and bar land and was approximately one

mile long. The State of Iowa admits that the canal was dug entirely in Nebraska.

The evidence shows that the river was placed considerably to the west of its 1934 location and around a substantial piece of land with vegetation upon it. This is substantiated not only by the testimony but also by ground level photographs taken in 1938 by the Corps of Engineers. It is further substantiated by the findings of Nebraska's dendrochronologist. Even Iowa's tree expert, Mr. Weakly, recognized that trees had commenced to grow on some of the land prior to the dredging of the canal and these trees were not destroyed by the movement of the river to the west around that land area. One of the surveyors who helped to lay out the canal said that they walked to the area from the Nebraska side and did not cross any water.

Some of Nebraska's witnesses were highly familiar with the area and had worked on the site for the Corps of Engineers, both in the construction of the dikes and in the dredging of the canal. Nebraska's witnesses lived close to the area and were familiar with the river. Iowa's witnesses were more casual witnesses and not as familiar with the river and the river work as were those of Nebraska.

By 1939 all structures were completed and the river has remained in the designed channel continuously to the present day. Following the completion of the work a channel flowed around the east side of Schemmel Island along the former left bank and this is the last place that water continued to flow. I find that, had the boundary not already been located in the Iowa Chute as the result of a prior avulsion, and had the river been the boundary

at the time the Corps of Engineers commenced their work, this construction activity of the Corps and the dredging of the canal constituted an avulsion which would have left the boundary between Iowa and Nebraska in this abandoned channel to the east of Schemmel Island.

It should be noted that there is some Schemmel land to the east of this abandoned channel which is owned by the Schemmels as the result of their Nebraska titles and the same indicia of ownership through which they claim the island, and the State of Iowa does not now claim and has never claimed this land. The Schemmels are in peaceful possession of the land to the east of Schemmel Island. Iowa has never claimed abandoned bed in the Iowa chute or between Schemmel Island and the Iowa Chute.

The court finds that the Corps of Engineers moved the main navigable channel of the Missouri River from the east side of Schemmel Island to the west side into the designed channel, thereby creating an avulsion. If it should be determined that the Iowa Chute was not the boundary between Iowa and Nebraska, then the Iowa-Nebraska Boundary immediately prior to the adoption of the Iowa-Nebraska Boundary Compact of 1943 would have remained in the east abandoned channel of the Missouri River and the thread of that channel constituted the boundary between Iowa and Nebraska prior to the Compact. At that time, the entire Missouri River was located in the State of Nebraska with both the right and left bank a part of Nebraska and title to the bed of the Missouri River in that place was in the Nebraska riparian owners subject to the public easement of navigation

under Nebraska law. The abandoned channel on the east side of Schemmel Island carried flowing water for several years and eventually ceased to flow and presently the island can be reached by road leading into the island from the east.

Iowa's traverse of Schemmel Island has no basis in fact along the eastern side of Schemmel Island. It followed no geographical feature marking the left bank ordinary high water mark as alleged by the State of Iowa. The traverse goes through an alfalfa field, across flat open ground, crossing a high bank at right angles, and across land with no depressions or banks. Just as in the *Babbitt* case, the eastern line is apparently an arbitrary determination by Iowa's surveyor without justification in fact. It is another indication of the lack of precision in the work of the State of Iowa, inadequate investigation and the arbitrary approach of her officials.

* * * * * *

X. WHAT RELIEF IS NEBRASKA ENTITLED — AREAS SOUTH OF OMAHA

Nebraska's Contentions:

1. At the outset it is to be emphasized that the Special Master's construction of the Compact is that, under the factual situation existing in 1943 and prior thereto, the possessor of a private title to land contiguous to the Missouri River on July 12, 1943, "good in Nebraska," need not prove that his land was formed on the west side of the pre-1943 river boundary in order to require Iowa to recognize it under Sections 2 and 3 of the Compact. This construction is in accord with Nebraska's main contention.

2. Nebraska also contends, and the Special Master has agreed, that as to Nottleman Island and Schemmel Island the fair preponderance of the evidence is that the old boundary line, that is the main channel of the river, was east of the islands at the time they formed in the river.

Iowa disagrees with the construction of the Compact given by the Special Master. She has consistently and strenuously contended that the Compact language requires that in order for land to be "ceded" from Nebraska to Iowa it must now, 28 years later, [as to all the 30 tracts on the river claimed to be owned by Iowa] be shown that they formed on the Nebraska or the west side of the original boundary line, and if not Iowa may claim them under her common law doctrines. This contention of Iowa is herewith overruled.

(The Special Master in his recommendations will suggest that the State of Iowa be enjoined from further prosecuting the Nottleman Island and the Schemmel Is-

land quiet title actions mentioned in the first page of this Report.)

3. The other areas south of Omaha which formed before 1943.

Nebraska's contention with respect to these areas is that the evidence has established that the Missouri River was located in the designed channel south of Omaha in 1943 and the Missouri River has remained in the designated channel ever since that time. All of the areas listed in Part 1 of the Missouri River Planning Report south of Omaha were in existence at the time of the Compact and no evidence has been introduced establishing that Iowa was claiming any of these areas at the time of the Compact and up until the Planning Report of 1961.

Most of these areas had been cleared by 1961 and were in the possession of private individuals. These are large and valuable areas. Nebraska contends that Iowa under her common law doctrines claims 8 of these areas as state owned by Iowa in her capacity as a sovereign state.

The Special Master believes it appropriate that Iowa's contentions with respect to these 8 areas be set forth in this Report. Iowa has requested the Special Master to find and conclude as follows:

A. The other areas formed before 1943, besides Nottleman Island and Schemmel Island, are referred to in this record as St. Mary's Bend, Auldon Bar, Copeland Bend, State Line Island, Wilson Island, Deer Island, and a portion of Winnebago Bend. I will not describe in detail the location of these other areas at

this point in my Report; locations are shown on maps which are in evidence; and a series of aerial and ground level photographs taken by the witness Gerald J. Jauron are in evidence showing the general nature of them. Neither Nebraska nor Iowa attempted or purported to adduce in evidence before me all of the facts and history concerning the formation of these other areas. Only enough evidence was adduced before me concerning them to provide a very general knowledge of where they are and when and how they formed.

An action to establish and quiet Iowa's title to Deer Island was commenced and prosecuted to completion in the District Court of Harrison County, Iowa, in which said court held and decreed that Deer Island is property of the State of Iowa. This decision was affirmed on appeal to the Iowa Supreme Court in the case entitled *State of Iowa v. Raymond, et al.,* 254 Iowa 828, 119 N.W.2d 135. The District Court Decree is dated October 20, 1959, and the Supreme Court Opinion is dated January 15, 1963. It appears to me that the ownership of Deer Island is no longer open to question because the judicial determination made in *State of Iowa v. Raymond, et al.,* was a finality.

It appears from the record made before me that Iowa has been in open, peaceable, notorious and adverse possession of Wilson Island for more than ten years and that she has made valuable improvements thereon to enable public enjoyment of the island. It therefore appears that the ownership of Wilson Island is no longer open to question.

This leaves us with five areas formed before 1943 to which my remarks now to be made may have some application, namely: St. Mary's Bend, Auldon Bar, Copeland Bend, State Line Island, and Winnebago Bend.

Concerning areas which formed before 1943, Nebraska asks this Court to (1) prevent Iowa from questioning titles flowing from Nebraska, (2) declare that by entering into the 1943 Boundary Compact, Iowa waived, relinquished and contracted away any claim to islands, bars or other land areas which had not been recorded as state owned in the Iowa General Land Office, (3) enjoin Iowa from applying the presumption in favor of accretion and against avulsion so as to cast the burden on an adverse claimant to prove that any land now in Iowa was ceded to Iowa by the Compact, (4) declare an irrebuttable presumption that land now in Iowa over which Nebraska exercised jurisdiction in 1943 is ceded land, and (5) declare that wherever the Corps of Engineers have moved the thalweg of the river, such moving had the legal effect of an avulsion, and did not move any boundary.

Nebraska's prayer No. (1) for relief is entirely too broad; it goes beyond the terms of the Compact; it would foreclose Iowa from litigating questions which she would have the right to litigate. Iowa agreed in the Compact that "Titles, mortgages, and other liens good in Nebraska shall be good in Iowa as to any lands Nebraska may cede to Iowa - - -". This is the agreement Iowa should be bound and held to, and which she says she is willing to be bound and held to. But this Court should not bar or foreclose Iowa

from questioning whether or not purported titles flowing from Nebraska were "good titles" and Iowa should not be barred or foreclosed from questioning whether or not the particular tract is "ceded land". Therefore, it is my recommendation that Nebraska's proposition No. (1) above be rejected.

Concerning Nebraska's proposition (2) above, it is my opinion and recommendation that said proposition be rejected because recordation of state owned lands in the Iowa General Land Office was a purely ministerial requirement, and the people of Iowa should not be deprived of their public lands simply because some official failed to perform a ministerial act. I would point out, also, that in 1943 and prior, it was a practical impossibility for Iowa to keep an accurate record of her state owned lands along the Missouri River because of the wild and restless nature of the river. It was not mere dereliction of duty that Iowa officials in 1943 and prior, were not keeping a number of survey crews on station along the river to accurately survey, chart and record all movements of the channel and all land formations then being created or washed away.

As I understand Nebraska's proposition (3) above, she does not ask this Court to strike down the long recognized and well established presumption in favor of accretion and against avulsion. What she does ask is that the State of Iowa be barred from having the use or benefit of said presumption in litigation concerning the ownership of Missouri River lands. This Court and the courts of numerous states have recognized and employed the presumption in many

accretion cases. See Report of Special Master Marvin Jones in *Louisiana v. Mississippi,* No. 14 Original, Oct. Term 1962; Report of Special Master Harvey M. Johnsen in *Illinois v. Missouri,* No. 18 Original, Oct. Term 1969; *Arkansas v. Tennessee,* 246 U.S. 158; *Nebraska v. Iowa,* 143 U.S. 359; *Jeffries v. East Omaha Land Co.,* 131 U.S. 178; *County of St. Clair v. Lovingston,* 23 Wall. 46; *Shopleigh v. United Farms,* 100 Fed. 287; *Plummer v. Marshall,* 59 Tex. Civ. App. 650, 126 S.W. 1162;*Municipal Liquidation v. Tench,* (Florida) 153 So. 728; *Gubser v. Town,* 202 Ore. 55, 273 P.2d 430; *Wyckoff v. Mayfield,* 130 Ore. 687, 280 Pac. Rep. 340; *Bouvier v. Stricklett,* 40 Neb. 793, 59 N.W. 550; *Kitteridge v. Ritter,* 172 Iowa 55, 151 N.W. 1097. The presumption favoring accretion and against avulsion and the presumption favoring the permanency of boundaries, which are very similar, and which produce the same result, are too deeply rooted in our law to now be uprooted. Nebraska argues that these presumptions are unfair and inequitable, but this argument is not well taken.

I perceive no reason why the State of Iowa should be deprived of the use and benefit of these presumptions in litigation when they are operating in her favor. It would be a most unusual rule of evidence if it were to operate or not operate depending solely upon which party is claiming it. There is no terminology in the Compact which could possibly be construed as a repealer or partial repealer of the presumptions. I recommend that the presumptions be left unimpaired to benefit whomsoever they may benefit in litigation concerning ownership of lands in the vicinity of the Missouri River.

Nebraska's proposition (4) above would create an irrebuttable presumption where none has existed in the law heretofore and it is my opinion that no such new presumption should be now created. The evidence before me in the instant case demonstrates that the facts surrounding the formation of each of the nine areas which were formed before 1943 and the facts of Nebraska's purported exercises of jurisdiction over them prior to 1943 are different; each of the nine sites must be judged upon its own facts; this Court should not attempt to lay down any broad irrebuttable presumption to control all cases such as Nebraska proposes.

Nebraska's proposition (5) above is contrary to all case law on the subject heretofore. So far as I have been able to discover, the general and universal rule has been that when the thalweg of a stream moves, the boundary moves with it if the thalweg movement was by accretion, but the boundary does not move with it if the thalweg movement was by avulsion, and this is true regardless of whether the thalweg movement was caused by the forces of nature or by the forces of some third party man-made endeavor. The law of Nebraska is contrary to Nebraska's proposition (5). *Burkett v. Krimlofski,* 167 Neb. 45, 91 N.W.2d 57. The law of Iowa is to the contrary of Nebraska's proposition (5). *Solomon v. Sioux City,* 243 Iowa 634, 51 N.W.2d 472. This Court has adopted and followed the general rule that whether the movement was natural or affected by artificial means is immaterial. *County of St. Clair v. Lovingston,* 23 Wall. 46, 23 L.Ed. 59. *Louisiana v. Mississippi,* No. 14 Original, Oct. Term 1962, 384 U.S. 24, 16 L.Ed. 330, 86 Ct. 1250.

There is reason and equity behind the general rule; there is no good reason to discard it and adopt Nebraska's proposal.

Summarizing my opinions and conclusions concerning the disputed areas which formed before 1943: (1) In prior Divisions hereof, I have stated my findings and conclusions concerning Nottleman Island and Schemmel Island. (2) Iowa's ownership of Deer Island and Wilson Island has been settled and determined and nothing herein should be construed so as to reopen any question concerning the ownership of them. (3) Nebraska should be awarded some specified time after final determination of this phase of this case in which to elect whether or not she desires to adduce additional evidence bearing upon whether or not the areas which Iowa claims to own at St. Mary's Bend, Auldon Bar, Copeland Bend, State Line Island, and the part of Winnebago Bend which existed before 1943, or any part of them, were in Nebraska by the facts of their formation or by recognition in and prior to 1943 and whether or not there were good titles in Nebraska to said areas, or any part of them, which Iowa bound herself by the Compact to recognize. (4) The presumption favoring accretion and against avulsion and the presumption favoring permanency of boundaries should apply in making determinations as to where the pre-1943 state boundary was. (5) The rule that the pre-1943 boundary moved with the thalweg when the thalweg moved by accretion but that it did not move when the thalweg moved by avulsion, should apply in making all determinations of where the pre-1943 state boundary line was. (6) Iowa should not be enjoined from questioning all titles flowing from Ne-

braska. (7) Iowa should not be enjoined from claiming lands which were not recorded as being state owned in the Iowa General Land Office prior to 1943. (8) The usual and ordinary rules of prescription, acquiescence and recognition should apply in determining what lands were ceded and what lands were not by operation of the 1943 Boundary Compact.

* * * * * * *

XI. SPECIAL MASTER'S CONCLUSION WITH RESPECT TO AREAS SOUTH OF OMAHA WHICH FORMED BEFORE 1943

On areas south of Omaha other than Nottleman and Schemmel Islands, the construction of the Compact in accordance with Nebraska's first contention above decides all issues necessary for this Court to reach in this controversy. We are not deciding a better title proposition as between private claimants to a parcel of land. But any title existing in 1943 supportable under Nebraska title law to land contiguous to the river must be recognized by Iowa, applying the general principles as hereinbefore mentioned. All along the Missouri River, the Nebraska and the Iowa State Courts, and the United States District Courts, and the Court of Appeals of the Eighth Circuit are well aware of the principle of the law of accretion. In *Nebraska v. Iowa,* p. 370, the Supreme Court said:

> ". . . [T]he law of accretion controls on the Missouri River, as elsewhere; and that not only in respect to the rights of individual land owners, but also in respect to the boundary lines between States."

However, both states and the trial courts in each state and in the Eighth Circuit need a decision from the Supreme Court on the interpretation and meaning of the language of the Compact. They can then decide the fact issues between private owners and the State of Iowa and apply the authoritative law.

The Special Master rejects Iowa's proposed findings as set forth in pages 53 et seq. under,

"A. The other areas formed before 1943, besides Nottleman Island and Schemmel Island. . . ."

By this rejection no inference is to be held that the Special Master affirms all Nebraska's claims for relief. For instance there are several owners to the land comprising Nottleman and Schemmel Islands. There may be other private claimants to those lands or to the areas south of Omaha formed before and after 1943 other than the State of Iowa. What the Special Master has decided is that against Iowa, because of the Compact, the owners of Nottleman Island and of Schemmel Island have a title "good in Nebraska." Iowa is the only entity barred from contesting those titles.

This ruling may have application to all the areas contiguous to the river as it flows between Nebraska and Iowa. But other than Nottleman and Schemmel Islands there was insufficient evidence presented to me to establish even a title good in Nebraska under the Compact. In the event Iowa claims areas south of Omaha which were in existence on July 12, 1943 other than Nottleman and Schemmel Islands, the state courts and The United States District Courts can make these determinations, but a decision of the Supreme Court of The United States interpreting the Compact is first needed.

It is my view as Special Master that the following rule will suffice not only as to all areas in dispute south of Omaha, but also as to several areas in dispute north of Omaha. The rule should read:

In any proceeding between a private litigant and the State of Iowa involving a claim of title good under the law of Nebraska, alleged to have been

ceded to Iowa under Sections 2 and 3 of the Compact and contiguous to the Missouri River on the Iowa side, the State of Iowa shall not invoke its common law doctrines either as a plaintiff or as a defendant.

In the application of the foregoing rule, it should only be necessary for the trial court to examine a private litigant's claim of title in the first instance. If under any aspect of Nebraska law as it existed in 1943, the litigant shows a title supportable under Nebraska law, then Iowa should not be able to overwhelm such a title by invoking its several common law doctrines. For instance, restricted to such a fact situation, Iowa should not be able to defend on the ground that no person can claim adversely against the sovereign State of Iowa. A 10 year possession title under Nebraska law would prevail over Iowa's common law ownership of the beds, and abandoned beds and islands in the area under investigation. Also, the presumption that accretion is favored over avulsion should not have application in such a situation. But it should be understood that Iowa is not foreclosed from contesting under Nebraska law the private litigant's alleged Nebraska good title. To emphasize again the private litigant must show a title "good in Nebraska." This very well may be a trial issue. As in ejectment the private litigant may prevail on the strength of his good Nebraska title because it is a title Iowa agreed to recognize.

* * * * * * * *

XII. AREAS NORTH OF OMAHA

It is remembered at this point that Nebraska as a sovereign state claims no land. She seeks merely to enforce the terms of the Compact. Iowa claims to own 21 areas and part of a twenty-second area, which had formed since 1943, north of Omaha, contiguous to the river. Again both states agreed that the Compact is not a conveyance of land, but merely a transfer of jurisdiction, and that all private property rights were preserved. But the sticky problem north of Omaha arises because of Nebraska's contention as follows:

> Although the Compact made a fixed state line for the boundary between Iowa and Nebraska, it did not change private ownership boundaries. The Nebraska riparian owner, owning title to the bed of the Missouri River, was not deprived of this title by the Compact and when the river moves gradually and imperceptibly or by accretion, the boundary of the Nebraska riparian owner still moves with the thalweg or main navigable channel, regardless of which state the movement is in. The Nebraska riparian owner's title is not cut off or limited by the fixed state line between Iowa and Nebraska but his title can extend into Iowa. Iowa cannot, under its common law, claim title to the bed or abandoned bed or islands arising in the bed of the Missouri River adjacent to or between the thalweg and the Nebraska title or claim, whether such claim extends from the right or left bank.

In this connection Nebraska also says:

> Riparian rights are vested property rights of which an owner cannot be deprived without the

payment of just compensation. The Nebraska owner preserved his riparian rights in the bed of the Missouri River and these rights were not taken away by the transfer of jurisdiction to Iowa.

Nebraska finds support for these propositions as to riparian rights. In *New Orleans v. U.S.*, 10 Pet. 662 and *County of St. Clair v. Lovingston*, 23 Wall. 46, the Supreme Court of the United States held that the future right to alluvion is a *vested right* which is an inherent and essential attribute of the original property. The Court said at 23 Wall. 68-69:

> "The question here under consideration is not a new one in this court. In *New Orleans v. U.S.*, it was said: 'The question is well settled at common law that the person whose land is bounded by a stream of water which changes its course gradually by alluvial formations, shall still hold the same boundary, including the accumulated soil. No other rule can be applied on just principles. Every proprietor whose land is thus bounded is subject to loss by the same means which may add to his territory, and as he is without remedy for his loss in this way he cannot be held accountable for his gain.' "

In polite but firm language, Nebraska has contended before me that the decision in *Tyson v. State of Iowa*, 283 F.2d 802, decided in 1960 by the Court of Appeals of the Eighth Circuit is wrong. By that decision, says Nebraska, the Tysons were deprived of their vested property rights without just compensation, i.e., the accretions to their Nebraska-owned riparian land. But as the Special Master looks at this decision it appears to me that Nebraska's quarrel is with the facts found by

the district court and affirmed by the court of appeals. The law of this case is clear and is a precedent for most of the legal problems which may arise relative to Iowa's claim to the areas north of Omaha. It seems to the Special Master that many of the authoritative decisions, as to saying that the right to alluvion and the consequent accretions is vested, are decisions involving movable water boundaries. North of Omaha we are discussing the fixed Compact boundary line. As to these areas the river is in the State of Iowa. In general the Special Master is in agreement with Iowa's view of the issues at these points in this controversy. However, it should be noticed that the language is that of Iowa's counsel. Iowa's discussion follows, [Excerpts from pp. 59-62 and 66-70 of Iowa's proposed findings]:

B. Having discussed the areas which were in existence prior to 1943, we now have remaining for discussion the 21 areas (and part of a 22nd area) which Iowa claims to own and which have formed since 1943. There is no question as to where the state boundary line was when these areas came into existence because, in 1943, the two states had fixed and established the boundary as an unmoving line, to wit: the center line of a designed channel as shown on certain maps. All the areas now under discussion are now in Iowa; hence it follows that they formed in Iowa. I should note that Iowa does not claim to own all areas which she considers to be state owned by reason of Iowa law and the facts surrounding their formation.

All of the areas formed since 1943 are upstream from Boyer Bend, which is approximately 21 river miles upstream from Omaha, Nebraska, and Council Bluffs,

Iowa. The reason why there are no areas formed since 1943 downstream from Boyer Bend is that the river did not escape from the 1943 designed channel at any point in those approximate 84 miles. Hence, below Boyer Bend, the river has not washed away any land, created any new river bed, created any new land, or abandoned any channels since 1943. As I have hereinbefore noted, however, in the approximate 97 miles from Boyer Bend to Sioux City, the river escaped from the 1943 designed channel at numerous places after 1943. In doing this, the river washed away substantial bodies of land along both banks, created new river bed, created new land, and abandoned its channel at many places. Then when the Corps of Engineers re-designed the stabilized channel and placed the river in it, lands were washed away, more new river bed was created, more new land was created, and more channel was abandoned. These things happened on both sides of the Iowa-Nebraska Boundary but we are presently concerned with only the Iowa side because the 21 areas and part of a 22nd which Iowa claims to own are all on the Iowa side.

Concerning these areas which have formed in Iowa, east of the Compact boundary, since 1943, Nebraska asks this Court to declare and adjudge that the State of Iowa owns none of them because. (1) by operation of the Compact, Iowa's common law of state ownership of river beds, abandoned river beds and islands no longer applies to the Missouri River, (2) by operation of the Compact, Iowa waived, relinquished and contracted away all claims to land ownership in the vicinity of the Missouri River, (3) Nebraska riparian landowners retained precisely the same accretion rights in Iowa, after cession of their lands and river beds to Iowa by opera-

tion of the 1943 Compact, which they previously had when their lands and river beds were in Nebraska, and (4) private property boundaries along the river remained at the thalweg of the stream after the 1943 Compact, the same as they had been prior to 1943, and said private boundaries remained moving boundaries with later movements of the thalweg.

The sum total effect of Nebraska's propositions (1) and (2) above, were they to be adopted, would be to extinguish utterly all of Iowa's claims of land ownership, river bed ownership, and abandoned channel ownership in the vicinity of the Missouri River, and this would be a very simplistic and final ending to the present case. But my most careful and prudent reading of the 1943 Boundary Compact discloses no terms, phrases or language which can be construed as saying that Iowa repealed her historic common law when she adopted the Compact. And although Nebraska has tried strenuously to adduce evidence concerning the circumstances surrounding negotiations leading up to the Compact, circumstances surrounding adoption of the Compact, and circumstances which have transpired since the Compact which would entitle or command this Court to so construe the Compact, she has failed.

Iowa continues at page 61:

The reasons which impel me to reach the above conclusion are many and varied. I mention some of them, not necessarily in their order of importance. First, I search the Compact in vain for any language, phrases or terms which could possibly be construed or interpreted as saying that Iowa was repealing or changing her historic doctrine concerning state ownership of navig-

able river beds, abandoned river beds, and islands, or that Iowa was excluding the Missouri River from that doctrine's application. I search the record of negotiations leading up to adoption of the Compact in vain for any evidenc that it was Iowa's intention or Nebraska's expectation that there would be any change in Iowa's common law doctrine. I search the evidence concerning Iowa's conduct after the Compact in vain for anything indicating that Iowa was unilaterally interpreting the Compact as a repealer or partial repealer of her common law doctrine.

As a matter of fact, the evidence before me discloses that on two separate occasions in 1939 and 1942, the Iowa Conservation Commission refused to sell Wilson Island; that in 1944, Iowa was causing a survey to be made of "Nobles Lake", a state owned oxbow lake then about a half mile from the Missouri River; that in 1947, Iowa was in court to enjoin the draining of Nobles Lake by a local drainage district; that during the 1940's and 1950's, the Iowa Conservation Commission was almost continuously studying and considering what best use the state owned areas along the Missouri River could be put to.

Next, my conclusion expressed above is in accord with the law of the Eighth Circuit as delineated in *Tyson v. Iowa,* 283 F.2d 902, and with the law of Iowa as delineated in *State of Iowa v. Raymond, et al.,* 254 Iowa 828, 119 N.W.2d 135, and numerous other cases decided in the Iowa Supreme Court since 1943. It inheres in *Tyson* and in *Raymond* and in numerous other decisions that the Iowa common law doctrine was unchanged and not repealed in whole or in part by the 1943 Boundary Compact, and I see no valid criticism of these decisions.

For detailed discussions of the Iowa doctrine and its applications, in addition to the two cases cited above, see *McManus v. Carmichael,* 3 Iowa 1; *Holman v. Hodges,* 112 Iowa 714, 84 N.W. 950; *Kitteridge v. Ritter,* 172 Iowa 55, 151 N.W. 1097; *Payne v. Hall,* 192 Iowa 780, 185 N.W. 912; *Bigelow v. Herrink,* 200 Iowa 830, 205 N.W. 531; *Solomon v. Sioux City,* 243 Iowa 634, 51 N.W.2d 471; *Wilcox v. Pinney,* 250 Iowa 1378, 98 N.W.2d 720; *Dartmouth College v. Rose,* 257 Iowa 533, 133 N.W. 2d 687.

Iowa continues at page 66:

At several places along the river, the 1943 Iowa-Nebraska Boundary Compact had the effect of changing the state boundary substantially. These places were the places where there had been avulsions prior to 1943 so that the pre-1943 boundary was not in the river; it had been left in some abandoned channel as a result of the prior avulsion. I make no attempt here to itemize where these places were, or may have been, because the evidence before me is incomplete as to many places, and from my limited information, I cannot determine where there may have been pre-1943 avulsions and where not. Suffice to say at this point that the places where there had been pre-1943 avulsions were relatively few.

Iowa continues at page 66:

. . . . By the Compact, Nebraska ceded to Iowa jurisdiction and sovereignty over all land east of the new boundary. She gave up and surrendered to Iowa all jurisdiction and sovereignty she may have formerly had over the lands east of the boundary. She said in effect that Nebraska law would no longer apply east of the boundary. Nebraska should now be held and bound by

it. Nebraska should not be permitted to project the operation of her law beyond the agreed line, and Iowa cannot project the operation of her law into Nebraska.

It is my opinion and conclusion that both Iowa and Nebraska intended when they entered into the 1943 Boundary Compact that henceforth and after 1943, ownership of the river bed would be determined by Iowa law on the Iowa side of the new boundary (center line of the designed channel) and ownership of the river bed on the Nebraska side of the new boundary would be determined by Nebraska law. In other words, good titles to Nebraska lands which Iowa agreed to recognize as good in Iowa became good Iowa titles; they did not become good Nebraska titles in Iowa. And good Iowa titles to lands ceded to Nebraska became good Nebraska titles, not good Iowa titles in Nebraska. Iowa is still entitled to have her law that the state owns the beds of all navigable rivers in the state and that private land titles terminate at the ordinary high water mark. Nebraska is entitled to have her law that private land titles shall extend to the thalweg. But the law of Iowa must stop at the boundary and Nebraska law must stop at the boundary.

This conclusion is in accord with the general rule that no state may extend or project the application of its laws beyond its own borders, and in matters of land titles, lex loci must be the controlling rule. Mr. Justice Johnson stated the rule in *Hawkins v. Barney,* 30 U.S. 294, 5 Pet. 457, 8 L.Ed. 190, as follows:

> "* * * the lex loci must be the governing rule of private right, under whatever jurisdiction private right comes to be examined."

The Court's comments at 30 U.S. page 300, are particularly apropos to the case at bar:

> "* * * It can scarcely be supported, that Kentucky would have consented to accept a limited, crippled sovereignty; nor is it doing justice to Virginia, to believe, that she would have wished to reduce Kentucky to a state of vassalage. Yet it would be difficult, if the literal and rigid construction necessary to exclude her from passing this law were to be adopted; it would be difficult, I say, to assign her a position higher than that of a dependent on Virginia. Let the language of the compact be literally applied, and we have the anomaly presented, of a soverign state governed by the laws of another soverign; of one-half the territory of a sovereign state hopelessly and forever subjected to the laws of another state. Or a motley multiform administration of laws, under which A. would be subject to one class of laws, because holding under a Virginia grant; while B., his next-door neighbor, claiming from Kentucky, would hardly be conscious of living under the same government. If the seventh article of the compact can be construed so as only to make the limitation act of Virginia perpetual and unrepeable in Kentucky; then I know not on what principle, the same rule can be precluded from applying to laws of descent, conveyance, devise, dower, curtesy, and in fact, every law applicable to real estate."

More recently, see *Arkansas v. Tennessee,* 246 U.S. 158, at page 175, where this Court stated:

"How the land that emerges on either side of an interstate boundary stream shall be disposed of as between public and private ownership is a matter to be determined according to the law of each State, under the familiar (sic) doctrine that it is for the States to establish for themselves such rules of property as they deem expedient . . . ."

Nebraska's propositions (3) and (4) were dealt with directly in the *Tyson* case, which I have hereinbefore mentioned. This case is important, it is the law of the 8th Circuit, and it warrants detailed discussion because, if I were to adopt Nebraska's said propositions, I would be disavowing and overruling it. The case is cited as *Tyson v. Iowa,* (1960) 283 F.2d 802.

The land in Tyson Bend which later became the subject of controversy began to form in 1948. The Missouri River had been in the designed channel in 1943, but between 1943 and 1948, the river escaped from the designed channel by washing away the left bank stabilizing structures and the land along the left bank. That is to say, the left bank moved into Iowa. The state boundary remained at the center line of the designed channel per 1943 Boundary Compact. After the left bank had moved a mile or thereabouts into Iowa, an island arose from the bed between the designed channel and the main channel. The island arose in Iowa. It was an island because when it arose and for several years thereafter, waters of the river continued to flow around both sides of it, the main channel flowing to the east of it and water continuing to flow through the designed channel to the west of it. In the 1952 flood, the designed channel was filled with sediment and the island was con-

nected to the Nebraska shore. In 1958, the Corps of Engineers had determined to place the river back into the designed channel at Tyson Bend and to accomplish this by dredging a canal in the designed channel and then diverting the river through the canal. Eminent Domain proceedings were commenced to condemn an easement on the island so that spoil from the dredge could be cast upon it. The issue litigated was who was entitled to the compensation for the taking and this turned upon who was the owner of the island.

Three parties or sets of parties laid claim to ownership of Tyson Island. The State of Iowa claimed it as an island formed over the state owned river bed in Iowa under the Iowa doctrine of state ownership. The Harrop claimants claimed it because they held the old Iowa titles to the land which had existed in that spot under the sky before the river began its escape eastward from the designed channel. The Tyson claimants claimed it as an accretion to Nebraska land or river beds belonging to them.

The decision in District Court was for Iowa and this was affirmed on appeal. The Harrop claim was rejected because the lands they once owned had been entirely washed away. (One Roy M. Harrop, at my first hearing in Omaha, sought to inject the Harrop claim in this case by petition to intervene. This was denied.) The Tyson claim was rejected because the island had not arisen as an accretion to any land or river bed owned by them. Iowa was adjudged owner of the island and entitled to the compensation because the island had arisen from the state owned river bed in Iowa.

* * * * * * * *

XIII. SPECIAL MASTER'S DISCUSSION AND CONCLUSION

As the Special Master understands Nebraska's criticism of the *Tyson* decision, it is [p. 212 of Nebraska's oral argument] that before the Compact the Tyson east line would follow the state boundary line as it moved south and east. The washing away of land would uncover accretion lands to Tysons' Nebraska bank. When the Engineers "put it back around here without destroying the island, this — there would have been an avulsion and the boundary would have been over here at common law in this abandoned channel." As the Special Master sees it, this case involves the problem of whether Tysons' vested rights were cut off at the state boundary. Iowa got the proceeds of the condemnation because the abandoned bed was in the State of Iowa.

The Court of Appeals in *Tyson* said at page 811:

> "We have held that the court's judgment is entitled to be affirmed upon the basis of the court's determination that the origin of the land in controversy was independent islands formed in the bed of the Missouri River, belonging to the State of Iowa and that the additional land formed as an accretion to such island. Such determination is decisive of these appeals."

But it seems to the Special Master that in this Compact boundary line problem which is before this Court the language used by Judge Van Oosterhout, even if dictum, must be declared to be the law of this case. He said:

"[16] Lastly, Tysons claim the court erred in stating the Nebraska land owners could acquire no accretion

rights to their banks across the fixed state boundary. We have considerable doubt whether the court intended by such statement to say more than that Iowa law controls since all the land in controversy is located in Iowa[3] *and that the Nebraska law of accretion did not operate to create riparian rights within the territorial limits of Iowa. So limited, the court's view would coincide with our view of the law.*"

But as both states agree that the Compact was not a conveyance of any kind, Nebraska says that under her law a private property owner has a vested right to his accretions, and the Supreme Court in this case should now declare that the Nebraska riparian owners vested riparian rights continue within the territorial limits of Iowa. The Special Master disagrees. In *Arkansas v. Tennessee,* 246 U.S. 158, 175, the Court held:

> "How the land that emerges on either side of an interstate boundary stream shall be disposed of as between public and private ownership is a matter to be determined according to the law of each State, under the familiar doctrine that it is for the States to establish for themselves such rules of property as they deem expedient with respect to the navigable waters within their borders and the riparian lands adjacent to them. [Citing cases].
>
> " . . . But these dispositions are in each case limited by the interstate boundary, and cannot be permitted to press back the boundary line from where otherwise it should be located."

Going back to Iowa and Nebraska, each state announced for itself, via its Supreme Court, which riparian rule it would follow. Iowa chose her rule in *Mc-*

Manus v. Carmichael in 1856, 10 years after she was admitted to the Union. Nebraska in *Kinkead v. Turgeon,* 109 N.W. 744 (1906), announced her common law rule, 50 years after she was admitted to the Union. In the opinion she recognized that she had announced a rule of law different than the rule of Iowa. The opinion mentions: "There is an irreconcilable conflict between the decisions of the courts of different states of this country upon this question." [p. 744], but concludes [p. 748]:

> "In several instances the courts of a state lying upon the one side of one of our great rivers holds and enforces the rule of the common law, and on the other side of the same river the courts of a sister state declare that the riparian owner only takes to high-water or low-water mark, as the case may be. On the whole matter, we deem it best to let well enough alone and adhere to the custom and policy of this state since its earliest settlement."

In *Kinkead,* the Nebraska Court recognized her decision was in conflict with the Iowa rule announced 50 years earlier. It cannot be supposed that she expected Iowa would abrogate her rule in order to accommodate her rule to Nebraska's. Neither could she expect that Nebraska law could be enforced by Iowa within her own territorial limits.

In Judge Van Oosterhout's opinion in *Tyson,* p. 811, FN. 3, he mentions:

> "3. Both Iowa and Nebraska recognize the right of a riparian owner to accretions forming against his river bank. However, in Nebraska, unlike Iowa, the riparian owner in the state owns the river bed

> to the thread of the stream. Thies v. Platte Valley Public Power & Irr. Dist., 137 Neb. 344, 289 N.W. 386, 387. Such difference in law distinctly affects ownership of islands forming in the river bed . . . ."

It is the belief of the Special Master that Iowa and Nebraska can both live by and profit by an announcement by the Supreme Court of The United States that the land laws of each respective state terminate at the fixed Compact line. Any accretion by a Nebraska property owner across that line must be under the law of Iowa. I am in agreement with Iowa's counsel that the rule of the common law is a living law, always subject to change. The Nebraska Supreme Court always had and still has the power to change the Nebraska doctrine of private ownership of river beds. Also the Nebraska Legislature had and still has the power to change, modify or repeal the common law of Nebraska as it might deem right, proper and necessary. Counsel for Iowa have cited *Western Pac. Ry. Co. v. Southern Pac. Co.*, 151 F.Rep. 376, 399, where the subject of vested rights to accretions is discussed. It is there held that the right to future possible accretion can be divested by legislative action. Mr. Murray for Iowa also says the Michigan Supreme Court reversed itself on a very similar matter in *Hilt v. Weber*, 252 Mich. 198, 233 N.W. 159, (1930). The court had previously held in *Kavanaugh v. Baird*, 241 Mich. 240, 217 N.W. 2, (1928) and in a long line of similar cases, that the true boundaries of lands riparian to the Great Lakes were the meander lines of the lands as surveyed by the government when Michigan was admitted to statehood. In *Hilt v. Weber*, the court specifically overruled the *Kavanaugh* cases, and held that the true boundary is the water mark. In the first paragraph of

his dissent, Justice Wiert pointed out that the result of this turnabout was to divest a "vested public trust" but only one other justice joined in the dissent.

At this point we are discussing areas north of Omaha which were formed since 1943 by the changes in the river either natural or by the Engineers. In 1943 these were expectant or contingent accretions. Iowa is claiming these areas not in 1943, but in 1961 and thereafter. So far as we know there were no accretions in 1943.

I am in agreement also with Iowa's final proposition on this subject that it is a proper construction of the Compact that it was an exercise of the Nebraska Legislature's power to change and modify the common law to be applicable to all lands and river beds being ceded to Iowa. The Nebraska Legislature was saying in effect that whereas these lands and river beds which had formerly been owned per the common law of Nebraska shall henceforth be owned per the common law of Iowa.

The Special Master has heretofore concluded in this case that a title good in Nebraska on land existing in 1943 contiguous to the river is now a title good in Iowa. However, that parcel of land when ceded to Iowa is subject to the real property laws of Iowa. It is only the title which Iowa must recognize under the Compact and which takes precedence over her common law doctrines. This principle applies all along the 192 miles of river between the two states. But on the 116 miles north of Omaha both states are in substantial agreement with the following situation north of Omaha as stated by Nebraska, [pp. 103-104 of Nebraska's proposed findings.]:

"Considerable evidence has been offered concerning other areas along the Missouri River. Generally, the areas which Iowa claims north of Omaha, Nebraska are claimed as result of natural movements of the Missouri River in escaping the designed channel following 1943 and river work by the Corps of Engineers in either moving the designed channel or placing the river back into the designed channel. Since 1943 the Corps of Engineers has redesigned much of the channel north of Omaha and from maps offered by the Plaintiff, it appears that both banks of the Missouri River of 1965 were wholly out of the 1943 designed channel and within the State of Nebraska for approximately 21 miles and both banks were completely out of the 1943 designed channel and in the State of Iowa for approximately 14 miles. In addition, there are places north of Omaha where just a portion of the Missouri River, but not both banks, is located outside of the confines of the 1943 designed channel."

It is conceivable, of course, that a private person may contend that he has a title supportable under Nebraska law on land existing north of Omaha on the Compact date, July 12, 1943. If so, his title is to be afforded the same recognition as given to Nottleman and Schemmel Islands with no requirement that the land be pinpointed as having formed in Nebraska.

But generally, north of Omaha, the rule to be applied is that proposed by Iowa which the Special Master herewith adopts and which is:

Ownership of areas which have formed since July 12, 1943 shall be determined by the law of the state in which they formed, the boundary fixed by the Iowa-Nebraska Boundary Company of 1943 being the line which shall determine in which state they formed. However, neither a Nebraska riparian landowner nor an Iowa riparian landowner shall be barred from owning accretions which may form to his land in one state and extend across the fixed boundary into the other state.

* * *

WITNESSES

The Special Master has not believed it necessary to review in detail the testimony of the 95 witnesses whom he heard either in person or by deposition. It is a case in which the decision must be based upon the overall picture developed by consideration of all the testimony and the documentary evidence. However, the testimony of several witnesses deserves some comment.

1. Lester F. Faber

This man directed the preparation of and published Part I of the Missouri River Planning Report of January 1961. He directed the investigation which uncovered the bonanza which Iowa received as a result of the control of the Missouri River by the U. S. Corps of Engineers. His testimony and the Report support Nebraska's position that Iowa made no public claim to the areas in dispute until 1960, some 17 years after the Compact. The Report says:

> "For the past several months the Conservation Commission has been studying the possibilities for development of thousands of acres of marsh, water and islands along the 192 mi'es of the Missouri as it passes the western border of this state."

From his deposition and the report, it is apparent that Mr. Faber was probably the first Iowa official to develop the thesis that the lands which emerged on the Iowa side of the Compact line could be claimed by Iowa under her common law doctrine of ownership of the river bed and abandoned beds, etcetera.

During 1960 Mr. Faber was Director of Planning and Coordination with the Iowa Conservation Commission, which by Iowa law had jurisdiction over meandered streams. (p. 4, Planning Report). This same Commission had disclaimed ownership in Iowa of Nottleman and Schemmel Islands.

2. Gerald J. Jauron

During the course of the trial at Omaha, Mr. Jauron testified as to many aspects of this case. From 1946 he was Game Warden in 2 counties on the river north of Omaha, but in 1958 when the investigation started he was assigned to patrol the entire river from Sioux City to the Missouri line, and in 1962 his title was Coordinator of Missouri River activities which required him to investigate and report concerning state-owned lands on the river. He knew the river. He was the "bird dog" under Mr. Faber in developing the claims which Iowa published in the Report. In the many lawsuits which were tried in the state and Federal courts relating to Iowa's claims, Mr. Jauron was the chief Iowa witness. He is undoubtedly a credible man, but it must be recognized that at the same time he was promoting Iowa's cause in his capacity as investigator. His credibility was influenced by his long time employment with Iowa and by his belief that the Iowa cause is right.

3. Willis L. Brown

This man is the Nebraska state surveyor. His office is in charge of all public lands of Nebraska. He is custodian of the records of surveys of Nebraska, including the original government surveys. He was the "bird dog" for Nebraska in locating the witnesses and documents

which counsel used in building up the evidence in this case. He is regarded as a truthful and credible witness. He was knowledgeable on his subject, and his opinions were largely based upon what various charts, maps, meridian lines, range lines, and property lines revealed. He had examined records both in Nebraska and in Iowa and especially the records of the Corps of Engineers.

4. Whitney Gillilland

This witness is now and has been a member of the Civil Aeronautics Board in Washington since 1959. Prior to 1943 the witness had been in the general practice of law in Iowa and had served for a period of time as a judge in an Iowa county court. The substance of his testimony before the Special Master was that he represented the owners of Nottleman Island and others, and the Iowa Conservation Commission had informed him that Iowa had no claim to the lands making up Nottleman Island. The testimony of this witness is credible and establishes the attitude of the responsible Iowa officials with regard to Iowa's lack of claiming ownership either of Nottleman or Schemmel Island areas until the Planning Report was published. In the meantime the conclusion is that Iowa during the intervening years was recognizing the titles "good in Nebraska."

5. General Herbert B. Loper

He came to the Omaha District Office of The United States Engineers in 1934 and was soon in charge of that office with the function of installing the regulating works on the Missouri River from Sioux City to Rullo. The river was in its normal or wild and natural state — "a meandering river in an alluvial bed." He testified

generally as to the design of the new channel and the construction and control of the river which was accomplished by the Engineers. But it is a fair inference from consideration of all his testimony that the Engineers were not at any time interested in the thalweg of the river insofar as the boundary was concerned. They did their construction work without regard to ownership of the banks on either side of the river until after 1943.

6. Raymond L. Huber

This man was a long-time employee of the U.S. Army Engineers at Omaha. He is not a licensed professional engineer. He has been a civil servant of The U. S. Government. Unquestionably he knows the river and the method of construction of the pile dikes, stone dikes, revetments and other methods used to control the river and to stabilize the channel. But again it is clear from this man that the Engineers were not concerned with the mid-channel boundary line between the 2 states during the 1930's and early 1940's. The Engineers were concerned, however, with the deep water and the speed of the current at various points. Mr. Huber has been a witness for Iowa and for practically all of Iowa's litigation in the courts of both states and in the federal courts. Before me he appeared to favor Iowa's interest, and his views as to the mid-channel boundary line are suspect.

7. WITNESSES GENERALLY ON RIVER CONDITIONS

Many witnesses were called by each state to testify as to their recollections of past events such as the river cutting away into Iowa; the location of chutes; the location of islands and bars; the size and growth of willows and cottonwood trees; and especially fishermen and hunters were asked their recollection as to the mid point of the channel. This testimony was interesting, but in sum total of very little weight. In the first place under all the evidence, the river location changed from year to year, from month to month, and as Iowa's counsel said, even from day to day. In *Holman v. Hodges,* 84 N.W. 950, 952 1901), the Supreme Court of Iowa said:

> "In that sense title to land bordering the Missouri river may be said to be movable, for no one at night may safely predict what will be his boundary line the next morning."

The witnesses for both states who testified concerning the pre-1943 Compact history of the river and the general conditions which led to the Compact, and who testified generally as to post Compact history and river conditions, were in substantial agreement. The major differences and contradictions between the witnesses and the evidence of each of the states related to the formation of the two islands, Nottleman and Schemmel, and the location when formed, and the various surveys and maps which were used and offered to prove the river boundary line at various times in the past. The presentation of this type of evidence resulted in the large record made in this case. But it is the view of the Special Master that this type of evidence has but

little significance in the construction of the meaning of the Compact. It is my view that neither state thought it necessary to identify or pinpoint the exact location of any land being ceded from one state to the other at the time they agreed upon the fixed boundary line in the Compact.

XIV. SUMMARY AND RECOMMENDATIONS

Both Nebraska and Iowa need a construction and an interpretation of the Iowa-Nebraska Boundary Compact of 1943 with respect to 3 main issues, and that the Supreme Court has jurisdiction to decide these issues:

1. Nebraska's contention that under the factual situation existing in 1943 and prior thereto, the possessor of a private title to land contiguous to the Missouri River on July 12, 1943, "good in Nebraska," need not prove that his land formed and existed on the west side of the pre-1943 river boundary in order to require Iowa to recognize it under Sections 2 and 3 of the Compact, as land ceded by Nebraska to Iowa.

   (a) It is the recommendation of the Special Master that this contention of Nebraska be upheld.

2. Whether the findings and conclusions of the Special Master are to be affirmed with respect to his finding that Nottleman and Schemmel Islands formed and existed on the west or Nebraska side of the pre-1943, mid-channel boundary, and are thus to be recognized by Iowa under Sections 2 and 3 of the Compact, as land ceded by Nebraska to Iowa?

   (a) The Special Master recommends affirmance.

   (In the event that the Court approves Nebraska's contention under *1* above and thus the construction of the Compact is that land

on which there is a title good in Nebraska need not be pinpointed as having formed in Nebraska to be ceded to Iowa—then *2* above, that is, the Special Master's finding that Nottleman and Schemmel Islands formed on the Nebraska side of the pre-1943 boundary is not necessary to be passed upon, as Nebraska prevails on the issue of these two islands under the construction given the Compact in *1* above.)

3. North of Omaha, on land formed since July 12, 1943 and situate in the State of Iowa, east of the fixed Compact line, contiguous to the Missouri River, the Nebraska law of accretion does not operate to create riparian rights within the territorial limits of Iowa.

4. It having been held in No. 3 that the Nebraska law of accretion does not operate to create riparian rights within Iowa, the counterclaim of Iowa is dismissed.

If Nebraska prevails on either 1 or 2, or both, then it is recommended:

5. That the State of Iowa, its officers, agents and servants, be enjoined from further prosecution in the cases of *State of Iowa v. Darwin Merrit Babbit,* Equity No. 17433, and *State of Iowa v. Henry E. Schemmel,* Equity No. 19765.

The Special Master suggests that the states be invited to submit a proposed decree with respect to the issues settled by this litigation.

Respectfully submitted,

JOSEPH P. WILLSON
Senior District Judge
Special Master

In The

Supreme Court of the United States

October Term, 1964

No. 17, Original

STATE OF NEBRASKA, PLAINTIFF,

vs.

STATE OF IOWA, DEFENDANT.

EXCEPTIONS OF THE STATE OF NEBRASKA TO THE REPORT OF SPECIAL MASTER AND BRIEF IN SUPPORT THEREOF

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EXCEPTIONS OF THE STATE OF NEBRASKA TO THE REPORT OF SPECIAL MASTER AND BRIEF IN SUPPORT THEREOF

EXCEPTIONS OF THE STATE OF NEBRASKA TO THE REPORT OF SPECIAL MASTER

Nebraska agrees with most of the findings of strict fact in the Report of Special Master and most of Nebraska's exceptions are directed either to the categorization of the issues and argument or to the relief recommended by the Master. In connection with the relief recommended, it is Nebraska's position that some of the relief recommended is proper, but is more limited than Nebraska is entitled to within the broader scope of Nebraska's contentions. Some explanation of the exceptions is necessary in order to avoid questions of semantics and in order that Nebraska's contentions be considered in the proper context. In the brief in support of the exceptions, Nebraska will further explain its contentions.

I.

EXCEPTIONS TO STATEMENTS CONCERNING JURISDICTION

The Master properly found that Iowa is in violation of the Iowa-Nebraska Boundary Compact of 1943 (SMR 1) and that this Court has jurisdiction (SMR 200). However, the Master has set forth in V of his Report the Statements by Iowa with regard to jurisdiction and if it should be deemed that the Master has adopted any of these statements then Nebraska excepts to any findings or conclusions that the main grounds for relief are based upon anything other than that Iowa is violating the Iowa-Nebraska Boundary Compact of 1943 and the consequences which necessarily flow from that agreement. Nebraska also excepts to any conclusions that Nebraska requests a declaratory judgment (SMR 108).

———o———

II.

EXCEPTIONS TO FINDINGS OF FACT

Nebraska excepts to the following findings of fact to the extent indicated:

(1) Although the Master has set forth Iowa's position on pages 50 to 61, if it should be deemed that the Master has adopted any of these statements, then Nebraska excepts to any statements therein which are inconsistent with Nebraska's position. Nebraska contends that the Iowa-Nebraska Boundary Compact of 1943 was a contract which bound the State of Iowa, including her

legislative, executive, and judicial branches, and Iowa cannot unilaterally determine her obligations and duties arising from the Compact.

(2) The statements on page 174 of the Report:

> "But other than Nottleman and Schemmel Islands, there was insufficient evidence presented to me to establish even a title good in Nebraska under the Compact. In the event Iowa claims areas South of Omaha which were in existence on July 12, 1943 other than Nottleman and Schemmel Islands, the state courts and The United States District Courts can make these determinations . . ." (SMR 174).

Nebraska agrees with the final portion of the continuation of the above sentence ". . . but a decision of the Supreme Court of the United States interpreting the Compact is first needed" (SMR 174).

Nebraska further objects to any inference from the statement excepted to that it was necessary to present evidence "to establish even a title good in Nebraska" for other areas as the evidence does show many instances where the Missouri River was entirely within the State of Nebraska at the time of the Compact from which it necessarily follows that there were property rights and titles "good in Nebraska" on the left bank or Iowa side of the Missouri River prior to the Compact which Iowa must recognize, regardless of who the claimant might be.

(3) In XII, entitled AREAS NORTH OF OMAHA, the Master stated that he was in agreement with Iowa's views of the issues at the points in controversy "in general" and Nebraska excepts to the paragraph from Iowa's proposed findings quoted on page 181 of the Report which reads:

"As a matter of fact, the evidence before me discloses that on two separate occasions in 1939 and 1942, the Iowa Conservation Commission refused to sell Wilson Island; that in 1944, Iowa was causing a survey to be made of Nobles Lake, a state owned oxbow lake then about a half mile from the Missouri River; that in 1947, Iowa was in court to enjoin the draining of Nobles Lake by a local drainage district; that during the 1940's and 1950's, the Iowa Conservation Commission was almost continuously studying and considering what best use the state owned areas along the Missouri River could be put to."

The evidence clearly establishes by the testimony of Iowa's own witnesses that the Iowa State Conservation Commission was paying no attention to the lands along the Missouri River and they were not considered "state owned areas". Mr. Schwob, Director of the Iowa State Conservation Commission from 1941 to 1946, testified that the islands along the Missouri River were not marked as owned by the state because "at that time nobody paid any attention" (R. Vol. XXII, p. 3225). He also testified:

"Q. Had the Iowa Conservation Commission done anything to determine or to mark these islands to show the people that they made claim to them?

A. I don't think they did at that time because there was no use of the river. Public use of the river was pretty nil because of the adverse conditions for fish and game. People didn't care about it and there were very few places of access to the river" (R. Vol. XXII, p. 3231).

• • •

"Q. Was there any effort after the Compact was entered into in 1943 to determine or identify lands the Conservation Commission might cover?

A. Not that I remember of because at that time, and before they got Fort Peck and these dams upriver, which were supposed to reduce the silt—I don't know whether it ever did or not; it did something about pollution—there was very little interest in the Missouri River, either by Nebraska or Iowa that I knew about" (R. Vol. XXII, pp. 3232-3233).

This was also confirmed by the testimony of Lloyd Bailey, Superintendent of Land Acquisition for the State Conservation Commission of Iowa, who testified that, for 10 or 12 years or more following the Compact, the State was not interested and no official action was taken (R. Vol. XVII, pp. 2625-2627). He testified that there were islands formed in the beds of the river and "Nobody had paid any attention to them until the channel became stabilized" (R. Vol. XVII, pp. 2625-2626). Mr. Bailey had commenced work with the Iowa Conservation Commission in 1936 and had become Chief of the Land Acquisition Section in 1958. When he took over his duties as head of that section he had been familiar with their record keeping prior to that time. He thought generally all of the activity by the Commission up and down the Missouri River and the big investigation to turn up lands that could be included in the 1961 Missouri River Planning Report started sometime after he took office in 1958 (R. Vol. XIX, pp. 2700, 2702, 2717). In determining lands which Iowa claimed, they made no investigation going back prior to the diversion of the waters into the new channel by the Corps of Engineers (R. Vol. XIX, p.

2715). Mr. Bailey was asked what records were kept of state-claimed lands just before he went into office as Chief of the Land Acquisition Section and answered "They were very poor along the Missouri River. There was little record of anything there in my office" (R. Vol. XIX, p. 2715). There were very few records in his office and there was no other office where an outsider could go to determine what lands were claimed by the State (R. Vol. XIX, p. 2716).

Nebraska also refers to the Master's finding number 10 at page 65 that Iowa had no official record of "state-owned land" held or claimed at the time of the Compact in spite of the requirement of the Iowa Code requiring the Secretary of State to keep records of all property pertaining to the State Land Office that the State then owned and the Master's finding number 11 on page 66 that, in spite of provisions in the Iowa Code, the Iowa State Conservation Commission had not marked any of the island areas or abandoned channels described in the Missouri River Planning Report, and at the time of the Compact Iowa was not making any claim to these lands and there was no record of such claim. The Master also made finding number 7 on page 64 of his Report that Iowa, in fact, was not applying her common law doctrine that Iowa owned the islands and abandoned beds of the Missouri River and any application of the principle by the State of Iowa at or prior to the Compact amounted to nothing more than lip service to a principle without any application to the specific factual situation which existed.

Nebraska excepts to Iowa's statements concerning Wilson Island and Nobles Lake. Even though Iowa has

suggested she was asserting ownership at Nobles Lake in the 1940's, the evidence offered to establish this by Iowa was a court decree of December 1, 1950 which indicates that Nobles Lake was cut off from the Missouri River and was a separate meandered lake in Iowa in 1858, which was 9 years prior to admission of Nebraska into the Union, and it has been a meandered lake ever since that date (Ex. D-1048, R. Vol. XXII, pp. 3220-3221). In addition, a letter from the Iowa Attorney General to the Governor of Iowa quoted at pages 101-102 of the Report clearly indicates that for many years the State did not "zealously protect its ownership of these islands" (R. Vol. XII, pp. 1863-1864).

The evidence and the findings which the Master specifically has adopted fail to substantiate Iowa's language quoted above.

(4) Any statements that the 1943 Compact discloses no terms, phrases, or language that can be construed as saying that Iowa repealed her historic common law when she adopted the Compact (SMR 180). The Master stated at page 178 that he was in agreement "in general" with Iowa's view of the issues at the points North of Omaha in controversy but the language is that of Iowa's counsel. The statements referred to are inconsistent with the finding that the common law changed the boundary from the movable navigable channel to a fixed line and this change abrogated the application of common law principles relating to a movable stream as the boundary between the states (SMR 78). Nebraska further contends that the Compact supersedes Iowa's common law and be-

came thereafter determinative of all rights to be recognized or established by it.

(5) Nebraska agrees with the statement of Iowa quoted by the Master concerning the factual history of how the land formed in the Tyson Bend area insofar as it goes (SMR 185-186) but would add that the evidence in connection with that area offered before the Master is conclusive, that when the river after the Compact moved out of the designed channel to the south and east into Iowa, the islands arose behind this movement, and when the Corps of Engineers placed the river back into the designed channel, it did so without washing away those islands (R. Vol. XXV, pp. 3659-3661). The states have no dispute as to the facts concerning formation but only as to the conclusions to be drawn from those facts. Nebraska excepts to any implications or statements in the finding that the holding in the case of *Tyson v. Iowa*, 283 F. 2d 802 is correct or that the river bed upon which these islands formed was "owned by the State of Iowa" by virtue of its common law. The latter statement is a conclusion which Nebraska contends is not warranted by the Compact and will be discussed in the brief. Had it not been for the Compact, the area would have belonged to the Nebraska riparian owner, and the Compact should not change that result.

(6) There is a printing error on page 39 of the Report and Section 3 should read:

> "Titles, mortgages and other liens good in Nebraska shall be good in Iowa as to any lands Nebraska may cede to Iowa and any pending suits or actions concerning said lands may be prosecuted to

final judgment in Nebraska and such judgments shall be accorded full force and effect in Iowa."

(7) The language suggested by Iowa and included in the Report at page 49 that there had been canals dredged at "11 locations" by 1943 is inconsistent with the 1938 Corps of Engineers Annual Report adopted at page 35 listing 11 canals and additional canals at California Bend, Peterson Bend (SMR 36, 42), and St. Mary's Bend (SMR 42). The evidence also showed a canal prior to 1943 at Winnebago Bend. These canals are described in Plaintiff's Resume' of Evidence, pp. 418-420, 422-430. This would total at least fifteen canals dredged by the Corps of Engineers along the Iowa-Nebraska boundary in connection with its channel stabilization work prior to 1943, but the exact number is not critical since it was a substantial number, all of which constituted avulsions.

At page 182 of the Report, recognizing that the Master was using language of Iowa's counsel and was only in agreement "in general", if it should be deemed that the Master has adopted those statements then Nebraska excepts to the statement "Suffice to say at this point that the places where there had been pre-1943 avulsions were relatively few." Iowa's own proposed findings recognized eleven canals dug by the Corps of Engineers (SMR 49) and Nebraska's evidence shows at least fifteen man-made avulsions and the earlier references in evidence of the history of the river prior to the Compact indicate a number of avulsions as being recognized by both states and the Master so found in the Nottleman Island (SMR 137-138) and Schemmel cases (SMR 156, 159, 161-162). Consequently, the use of the words "relatively few" could be misleading.

(8) In failing to find that the states by entering into the Compact, recognized that there was no presumption that prior movements of the Missouri River had been gradual and imperceptible and that there were many places where land would be ceded from one state to the other; and this agreement, insofar as the position of the two states was concerned, negated any presumption at common law that prior movements had been gradual and imperceptible. The Compact recognized that in fact this was not the case. If the states had agreed that the boundary was in the Missouri River, there would have been no need for the Compact.

(9) The Master has set forth on pages 91 to 102 Nebraska's contentions concerning the conduct of the State of Iowa following the Compact and, if it should be determined that the Master did not adopt those findings then Nebraska takes exception to this failure to adopt such findings. These facts are documented in Plaintiff's Resume' of Evidence Before the Special Master.

(10) In failing to find in accordance with Nebraska's Proposed Findings submitted by the State of Nebraska before the Special Master commencing with THE OTHER AREAS SOUTH OF OMAHA on page 102 through page 123. These facts are documented in Plaintiff's Resume' of Evidence Before the Special Master.

(11) There is a printing error on page 161 of the Master's Report. Mr. Weakly was Nebraska's tree expert and his name was erroneously inserted indicating he may have been Iowa's tree expert.

(12) Another printing error appeared on page 141 of the Master's Report. The Master adopted the findings as submitted by Nebraska and the printer omitted approximately five lines. The Report should read:

> "In 1908 a Treasurer's Deed from the County Treasurer of Otoe County, Nebraska was filed for record in the office of the Register of Deeds of Otoe County which was issued pursuant to public sale of the real estate under a decree of the District Court of Otoe County, Nebraska in a State tax suit for the year 1905. The Schemmels at the time of the Compact had a direct chain of title tracing back to this Treasurer's Deed.
>
> "Over the years there were some Nebraska quiet title actions in the District Court of Otoe County, Nebraska quieting title to some of the land which is included within the description of the Schemmel land. There were also some conveyances of the land recorded with the Register of Deeds of Otoe County, Nebraska" (Proposed Findings Submitted by the State of Nebraska, p. 80).

III.

EXCEPTIONS TO RELIEF RECOMMENDED BY THE MASTER AND CATEGORIZATION OF THE ISSUES

Nebraska is basically in agreement with the recommendations of the Master as concerns the areas south of Omaha and the Nottleman Island or Babbitt Island areas and the Schemmel Island area and Nebraska agrees with the Master's recommendation at pages 174 and 175 that:

> "In any proceeding between a private litigant and the State of Iowa involving a claim of title good

> under the law of Nebraska, alleged to have been ceded to Iowa under Sections 2 and 3 of the Compact and contiguous to the Missouri River on the Iowa side, the State of Iowa shall not invoke its common law doctrines either as a plaintiff or a defendant."

However, Nebraska's request for relief goes further than this and Nebraska takes exception to the Master's recommendations concerning the legal principles applicable to the areas north of Omaha because Nebraska's position is that, regardless of the common law of either state that may have existed at the time of the Compact, the governing principles concerning the boundary and property rights along the Missouri River following the Compact must be determined by the Compact itself and by what the states agreed to. Although numerous separate legal propositions have been discussed in the various briefs and oral arguments, these propositions have been incidental to the main argument of the State of Nebraska that Iowa is violating the Compact and they have been intended to either explain why the Compact has the meaning and effect advocated by Nebraska or to place the Compact in the meaningful context of the common law which existed at the time it was adopted. Nebraska then takes the position that following the Compact, it is the provisions of the Compact which are controlling as against the states because this is what the states agreed to. Nebraska does not wish to get bogged down in questions of semantics, but does feel it is critical that Nebraska's contentions be considered in the proper context at all times.

Nebraska's exceptions to the relief recommended by the Master or to the manner in which some of the issues are stated in the report are:

(1) Nebraska would phrase the question in a different manner than as stated by the Master under ISSUES TO BE DECIDED on page 1 of the Report in Proposition II which states "Where all land in controversy north of Omaha is located in the State of Iowa contiguous to the Missouri River, does the Nebraska law of accretion operate to create riparian rights within the territorial limits of Iowa?" The latter portion of that proposition, more precisely stated as contended by Nebraska, should be "are the titles to the bed of the Missouri River and the riparian rights of Nebraska owners which existed in Nebraska prior to the Compact repealed or taken away by the cession of the property to Iowa or by the change of the jurisdictional line to place the property within the territorial limits of Iowa?" This proposition should also include the question: "Did the Compact operate to change the boundaries of the private property owners from the thalweg or middle of the main channel of the Missouri River to the fixed Compact line?" It is Nebraska's contention that the states could not change the property lines of private individuals or take away vested riparian rights of private individuals without provision for compensation and it is Nebraska's further contention that the Compact clearly provides for recognition of private property rights by the states. There is nothing in the Compact indicating an intention to take away or divest the riparian owners of their rights. The question clearly is what was the effect of the Com-

pact upon the property claims which existed and which the states did not question and can Iowa now resurrect a "common law principle" which she had not been applying at the time of the Compact and for many years thereafter in a manner which would retroactively transform these areas into "state-owned areas". Nebraska contends that Iowa cannot, and that the two states by the Compact did not contract away private property rights but instead recognized them.

(2) The Master on page 173 of his Report rejected Iowa's proposed findings which were quoted commencing on page 165 through page 172 with the words "The other areas formed before 1943, besides Nottleman Island and Schemmel Island, . . ." Consequently, it is not necessary for Nebraska to take exception to any of that material.

Under Iowa's contentions, the Compact would have merely changed the common law rules concerning the state boundary and then left the Nebraska owners at the mercy of the State of Iowa, her so-called "common law" rule as to sovereign ownership of beds and abandoned beds of the Missouri River, and the whim and caprice of her various officials.

(3) Nebraska agrees with the Special Master's finding commencing with the bottom paragraph on page 174 and continuing through the end of page 175 that:

> "In any proceeding between a private litigant and the State of Iowa involving a claim of title good under the law of Nebraska, alleged to have been ceded to Iowa under Sections 2 and 3 of the Compact and contiguous to the Missouri River on the Iowa side, the State of Iowa shall not invoke its

> common law doctrines either as a plaintiff or as a defendant."

if this Court should fail to grant Nebraska the broader relief requested as concerns the meaning and effect of the Compact. It is Nebraska's contention that these findings are proper within the context of the Compact, but are more restricted than the total relief which Nebraska is entitled to. Within that broader spectrum of relief requested by Nebraska, these findings are correct as far as they go. Nebraska excepts to the Master's recommendation on page 175 that Iowa is not foreclosed from contesting under the Nebraska law the private litigant's alleged Nebraska good title and that this very well may be a trial issue. Nebraska contends that Iowa is foreclosed from contesting the titles of private landowners along the Missouri River, because of the fact that the mere contesting of the title by the State of Iowa constitutes a violation of Iowa's agreement in the Compact that she would recognize the private Nebraska titles along the Missouri River as a part of the consideration for obtaining a new Compact line and the settlement of all the boundary problems without the necessity of having to determine where the prior boundary had been and the implications which would follow from such a determination. Iowa in contesting the titles is violating her solemn agreement made in 1943 that they would be good in Iowa.

(4) In XII, entitled AREAS NORTH OF OMAHA, the Master stated that he was in agreement with Iowa's views "in general", and Nebraska excepts to the Special Master's findings with respect to the areas north of

Omaha on pages 176 through 186 of his Report insofar as they are inconsistent with Nebraska's contentions as therein set forth. Nebraska particularly excepts to any conclusions that boundary lines between private individuals on the Missouri River were changed by the Compact because there is a clear recognition by the states in the Compact to respect private property claims, and the Master's recommendation would operate to take away riparian rights and vested property rights from the private landowners along the Missouri River without compensation and would constitute a taking without due process of law in violation of the 14th Amendment of the Constitution of the United States and the Constitutions of the States of Nebraska and Iowa.

Without limiting these exceptions, Nebraska further takes specific exception to the conclusion (stated in Iowa's words) that ". . . after 1943, ownership of the river bed would be determined by Iowa law on the Iowa side of the new boundary (center line of the designed channel) and ownership of the river bed on the Nebraska side of the new boundary would be determined by Nebraska law. In other words, good titles to Nebraska lands which Iowa agreed to recognize as good in Iowa became good Iowa titles; they did not become good Nebraska titles in Iowa. And good Iowa titles to lands ceded to Nebraska became good Nebraska titles, not good Iowa titles in Nebraska. Iowa is still entitled to have her law that the state owns the beds of all navigable rivers in the state and that private land titles terminate at the ordinary high water mark. Nebraska is entitled to have her law that private land titles shall extend to the thalweg.

But the law of Iowa must stop at the boundary and the Nebraska law must stop at the boundary'' (SMR 183).

Nebraska contends that the Compact is controlling along the boundary and titles ''good in Nebraska'' (including titles to the bed and vested riparian rights which are incident to the titles) are to be good in Iowa as ''titles'' or property rights because Iowa so agreed. Nebraska contends that just as Iowa changed her boundary by the Compact, she also changed her right to make any claim to the bed of the Missouri River and accretions to that bed on the Iowa side of the new Compact line because she agreed to recognize the titles to the bed of the Missouri River which had been good titles in Nebraska and the riparian rights to accretions to that bed which were a part of those Nebraska titles.

Just as Iowa changed her prior law by agreeing to a new boundary, she also changed anything in her prior law which might conflict with her agreement to recognize the individual title claims to the beds of the Missouri River. The evidence shows that there were many places where the river was entirely within Nebraska because of either natural avulsions or canals dug by the Corps of Engineers, and in all of those places Iowa had no claim whatsoever prior to the Compact to ownership of the bed of the Missouri River. Nebraska contends that Iowa did not immediately acquire such a claim by the adoption of the Compact, and her agreement to recognize titles, liens and mortgages good in Nebraska precludes her from making those claims of ownership to the bed which she had agreed to recognize in others. The Nebraska riparian owners' claims are not thereafter based

upon the Nebraska common law, but are a claim of a property right granted to the individual owners which are vested property rights which Iowa agreed to recognize and must recognize. Obviously, Iowa law can thereafter become applicable in other respects, but not in the sense that it can divest these owners of their title without just compensation in accordance with constitutional guarantees and in accordance with the guarantees agreed to in the Compact.

Under all of the circumstances leading up to the adoption of the Compact, the State of Iowa by agreeing to recognize good Nebraska titles without excepting beds of the river and accretions to that bed, should not now be able to negate or circumvent her agreement by claiming that her common law provides otherwise. This is tantamount to Nebraska's taking the position that her boundary remained the movable thalweg or middle of the main channel under common law principles and that the Compact could not change that common law applicable to her boundary. Obviously, this was not the case.

(5) The State of Nebraska takes exception to the recommendation on page 190 that ". . . the land laws of each respective state terminate at the fixed Compact line. Any accretion by a Nebraska property owner across that line must be under the law of Iowa." insofar as it is inconsistent with Nebraska's argument herein, and to the statements on page 190 that:

> "The Nebraska Supreme Court always had and still has the power to change the Nebraska doctrine of private ownership of river beds. Also the Nebraska Legislature had and still has the power to

> change, modify or repeal the common law of Nebraska as it might deem right, proper and necessary."

insofar as the findings might imply that these rights were or could be taken away from a property owner without just compensation. Nebraska further excepts to the statement on page 191 that there were no accretions in 1943 and the statement that "I am in agreement also with Iowa's final proposition on this subject that it is a proper construction of the Compact that it was an exercise of the Nebraska Legislature's power to change and modify the common law to be applicable to all lands and river beds being ceded to Iowa. The Nebraska Legislature was saying in effect that whereas these lands and river beds which had formerly been owned per the common law of Nebraska shall henceforth be owned per the common law of Iowa."

This is not what the Compact said. It clearly stated that titles good in Nebraska would be good in Iowa. The Compact provided for the recognition of existing rights by Iowa—not the extinction of such rights or any *change* of *ownership.*

(6) Again without limiting Nebraska's broader exception in (5), Nebraska excepts to the first sentence of the recommended rule to be applicable north of Omaha at page 193 as follows:

> "Ownership of areas which have formed since July 12, 1943 shall be determined by the law of the state in which they formed, the boundary fixed by the Iowa-Nebraska Boundary Compact of 1943 being the line which shall determine in which state they formed."

insofar as it implies that the Compact did not alter or change the Iowa law. Nebraska concurs with the final statement on page 193 that "However, neither a Nebraska riparian landowner nor an Iowa riparian landowner shall be barred from owning accretions which may form to his land in one state and extend across the fixed boundary into the other state.", insofar as that sentence goes. Nebraska further contends that the Nebraska or former Nebraska riparian landowner has retained and should retain his right to the bed and any accretions to the bed of the Missouri River on that owner's side of the thalweg without regard to the state in which the bed or islands arising in the bed may be located. Nebraska contends that the Compact only changed the jurisdictional line between the States but not the boundary of the property owners.

(7) Nebraska submits that the Master erred in failing to make the following additional recommendations:

(A) That Iowa no longer has title to the bed of the Missouri River following the Compact but Iowa has merely a public easement and the public right of navigation in the Missouri River.

(B) That property boundaries remained the thalweg of the Missouri River in spite of the fact that the Iowa-Nebraska Boundary Compact changed the jurisdictional boundary between the states to a fixed line. The Nebraska riparian owner continued to hold his title to the thalweg or middle of the main channel of the Missouri River and to own the

bed and accretions to that bed on his side of the thalweg regardless of whether located in Nebraska or Iowa.

(C) Should the Court fail to adopt proposition (A) above, then Nebraska submits that the following proposition should be adopted by this Court and the Master erred in failing to adopt this proposition:

> In those areas where there is a claim of a title good in Nebraska to land ceded to Iowa, Iowa has no claim at such places to the bed of the Missouri River or any beds arising in Iowa as a result of the movement of the Missouri River after the Compact, because the Nebraska riparian owners owned both banks and the bed prior to the Compact and Iowa agreed to recognize those titles by the Compact.

(D) That Iowa, by the Compact, contracted away any rights she may have had to contest titles along the Missouri River based upon any doctrine of sovereign ownership to the bed or abandoned beds of the Missouri River.

BRIEF OF THE STATE OF NEBRASKA IN SUPPORT OF EXCEPTIONS TO THE REPORT OF THE SPECIAL MASTER

Nebraska generally agrees with almost all of the findings of strict fact which appear in the Report of Special Master. The Master accepted as findings the general history of the Iowa-Nebraska Boundary problems as sub-

mitted by Nebraska appearing on pages 9 through 49 of the Report. These findings emphasize that while the Missouri River was the natural boundary between Iowa and Nebraska, it was notorious for the many natural changes and periodic flooding, and all of the alluvial plain between the bluffs on the Iowa side and the bluffs on the Nebraska side several miles in width has been part of the river from time to time. This created a great deal of uncertainty as to the location of the boundary which was recognized by the legislatures of the two states from 1901 until the adoption of the Iowa-Nebraska Boundary Compact in 1943. In addition to the Legislative history, the uncertainty of the boundary and the situs of lands along the river was a matter of common knowledge as indicated by the Corps of Engineer reports and the references in the newspapers and periodicals.

Superimposed upon the already confused situation was the fact that the U. S. Army Corps of Engineers, commencing in about 1934, engaged in a project to stabilize the channel of the Missouri River and to confine it to a channel of a designed width of 700 feet as determined by the Corps. In so doing, the Corps dredged at least fifteen canals along the Iowa-Nebraska border in addition to movement of the river by the construction of dikes and revetments.

Nebraska also endorses the findings of the Master with regard to the Iowa-Nebraska Boundary Compact of 1943 commencing on page 37 through page 43. Nebraska accepts the pre-1943 history of the Missouri River as submitted by Iowa with the minor exception that the evidence shows canals had been dredged in at least fifteen

locations instead of eleven as indicated by Iowa, but this is only a minor point of difference. Even Iowa recognized: "The reason why the boundary had become unsatisfactory was that its precise location at many places had become doubtful and uncertain; this doubt and uncertainty was a handicap and hindrance in matters of law enforcement, taxation, and land ownership" (SMR 47).

Nebraska further agrees with the Special Master's findings on the Pre-Compact history and Nebraska feels that the findings numbered 1 through 19 on pages 63 through 69 are extremely significant in determining the meaning and application of the Iowa-Nebraska Boundary Compact.

Nebraska endorses the findings commencing on pages 69 through 90. These deal with the Compact and its various provisions and the meaning of those provisions. These findings also indicate the present concern of the State of Iowa with the unsettled boundary problems resulting from the fact that stabilization work by the Corps following the Compact has placed approximately twenty-one miles of both banks of the river between Omaha and Sioux City entirely in Nebraska and approximately fourteen miles where both banks of the river are entirely in Iowa (SMR 77-78). The Master further found that a determination of the meaning and application of the Iowa-Nebraska Boundary Compact is of paramount interest to both states and is essential if the two states' boundary problems are ever to be solved (SMR 78).

Nebraska also concurs with the Master's findings concerning the Nebraska and Iowa common law at pages 89 and 90 and the statements concerning the conduct of the

State of Iowa following the Compact and adoption by the State of Iowa of Part 1 of the Missouri River Planning Report found on pages 91 through 102. Nebraska further agrees with the Special Master's findings on pages 109 through 111 including his statement of Iowa's position, without hereby agreeing to the correctness of Iowa's contentions as so stated. In addition, Nebraska agrees with the Master's statements on the issues of Nottleman and Schemmel Islands commencing at the middle of page 111 through page 163 of the Report. Nebraska further agrees with the Master's findings on pages 164 and 165 under paragraphs 1, 2 and 3 to where the Master commences to restate Iowa's contentions at the bottom of page 165, but Nebraska does not agree with the propriety of these contentions of Iowa.

Nebraska further is in agreement with the Master's comments concerning specific witnesses found on pages 195 through 197 and particularly with his final sentence on page 199 that:

> "It is my view that neither state thought it necessary to identify or pinpoint the exact location of any land being ceded from one state to another at the time they agreed upon the fixed boundary line in the Compact."

Nebraska further agrees with recommendations 1 and 2 on pages 200 to 201. However, Nebraska takes exception to finding 3 on page 201. Nebraska agrees with that part of the Master's finding in 4 on page 201 that the counterclaim of Iowa should be dismissed and excepts to the remainder of that finding. Nebraska further agrees with recommendation 5 of the Master on page 201.

This case has been extensively briefed and copies of PLAINTIFF'S RESUME' OF EVIDENCE BEFORE THE SPECIAL MASTER, PLAINTIFF'S BRIEF AND ARGUMENT BEFORE THE SPECIAL MASTER, and PLAINTIFF'S REPLY BRIEF BEFORE THE SPECIAL MASTER have been filed at the direction of the Master. Also filed with the Court are the TRANSCRIPT OF ORAL ARGUMENTS, Part 1 of the Missouri River Planning Report and the PROPOSED FINDINGS SUBMITTED BY THE STATE OF NEBRASKA BEFORE THE SPECIAL MASTER. These materials document the evidence and Nebraska's position. Any attempt to summarize these materials necessarily must omit many significant facts.

SUMMARY OF FACTS

Basically, the Master has found that at the time the states negotiated the Iowa-Nebraska Boundary Compact of 1943, each state recognized that the shifts of the river channel, both in its natural state and as a result of the work of the Corps of Engineers, had been so numerous and intricate that for practically all land adjacent to the Missouri River, no conclusive determination of either state or private boundaries was considered possible. Iowa had no public record of "state-owned land" which Iowa claimed although Iowa's statutes provided for the keeping of such public records. Although there were abandoned Missouri River channels and cut-off lakes or oxbow lakes all along the Missouri River valley, the State of Iowa had made no claim to these abandoned channels and Iowa was not applying her common law doctrine of sup-

posed "state ownership" of beds and abandoned beds of the Missouri River or islands arising in the beds of the Missouri River in order to make claim to land areas along the river. Iowa showed no interest in the ownership of these lands.

Although the states could have determined by an original action in this Court where the location of the boundary was in 1943, they recognized this would be extremely complicated and expensive. By embarking upon the settlement of the problems by Compact, rather than by original action in the Supreme Court of the United States, the states intended to avoid the necessity of the determination of the prior boundary by entering into a compact which recognized the existing situation along the Missouri River and was intended to settle all of the states' problems.

The Compact was adopted in general terms to accomplish a general purpose of settling and laying to rest all boundary and jurisdictional problems which existed between the states and was done in the context in which the State of Iowa was making no claims of any kind to abandoned river beds or islands which were in existence and which Iowa now claims. Express conditions were included in the Compact to recognize and provide protection to the individual landowners in spite of the many uncertainties concerning the actual location of the prior boundary. The states had no records of lands actually transferred from one state to the other by the Compact and did not provide for the identification of such lands. They did not know where the prior boundary had been located and they really did not care because they were not

concerned whether they were going to lose or gain anything. They were desirous of settling all controversy. They treated all areas generally with recognition to private titles to be given general application (SMR 63-69, 47).

In this context, the states entered into the Iowa-Nebraska Boundary Compact of 1943 in order to settle and lay to rest all of their boundary problems. This Compact is quoted at pages 69 through 71 of the Report of Special Master. Section 1 designated a new fixed boundary by referring to the center line of the proposed stabilized channel of the Missouri River as established by the United States Engineers' Office and shown on alluvial plain maps filed with the Secretaries of States of Iowa and Nebraska. These maps were very general maps analogous to a highway or road map and were not intended for any engineering results. They did not contain any distances, calls, angles or measurements which would enable a surveyor to find the center of the designed channel on the ground. They were extremely inaccurate and the Corps of Engineers has stated that it is not possible today to locate the boundary on the ground throughout from any maps on file in the Corps' office (SMR 72-75). Section 2 of the Compact then provided that each state ceded to the other state and relinquished jurisdiction over all lands lying on the opposite side of said boundary and contiguous to lands in the other state.

The states did not stop here, however. They then specifically added sections 3 and 4 which, as adopted by Iowa, are repeated as follows:

"Sec. 3. Titles, mortgages, and other liens good in Nebraska shall be good in Iowa as to any lands Nebraska may cede to Iowa and any pending suits or actions concerning said lands may be prosecuted to final judgment in Nebraska and such judgments shall be accorded full force and effect in Iowa.

"Sec. 4. Taxes for the current year may be levied and collected by Nebraska or its authorized governmental subdivisions and agencies on lands ceded to Iowa and any liens or other rights accrued or accruing, including the right of collection, shall be fully recognized and the county treasurers of the counties affected shall act as agents in carrying out the provisions of this section: *Provided,* that all liens or other rights accrued or accruing, as aforesaid, shall be claimed or asserted within five years after this act becomes effective, and if not so claimed or asserted, shall be forever barred."

Section 5 as adopted by Iowa then reads:

"Sec. 5. The provisions of this act shall become effective only upon the enactment of a similar and reciprocal law by the State of Nebraska and the approval of and consent to the compact thereby effected by the Congress of the United States of America. Said similar and reciprocal law shall contain provisions identical with those contained herein for the cession to Iowa of all lands now in Nebraska but lying easterly of said boundary line described in section 1 of this act and contiguous to lands in Iowa and also contain provisions identical with those contained in sections 3 and 4 of this act but applying to lands ceded to Nebraska."

Prior to the Compact the boundary had been the middle of the navigable channel of the Missouri River or the thalweg, subject to the usual rules of accretion and

avulsion applicable to such a movable boundary, *Nebraska v. Iowa,* 143 U. S. 359. Following a sudden change of the river by avulsion, the boundary then became fixed in the abandoned channel. *Nebraska v. Iowa,* 143 U. S. 359; *Missouri v. Nebraska,* 196 U. S. 23; *Arkansas v. Tennessee,* 397 U. S. 88. Obviously, the boundary had become fixed in various abandoned channels along the Missouri River because of the natural avulsions and cutoffs of the Missouri River as well as the channel stabilization work by the Corps of Engineers during which they dredged well over a dozen canals to divert the river into the designed channel. These canals also constituted avulsions fixing the boundary someplace other than the river. None of these had been identified in actions between the states except at Carter Lake, Iowa, which is an area of Iowa on the Nebraska side of the river in close proximity to Omaha, Nebraska, *Nebraska v. Iowa,* 143 U. S. 359.

It was generally recognized that these shifts had been so numerous and intricate that no conclusive determination of the boundary was considered possible. However, even in those places where the navigable channel of the Missouri River did constitute the boundary, the adoption of the new Compact line necessarily operated to change that boundary along the entire length of the Missouri River because the testimony and navigation charts established that the navigable channel tends to follow the outside of bends and was not in the geographical center of the designed channel as described in the Compact (SMR 78-79). Land within the bed of the Missouri River necessarily was "ceded" along the entire boundary (SMR 79). The change in the boundary line abrogated the applica-

tion of the common law principles relating to a movable navigable stream as the boundary between the states (SMR 78, 82-83).

The Master further correctly found that the states had recognized that the river necessarily had to have been entirely in Iowa or entirely in Nebraska in many places and desired to avoid the expense of determining these specific places so they took the easier course of attempting to accomplish the general purpose of settling and laying to rest all boundary and jurisdictional problems which existed between the states by agreement (SMR 83). Section 3 was intended to protect the rights of private property claimants against the claims by either state, and is a broadly phrased clause which should be liberally construed to effect this purpose. As such, the Master correctly found that neither state should be able to attack any private title or claims emanating from the other state as of the date of the Compact (SMR 84). Section 4 constituted a clear limitation upon the claims by the states for tax purposes, which were the only claims which were being asserted by the states at that time (SMR 85).

Nebraska agrees with the Master's findings that the provisions of the Compact became the law of the contracting states and state statutes or laws which conflict with the Compact are invalid and unenforceable, *Green v. Biddle,* 8 Wheat. 1; *The Interstate Compact since 1925* by Zimmerman and Wendell, p. 32; *U. S. v. Bekins,* 304 U. S. 27; *Poole v. Fleeger,* 11 Pet. 185, 209; *Rhode Island v. Massachusetts,* 12 Pet. 657, 725; *Hinderlider v. LaPlata River & C. C. Ditch Co.,* 304 U. S. 92 (SMR 86),

and Nebraska agrees with the rules of construction referred to in the Master's discussion of the Compact from pages 69 to 89.

Following the Compact, individuals possessing land on the Iowa side of the river continued in the peaceful use and enjoyment of their land without interference by the State of Iowa during the 1940's and 1950's. This is supported by the testimony of Mr. Schwob and Mr. Bailey referred to in the Exceptions, supra. In the latter part of the 1950's the State of Iowa commenced investigations in an attempt to claim lands under a so-called principle that the State of Iowa was the owner of the bed and all abandoned beds of the Missouri River and islands which had arisen within the bed of the Missouri River. The first official public knowledge of this position by the State of Iowa was found in the publication of a document dated January 1, 1961, entitled PART 1 of the Missouri River Planning Report (SMR 99; Ex. P-2609, R. Vol. I, p. 87-88) which listed twenty-one areas which Iowa was claiming under its "common law". This Report was discussed at pages 99-102 of the Master's Report and recognized the virtual impossibility of describing the state boundary or to determine ownership on the Iowa side because of the past frequent fluctuations of the river (SMR 100; Ex. 2609, p. 4, R. Vol. I, pp. 87-88). Iowa had not been interested in making these claims previously, but this new interest was motivated because the areas had now become of substantial value, both monetary and in some cases recreational (SMR 101-102; R. Vol. XII, pp. 1863-1864).

The evidence is clear that in the determination of

these areas which Iowa claims, Iowa utilized Section 1 of the Compact to establish the location of the boundary and that the land on the eastern side of that boundary was "in Iowa", and then Iowa proceeded to apply her "common law" (SMR 90) in a manner which would award Iowa title to the land. The evidence is also clear that, in the selection of the areas claimed, Iowa did not examine county records to determine claims of titles which must be recognized by the Compact.

However, Iowa did not claim all abandoned channels in the Missouri River valley (SMR 94-95, R. Vol. XI, pp. 1602-1603). She disclaimed some and purchased land in others. (This evidence is summarized with references to the Record in PLAINTIFF'S RESUME OF EVIDENCE BEFORE THE SPECIAL MASTER, pp. 349-363; 363-382; 409-411; and 427-428.) The evidence fails to show any consistency or logic in the selection of the areas Iowa claims. The policy of the Attorney General's administration changed three or four times because Iowa changed Attorneys General three or four times (SMR 95; R. Vol. XXIV, p. 3571). The evidence showed that Iowa's conduct was determined by particular attitudes by the various Attorneys General and not by any rule of law concerning the meaning or effect of the Compact (SMR 95-96; R. Vol. XXIV, p. 3571).

Iowa also takes the position that it now owns the entire bed of the Missouri River located on the east or left bank side of the Compact line because that bed is now "in Iowa" and Iowa is claiming the areas where the river escaped following 1943 as abandoned channel because that land "is in Iowa". This ignores the fact that

the Nebraska riparian owner owned the bed of the Missouri River on his side of the thalweg under a line of cases commencing with *Kinkead v. Turgeon,* 74 Neb. 580, 109 N. W. 744 and he owns any islands arising in the bed on his side of the thalweg. *State v. Ecklund,* 147 Neb. 508, 23 N. W. 2d 782. (This case was decided in 1946 after the Compact but is consistent with the principles of riparian ownership of the bed.) It also overlooks the fact that there were many places along the Missouri River where the river was entirely in Nebraska prior to the Compact, and consequently title to the entire bed of the Missouri River and both banks was necessarily in Nebraska riparian owners, subject to the public easement for navigation. Such areas according to the evidence are at Lake Manawa, Winnebago Bend, California Bend, Nebraska City Island, as well as in the Nottleman Island and Schemmel areas, in addition to the many other places where the Corps dug canals in Nebraska in order to channelize the river and such other areas which had not been ascertained by the states where the river had previously moved into Nebraska by natural avulsions. This evidence is referred to in PLAINTIFF'S RESUME' OF EVIDENCE BEFORE THE SPECIAL MASTER.

Extensive evidence was offered concerning Iowa's conduct with regard to the Nottleman Island and Schemmel areas and the factual history of those two areas (SMR 112-163). This evidence is illustrative of Iowa's conduct and the ignoring by Iowa of all individual rights and anything inconsistent with Iowa's position. It further graphically illustrates that the mere claim of title by the State of Iowa constitutes a hardship upon the farmer

and clouds his title in violation of Section 3 of the Compact requiring Iowa to recognize titles which had been good in Nebraska (SMR 116). The evidence further illustrates that Iowa has taxed the Nottleman and Schemmel areas, and, in the Nottleman area, the Attorney General's office had knowledge of the private claims through Nebraska titles both in 1946 and 1951 and the Iowa Conservation Commission specifically disclaimed ownership of the Nottleman Island area in 1951. On at least two occasions, Nottleman Island lands had been included in inheritance tax determinations in the State of Iowa and the County Treasurer of Fremont County, Iowa, had issued tax deeds to the Schemmel area in 1954. This evidence is summarized by the Master and is overwhelming in showing the recognition of the private ownership and the prior Nebraska titles.

Iowa proceeded to file law suits against the Nottleman and Schemmel areas under the theory that Iowa owned the land as accretion to the state-owned bed of the Missouri River and it was not affected by the Compact. In the Schemmel case, which commenced trial in 1964, Iowa put in only a minimum of evidence to show formation of the land and no pre-1943 avulsions, and Iowa relied upon the presumption against avulsions, thus placing the entire burden of showing the history of the land and the location of the boundary prior to 1943 upon the defendants (SMR 152-153). This placed a tremendous burden upon the landowner to prove the Pre-Compact Boundary and ignored all the history which is described in the Master's Findings.

THE SPECIAL MASTER'S RECOMMENDATIONS

This general summary of many of the facts is necessary to place Nebraska's argument in its proper context. The Master found that the areas which Iowa claimed south of Omaha were in existence in 1943 at the time of the Compact (SMR 63-64) and generally the areas north of Omaha which Iowa now claims are claimed as a result of movements of the river following the Compact (SMR 192). The Master basically recommended two general principles of law:

> (1) In any proceeding between a private litigant and the State of Iowa involving a claim of title good under the law of Nebraska, alleged to have ceded to Iowa under Sections 2 and 3 of the Compact and contiguous to the Missouri River on the Iowa side, the State of Iowa shall not invoke its common law doctrines either as a plaintiff or as a defendant (SMR 174-175).
>
> (2) Ownership of areas which have formed since July 12, 1943 shall be determined by the law of the state in which they formed, the boundary fixed by the Iowa-Nebraska Boundary Compact of 1943 being the line which shall determine in which state they formed. However, neither a Nebraska riparian landowner nor an Iowa riparian landowner shall be barred from owning accretions which may form to his land in one state and extend across the fixed boundary into the other state (SMR 193).

Nebraska agrees with recommendation No. (1) above insofar as it goes, although contending that the principle should be broader. Nebraska disagrees with the first sentence of proposition (2) above, which constitutes Nebraska's basic exception to the Master's findings.

Nebraska further agrees with the Master's recommendations 1, 2, and 5 on pages 200-201 concerning the Nottleman and Schemmel Island areas.

SUMMARY OF ARGUMENT

The Iowa-Nebraska Boundary Compact of 1943 was a contract which is binding upon both states. At the time it was adopted, both states recognized the uncertainty of the location of the natural boundary because of the many natural and man-made movements of the Missouri River, and the contracting states recognized that such a determination was almost impossible of ascertainment. Consequently, they attempted to settle all controversy by eliminating the necessity of locating the prior boundary. They did so by establishing a fixed line as the new boundary which changed the boundary along the length of the Missouri River from the former main channel of the Missouri River or from various abandoned channels which were generally recognized as existing but which the states did not deem it necessary to locate. The two states foreclosed inquiry by each other as to the location of the Pre-Compact boundary at the time they entered into the Compact. As a condition for this change, the states agreed to recognize titles and property interests recognized in the other state. They did this fully realizing the uncertain title situation and acknowledging they had no interest in determining what lands would be actually transferred. They accepted the fact that all titles along the river would be recognized by the other state. There were abandoned channels all along the Missouri River and the State of Iowa was making no claim

to these abandoned channels and Iowa was not claiming land areas as islands or abandoned beds under any claim of sovereign right under the common law in 1943 or for many years thereafter.

The states adopted the Compact in general terms with a view to public convenience and the avoidance of controversy. They intended to recognize all titles as against the states without further investigation. They clearly evidenced the fact that they did not care where the boundary was, but if an individual had what was then considered a good title, lien or mortgage, then the state must recognize and could not attack it. They had no record of land ceded; they did not know where the boundary had been located; and they did not care. The State of Iowa was not claiming these lands and there was no record of any such claim in spite of statutory requirements in Iowa requiring such records and the marking of such lands which the state claimed. It was the purpose and the intent of the states in adopting the Compact to lay to rest questions involving the historic location of the boundary and the manner in which bottom lands came into being. It is, therefore, a violation of the Compact for either state to make a claim of ownership which requires an individual or the other state to litigate the question of the precise location of the boundary at the time of the adoption of the Compact or the formation of land by the actions of the river. Neither state should now be allowed to place the burden on individual farmers and land owners of establishing something which the two states themselves recognized was practically impossible.

If the language, purpose and intent of the Compact is to be effectuated, Iowa must now be required to live up to her commitment to recognize all titles along the Missouri River and she should be restrained from attacking titles under any common law claim of sovereign title to the bed and abandoned beds of the Missouri River. Those Nebraska titles which Iowa agreed to recognize as good included the ownership of the bed of the Missouri River, subject to the public easement for navigation, and the right to accretions and islands arising in that bed. A determination is necessary that the Compact changed and supersedes any so called "common law" doctrines in Iowa which are inconsistent with Iowa's agreement to recognize these vested property rights. This is necessary in order to permit riparian owners from having their property taken away by Iowa without compensation, in violation of Iowa's agreement. Nebraska could not constitutionally legislate such rights out of existence and could not do so by the Compact. Iowa must recognize that the determination of sovereignty pursuant to the Compact cannot operate to divest a riparian owner of his property boundary or his riparian right to the bed and accretions to the bed of the Missouri River. As a party to the Compact, Nebraska is entitled to such a determination by this Court.

ARGUMENT

Nebraska has brought this action as a party to the Compact. It is Nebraska's position that the Compact was a complete document and Iowa cannot enforce only Section 1 with regard to location of the boundary and

disregard Sections 3 and 4 which were a part of the total consideration for the Compact. The questions raised are to be decided not by the common law or courts of either state, but by the Compact itself. *Marlatt's Lessee v. Silk,* 11 Pet. 1; *Green v. Biddle,* 8 Wheat. 1; *Fletcher v. Peck,* 6 Cranch 87, 136; *West Virginia ex rel. Dyer v. Sims,* 341 U. S. 22. The Master properly recognized that the provisions of Compacts become the law of the contracting states and state statutes or laws which conflict with an interstate compact are invalid and unenforceable. (SMR 86 and cases therein cited.) Consequently, the basis of jurisdiction in this case is because it is an action between signatory states which are parties to the Compact and not on any exclusive theory of *parens patriae* as suggested by Iowa, and the statements of Iowa's contentions concerning *parens patriae* in *State of Hawaii v. Standard Oil Company,* 301 F. Supp. 982 (SMR 56-58) are not in point.

The Master not only found a violation of the Compact by the State of Iowa, but also found that a determination of the meaning and application of the Iowa-Nebraska Boundary Compact "is of paramount interest to both states and is essential if the two states' boundary problems are ever to be solved" (SMR 78). Iowa should not be allowed to avoid her contractual obligations created by the Compact by the argument of jurisdictional issues which are not relevant to this case. In fact, in an action brought by certain truckers against the Iowa Reciprocity Board to enforce the terms of an interstate motor carriers compact, the State of Iowa recently took the position that only the signatory states can raise the compact is-

sue. *General Expressways, Inc. v. Iowa Reciprocity Board,* — Iowa —, 163 N. W. 2d 413, 417, 426. Now Iowa inconsistently takes the position that even the signatory states themselves cannot raise the Compact issue.

Just as the Compact superseded the prior law and now governs the location of the boundary between the states, Nebraska contends that it also requires that Iowa recognize the private claims to title to all those lands along the Missouri River which were admittedly in an uncertain status, because Iowa agreed that all of these titles would be good. Nebraska contends that this recognition included all vested rights which were a part of those titles because Iowa pledged in the Compact to respect them. When Iowa agreed that the titles shall be good in Iowa she thereby waived, relinquished, and contracted away any rights she had to attack those titles. Iowa should not be able to take the position, as she has, that the Compact only established the state line to give her jurisdiction so that she can ignore or attack the Nebraska titles which she agreed "shall be good".

The two states were concerned that the benefits secured by the Compact to the private owners of both states should be equal and reciprocal—that their titles would be good regardless of jurisdiction and that their vested riparian rights, which were part and parcel of their titles, would remain in full force. The Compact should not be construed as giving the State of Iowa the power of destroying vested rights of Nebraska owners when she in apparent good faith pledged to respect them. Iowa should not be able to resurrect a new application of her common law principles to enable her to clearly

subvert her commitment under the contract to recognize Nebraska titles and property rights.

The tremendous burden placed upon the landowner by Iowa's arbitrary conduct in attacking the titles is illustrated by the Master's findings at pages 112 through 163 of his Report. From these findings, Nebraska contends that it follows that Iowa cannot make a claim of title based upon her common law doctrine of sovereign ownership of the beds of navigable streams and thereby require a landowner to prove where the boundary was prior to 1943, and in this respect the Master's recommendations are certainly correct.

Iowa has suggested that "Nebraska should be awarded some specified time after final determination of this phase of this case in which to elect whether or not she desires to adduce additional evidence bearing upon whether or not the areas which Iowa claims to own at St. Mary's Bend, Auldon Bar, Copeland Bend, State Line Island, and the part of Winnebago Bend which existed before 1943, or any part of them, were in Nebraska by the facts of their formation or by recognition in and prior to 1943 and whether or not there were good titles in Nebraska to said areas, or any part of them, which Iowa bound herself by the Compact to recognize" (SMR 171).

Nebraska contends that to place this burden on Nebraska at this late date of establishing where the boundary was prior to 1943 is to require Nebraska to do something which both states agreed was not necessary when they adopted the Compact. By placing the burden on someone else to determine where the Pre-Compact boundary was, the Compact is thereby construed in such a man-

ner as to render Sections 3 and 4 meaningless. The great object of the Compact was to settle all these matters and lay them to rest and the language of Chief Justice Marshall in the case of *Handly's Lessee v. Anthony,* 5 Wheat. 374, 383-384, is certainly applicable:

> "... but in great questions which concern the boundaries of states, where great natural boundaries are established, in general terms, with a view to public convenience, and the avoidance of controversy, we think, the great object, where it can be distinctly perceived, ought not to be defeated, by those technical perplexities which may sometimes influence contracts between individuals" (SMR 67-68).

The Master did find that the States relinquished by the Compact the right to question any title on the grounds that the land was not within the jurisdiction of Nebraska (SMR 68, par. 16) and at this late date neither state should now be able to require someone else to make the determination of where the Boundary was located prior to the Compact in order to preserve a claim of title (SMR 65, par. 9). This finding is in agreement with Nebraska's position.

It should also be remembered that there were places along the Missouri River in addition to Nottleman and Schemmel Islands where the River was entirely within the State of Nebraska (see evidence relating to Winnebago Bend and California Bend, PLAINTIFF'S RESUME' OF EVIDENCE BEFORE THE SPECIAL MASTER, pp. 349-363; 396-405) (SMR 97), because of avulsions prior to 1943, and title to the entire bed was in a Nebraska riparian owner. When Iowa agreed that titles would be good in Iowa, certainly she did not except the

title to the bed, and there would have been many places along the boundary where Iowa had no claim to the bed. There is nothing in the Compact that indicates that Iowa was to deprive the riparian owner of that right to the bed. In fact, everything indicates Iowa's agreement to recognize that title. By agreeing that such titles were good in a context where Iowa also agreed that it was not necessary to determine where the boundary was, she precluded herself from thereafter asserting title to the bed of the Missouri River. This must follow from the Compact and Iowa's conduct in failing to make any such claim for several years following the Compact because, as the Master found, the mere questioning of the title by Iowa constitutes a burden upon the landowner (SMR 133). It can amount to confiscation because Iowa can exert the entire resources of the state against a landowner merely to obtain a legal principle which will assist her to acquire other areas.

In the Riley Williams or Middle Decatur Bend case which is discussed in PLAINTIFF'S RESUME' OF EVIDENCE BEFORE THE SPECIAL MASTER, at pages 382-389, the amount of $2,070 as proceeds of a condemnation by the Corps of Engineers for an easement in which to place the Missouri River was at issue (R. Vol. XII, pp. 1759-1760). Iowa claimed the land under its sovereign doctrines and based upon the principle that "there can be no extension of accretion lines across a fixed and established State boundary line and into the State of Iowa from the State of Nebraska." (Ex. P-2693 (R. Vol. XIV, p. 1942) quoted at pages 384-386 of Plaintiff's Resume'). Iowa informed the judge in that case that her

evidence would take 2 to 3 weeks for the trial of the case (R. Vol. XIV, p. 1761) and the landowner's attorney testified that they could not afford to try the case under any circumstances because, even if the landowner won, he would lose from a monetary standpoint because the legal and surveying expenses and fees would cost more than the amount of the award (R. Vol. XIV, pp. 1761-1762). Iowa's position was stated in a letter from Iowa's Attorney to the United States District Attorney dated October 7, 1960, which said:

> "This case is of considerable importance to the State of Iowa for a number of reasons: First of all, it is one of a series of cases which the State has determined to litigate until there is some final answer. Secondly, although that portion of Tract 103E situated in the State of Iowa contains only 22.84 acres, you will see by looking at the plat that there is considerable more land, both above and below Tract 103E which the State claims to own. The decision in the pending case will probably, as a practical matter, determine ownership of the additional land also. I do not seek to argue our case to you in this letter, but I wanted you to know the general nature of the State's position so that you will know what to expect whenever trial of the title question is reached." (Ex. P-2694, R. Vol. XIV, p. 1943, quoted in PLAINTIFF'S RESUME', pp. 384-386).

This factual situation clearly illustrates the disadvantage of the small landowner involved in a title fight against the State of Iowa and how Iowa can pick and choose her cases in order to establish a precedent to help her take advantage of landowners in other areas. Consequently, in order to assure Nebraska that Iowa is living up to her commitment that she would recognize Nebras-

ka's titles, Iowa should not be able to claim title to any area on the Iowa side of the Compact line or the present bed of the Missouri River, because by placing the burden on someone else to prove the facts and history, Iowa thereby has avoided what she agreed to in the Compact.

The Master stated with reference to Part 1 of the Missouri River Planning Report of January, 1961, which was the report in which the State of Iowa first publicly set forth the areas which Iowa claimed title to under her common law doctrine of sovereign ownership: "Unquestionably Iowa's publication of this report changed the status quo along the river and is in itself a history of the boundary problems." (See enclosure letter of September, 1971 accompanying the Report of Special Master to the Honorable E. Robert Seaver, Clerk, United States Supréme Court.) This is also implicit in the Report of the Master although not as succinctly stated.

The Master recognized at pages 89 and 90 of his Findings that an article appeared in the Iowa Law Review in 1955 which discussed rights to real property along the Missouri River in connection with the river stabilization work of the Corps of Engneers and stated that the Iowa courts had vascillated in determining whether the formation of certain types of areas along the Missouri River were islands or accretions to the high bank. The article suggested that if such sandbars be deemed islands, then there was reason to believe that the State of Iowa might lay claim to them as state property. However, the article stated that there had been no determination by the courts that the State of Iowa would have the right to such sandbars or new lands added to

the territorial domain of Iowa through the process of avulsion or by stabilizing work done by the Corps of Engineers. It was following this article that Iowa's activities to attempt to discover and claim "state-owned" lands began (SMR 90).

Nebraska contends that Iowa's policy as adopted or reflected in the Planning Report of 1961 reflects a sudden change in the application of the Iowa law which was completely unpredictable in light of the history of the Compact and Iowa's conduct for approximately 17 or 18 years thereafter; and that Iowa would ever take such a position did not conform to reasonable expectations of the States when they entered into the Compact or for many years thereafter. Iowa's change of position is somewhat similar to the conduct of the State of Washington in the case of *Hughes v. Washington*, 389 U. S. 290, in which the State of Washington claimed ownership of the accretion gradually deposited by the ocean on adjoining upland property conveyed by the United States prior to statehood, contending that the State's constitution adopted in 1889, as interpreted by its Supreme Court, denied the owner of ocean-front property in the State any further rights and accretions that might in the future be formed between their property and the ocean. Although the question hinged upon the issue of whether the right to future accretions which existed under federal law in 1889 was abolished by the provisions of the Washington Constitution, and the question was decided on the basis of federal law, the majority opinion recognized some of the problems which had been created by the State of Washington by the sudden change in the

application of its law. Mr. Justice Black at 389 U. S. 293-294:

> "This brings us to the question of what the federal rule is. The State has not attempted to argue that federal law gives it title to these accretions, and it seems clear to us that it could not. A long and unbroken line of decisions of this Court establishes that the grantee of land bounded by a body of navigable water acquires a right to any natural and gradual accretion formed along the shore. In *Jones v. Johnston*, 18 How. 150 (1856), a dispute between two parties owning land along Lake Michigan over the ownership of soil that had gradually been deposited along the shore, this Court held that "[l]and gained from the sea either by alluvion or dereliction, if the same be by little and little, by small and imperceptible degrees, belongs to the owner of the land adjoining." 18 How., at 156. The Court has repeatedly reaffirmed this rule, *County of St. Clair v. Lovingston*, 23 Wall. 46 (1874); *Jefferis v. East Omaha Land Co.*, 134 U. S. 178 (1890), and the soundness of the principle is scarcely open to question. Any other rule would leave riparian owners continually in danger of losing the access to water which is often the most valuable feature of their property, *and continually vulnerable to harassing litigation challenging the location of the original water lines.* While it is true that these riparian rights are to some extent insecure in any event, since they are subject to considerable control by the neighboring owner of the tideland, this is insufficient reason to leave these valuable rights at the mercy of natural phenomena which may in no way affect the interests of the tideland owner. See *Stevens v. Arnold*, 262 U. S. 266, 269-270 (1923). We therefore hold that petitioner is entitled to the accretion that has been gradually formed along her property by the ocean" (Emphasis ours.)

In the concurring opinion, Mr. Justice Stewart stated at 389 U. S. 294-298:

"I fully agree that the extent of the 1866 federal grant to which Mrs. Hughes traces her ownership was originally measurable by federal common law, and that under the applicable federal rule her predecessor in title acquired the right to all accretions gradually built up by the sea. For me, however, that does not end the matter. For the Supreme Court of Washington decided in 1966, in the case now before us, that Washington terminated the right to oceanfront accretions when it became a State in 1889. The State concedes that the federal grant in question conferred such a right prior to 1889. But the State purports to have reserved all post-1889 accretions for the public domain. Mrs. Hughes is entitled to the beach she claims in this case only if the State failed in its effort to abolish all private rights to seashore accretions.

Surely it must be conceded as a general proposition that the law of real property is, under our Constitution, left to the individual States to develop and administer. And surely Washington or any other State is free to make changes, either legislative or judicial, in its general rules of real property law, including the rules governing the property rights of riparian owners. Nor are riparian owners who derive their title from the United States somehow immune from the changing impact of these general state rules. *Joy v. St. Louis,* 201 U. S. 332, 342. For if they were, then the property law of a State like Washington, carved entirely out of federal territory, would be forever frozen into the mold it occupied on the date of the State's admission to the Union. It follows that Mrs. Hughes cannot claim immunity from changes in the property law of Washington simply because her title derives from a fed-

eral grant. Like any other property owner, however, Mrs. Hughes may insist, quite apart from the federal origin of her title, that the State not take her land without just compensation. *Chicago, B. & Q. R. Co. v. Chicago,* 166 U. S. 226, 236-241.

Accordingly, if Article 17 of the Washington Constitution had unambiguously provided, in 1889, that all accretions along the Washington coast from that day forward would belong to the State rather than to private riparian owners, this case would present two questions not discussed by the Court, both of which I think exceedingly difficult. First: Does such a prospective change in state property law constitute a compensable taking? Second: If so, does the constitutional right to compensation run with the land, so as to give not only the 1889 owner, but also his successors—including Mrs. Hughes—a valid claim against the State?

The fact, however, is that Article 17 contained no such unambiguous provision. In that Article, the State simply asserted its ownership of "the beds and shores of all navigable waters in the state up to and including the line of ordinary high tide, in waters where the tide ebbs and flows, and up to and including the line of ordinary high water within the banks of all navigable rivers and lakes." In the present case the Supreme Court of Washington held that, by this 1889 language, "[l]ittoral rights of upland owners were terminated." 67 Wash. 2d 799, 816, 410 P. 2d 20, 29. Such a conclusion by the State's highest court on a question of state law would ordinarily bind this Court, but here the state and federal questions are inextricably intertwined. For if it cannot reasonably be said that the littoral rights of upland owners were terminated in 1889, then the effect of the decision now before us is to take from these owners, without compensation, land deposited by the Pacific Ocean from 1889 to 1966.

We cannot resolve the federal question whether there has been such a taking without first making a determination of our own as to who owned the seashore accretions between 1889 and 1966. To the extent that the decision of the Supreme Court of Washington on that issue arguably conforms to reasonable expectations, we must of course accept it as conclusive. But to the extent that it constitutes a sudden change in state law, unpredictable in terms of the relevant precedents, no such deference would be appropriate. For a State cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all. Whether the decision here worked an unpredictable change in state law thus inevitably presents a federal question for the determination of this Court. See *Demorest v. City Bank Co.*, 321 U. S. 36, 42-43. Cf. *Indiana ex rel. Anderson v. Brand*, 303 U. S. 95. The Washington court insisted that its decision was "not startling." 67 Wash. 2d 799, 814, 410 P. 2d 20, 28. What is at issue here is the accuracy of that characterization.

The state court rested its result upon *Eisenbach v. Hatfield*, 2 Wash. 236, 26 P. 539, but that decision involved only the relative rights of the State and the upland owner in the tidelands themselves. The *Eisenbach* court declined to resolve the accretions question presented here. This question was resolved in 1946, in *Ghione v. State*, 26 Wash. 2d 635, 175 P. 2d 955. There the State asserted, as it does here, that Article 17 operated to deprive private riparian owners of post-1889 accretions. The Washington Supreme Court rejected that assertion in *Ghione* and held that, after 1889 as before, title to gradual accretions under Washington law vested in the owner of the adjoining land. In the present case, 20 years after its *Ghione* decision, the Washington Supreme Court reached a different conclusion. The state court in

this case sought to distinguish *Ghione:* The water there involved was part of a river. But the *Ghione* court had emphatically stated that the same "rule of accretion . . . applies to both tidewaters and fresh waters." 26 Wash. 2d 635, 645, 175 P. 2d 955, 961. I can only conclude, as did the dissenting judge below, that the state court's most recent construction of Article 17 effected an unforeseeable change in Washington property law as expounded by the State Supreme Court.

There can be little doubt about the impact of that change upon Mrs. Hughes: The beach she had every reason to regard as hers was declared by the state court to be in the public domain. Of course the court did not conceive of this action as a taking. As is so often the case when a State exercises its power to make law, or to regulate, or to pursue a public project, pre-existing property interests were impaired here without any calculated decision to deprive anyone of what he once owned. But the Constitution measures a taking of property not by what a State says, or by what it intends, but by what it *does.* Although the State in this case made no attempt to take the accreted lands by eminent domain, it achieved the same result by effecting a retroactive transformation of private into public property—without paying for the privilege of doing so. Because the Due Process Clause of the Fourteenth Amendment forbids such confiscation by a State, no less through its courts than through its legislature, and no less when a taking is unintended than when it is deliberate, I join in reversing the judgment."

Although the facts in the *Hughes* case are clearly distinguishable, the conduct of the State of Iowa leads to the same injustices as would have resulted from the State of Washington's conduct. With regard to areas

existing in 1943 which after the Compact were clearly in Iowa, Iowa's position would place every title in the Missouri River Valley "vulnerable to harassing litigation challenging the location" of the boundary as of some earlier date. In our situation selected areas along the Missouri River which the former Nebraska land owners had every reason to regard as theirs were all of a sudden under attack by the State of Iowa on the theory that they always belonged to the State of Iowa or under the theory that since the lands are now "in Iowa" the Iowa common law provides for state ownership and therefore they belong to Iowa. This completely disregards Iowa's commitment in the Compact to recognize Nebraska titles as good in Iowa.

The problems north of Omaha are illustrated by two factual situations which are in evidence. At page 97 of the Master's Report reference is made to at least two instances where the river was completely in Nebraska in 1943 because of prior avulsions and the river then escaped from its designed channel and moved back to the east. The Corps placed it in the designed channel by subsequent canals and Iowa is claiming the area where the river escaped following 1943 as abandoned channel because that land is "in Iowa" as the state line is defined by the Compact of 1943. One of these situations is Winnebago Bend discussed at pages 349 through 362 of PLAINTIFF'S RESUME' OF EVIDENCE BEFORE THE SPECIAL MASTER in which the exhibits and testimony are summarized. The other is California Bend discussed in PLAINTIFF'S RESUME' OF EVIDENCE BEFORE THE SPECIAL MASTER at pages 396

through 405. In both situations there were other abandoned channels to the east of these areas which Iowa officials had made no claim to. The river was entirely in Nebraska at both places and the land which Iowa is presently claiming would have been in Nebraska had it not been for the Compact. The movements of the river all took place within areas which were ceded to Iowa by the Compact and Nebraska contends that Iowa must recognize the good Nebraska titles to the entire bed and both banks of the Missouri River because she agreed to this in Section 3.

The other type of situation about which evidence was introduced is the Tyson Bend case. This area is shown on pages 34 and 35 of Part 1 of the Missouri River Planning Report (Exhibit 2609, R. Vol. I, pp. 87-88) and is referred to by the Master at pages 187 and 188 of his Report with excerpts from Iowa's discussion at pages 181 through 186 of the Report. The factual situation is discussed on pages 393 through 396 of PLAINTIFF'S RESUME' OF EVIDENCE BEFORE THE SPECIAL MASTER. Page 34 of the Missouri River Planning Report (Ex. P-2609, R. Vol. I, pp. 87-88) has the comment under "Recommended Action":

> "It was in this area that the question of whether or not a Nebraska landowner can accrete across a state line arose. The case was tried in Federal District Court and the owner ruled against. The case was appealed to the Circuit Court of Appeals. The lower court's decision was upheld."

The photographs in the Planning Report show the state line and an island or bar on the left bank side and then water before the mainland is reached on the Iowa

side. According to the Planning Report, the Tyson area consisted of 1,100 acres, of which 75 acres were water, 250 acres land, 275 acres of mud and marsh, and 500 acres of sand dunes.

Iowa's witness was asked if he agreed with statements made by counsel for the State of Iowa in the case of *Dartmouth College v. Rose,* 257 Iowa 533, 133 N. W. 2d 687, describing how the land formed in the *Tyson* case. This statement read:

> "The facts were that prior to 1946 the main and only channel of the river was the designed channel which was west of the area in dispute in that case. The Iowa-Nebraska boundary was the center of said channel by reason of the 1943 Compact.
>
> "In 1946, 1947 and 1948 the main channel left its designed channel and gradually moved southeasterly, washing away all of the land then existing in the disputed area. In 1947 or 1948, two small sandbars appeared in the disputed area behind this southeasterly movement of the main channel, with the main channel flowing to the east of them and with water still flowing to the west of them in the designed channel. Vegetation appeared on the sandbars in 1948 indicating that they were above ordinary high water mark and had attained the status of islands.
>
> "Later in 1948, the Corps of Engineers repaired some of their dikes in the area so as to again place the main channel in its designed channel to the west of the islands. The islands were not destroyed by this movement.
>
> "In the spring of 1949 the main channel again escaped from the designed channel and moved to the channel east of the islands. This movement of the main channel in the spring of 1949 was also accomplished without destroying the islands.

> "Water continued to flow through the designed channel until the 1952 flood, during which it became filled with silt and sand. The main channel continued to flow through the channel east of the islands until about 1959 when the Corps of Engineers again repaired their dikes so as to again place it in the designed channel. The 1959 movement was also accomplished without destroying the islands" (R. Vol. XXV, pp. 3659-3661).

Mr. Jauron, Iowa's Missouri River Co-ordinator, agreed with all of that statement except whether the '43 Compact line was filled with silt and sand by the 1952 flood (R. Vol. XXV, p. 3661).

The case was decided by the United States Court of Appeals, Eighth Circuit, and is found at 283 Fed. 2d 802 (1960). The Court of Appeals for the Eighth Circuit based its opinion on the fact that all of the land involved arose "in Iowa". This is a situation where had it not been for the Compact establishing a fixed line between Nebraska and Iowa, the result would necessarily have been different. If there had been no Boundary Compact, when the river moved out of the channel towards the south and east, or into Iowa, the boundary would have moved with the river and the islands forming behind this movement would have been on the Nebraska side of the river and part of the Nebraska riparian owner's lands. Then when the river was placed back to the northwest without washing away those lands, there would have been an avulsion leaving the islands in Nebraska although on the left bank of the river and leaving the boundary in the abandoned channel to the southeast. These islands would have remained the property of the Nebraska riparian owner.

The State of Iowa in the Tyson case used the fixed State Compact line as the commencement of its ownership, ignoring the fact that before the Compact the Nebraska riparian owner owned the bed to the middle of the main channel and any island or bar areas in that bed. Thus the Tysons lost 1,100 acres of what otherwise would have been theirs. In the Planning Report, Iowa's Conservation Commission said, "This action will help in declaring islands to be state-owned" (P. 4 of Exhibit P-2609, R. Vol. I, pp. 87-88).

Although it is easy to make the statement that the Compact has no effect upon private titles, it can readily be seen that by merely applying "Iowa law" the Nebraska riparian owner has been deprived of his property rights whenever the river moves to the east following the Compact. If this is the situation, then his title has been severely impaired. Nebraska reasserts its contention that riparian rights are vested property rights of which an owner cannot be deprived without the payment of just compensation. In *County of St. Clair v. Lovingston,* 23 Wall. 46, 68-69 the Court said:

> ". . . The riparian right to future alluvion is a vested right. It is an inherent and essential attribute of the original property. The title to the increment rests in the law of nature. It is the same with that of the owner of a tree to its fruits, and of the owner of flocks and herds to their natural increase. The right is a natural, not a civil one. The maxim *'qui sentit onus debet sentire commodum'* lies at its foundation. The owner takes the chances of injury and of benefit arising from the situation of the property. If there be a gradual loss, he must bear it; if a gradual gain, it is his. . . ."

In *Yates v. Milwaukee,* 10 Wall. 497, 504, the Court recognized with regard to the right of a riparian owner as asserted by the Supreme Court of Wisconsin to construct docks or landing places for goods or passengers that:

> "This riparian right is property, and is valuable, and, though it must be enjoyed in due subjection of the rights of the public, it cannot be arbitrarily or capriciously destroyed or impaired. It is a right of which, when once vested, the owner can only be deprived in accordance with established law, and if necessary that it be taken for the public good, upon due compensation."

Although the Master stated at page 190 of his Report that:

> "The Nebraska Supreme Court always had, and still has, the power to change the Nebraska doctrine of private ownership of riverbeds. Also the Nebraska Legislature had, and still has, the power to change, modify or repeal the common law of Nebraska as it might deem right, proper and necessary.",

Nebraska contends that the state cannot take such vested property rights away without compensating the owner. The applicable principle is as set forth in *Fall River Valley Irrigation District v. Mt. Shasta Power Corporation,* 202 Cal. 56, 259 P. 444, 449, 56 A. L. R. 264, which involved the concept of riparian rights and the appropriation of waters, where the California Supreme Court said:

> ". . . No question can arise as to the power of the Legislature to modify or abrogate a rule of common law. The question is: Can any such change af-

> fect previously vested rights of property owners? We need here only say that the legislative department of the state may not take any portion of a vested property right from one person and invest another with it and be justified in so doing in view of the provision of sections 13 and 14 of article I of the state Constitution and the Fourteenth Amendment to the Constitution of the United States."

The Nebraska Supreme Court in the case of *Clark v. Cambridge Irrig. & Improv. Co.*, 45 Neb. 798, 64 N. W. 239, held a statute declaring that the use of running water in all streams of over 20 feet in width might be acquired by appropriation, invalid as a constitutional invasion of private rights since, under the common law rule which prevailed in Nebraska at the time of adoption of the statute, every riparian owner, as an incident to his estate, was entitled to the natural flow of the water of running streams through his lands undiminished in quantity and unimpaired in quality, with the exception of the right of all to reasonable use for the ordinary purposes of life. The original right arose under the common law.

There have also been cases where the legislatures have attempted to declare non-navigable streams navigable, and the Courts have held this invalid as depriving the riparian owner of his rights because of the difference in rights which follows from such a change. In *Murray v. Preston,* 106 Ky. 561, 50 S. W. 1095, 1096, in considering such an act and its effect upon the right of a riparian owner to place water gaps across a stream, the Court of Appeals of Kentucky stated:

"The first question is, what is the effect of the act of the legislature declaring this creek a navigable stream? The constitution of the state forbids private property being taken for public use without just compensation being previously made. If the creek was not a navigable stream when this act was passed, it was the private property of the owners of the adjoining lands. If it was the private property of appellant, within the boundary of his land, the legislature could not devest him of his rights by simply calling it a navigable stream, when it was not one in fact. The rule on this subject is thus stated in Cooley on Constitutional Limitations (side page 591): 'The question, what is a navigable stream? would seem to be a mixed question of law and fact; and, though it is said that the legislature of the state may determine whether a stream shall be considered a public highway or not, yet, if in fact it is not one, the legislature cannot make it so by simple declaration, since, if it is private property, the legislature cannot appropriate it to a public use without providing for compensation.'"

See also *Bigelow v. Draper,* 6 N. D. 152; *Walker and Fulton v. Board of Public Works,* 16 Ohio 540; *People v. Economy Light & Power Co.,* 241 Ill. 290, 89 N. E. 760 (writ of error dismissed 234 U. S. 497).

In *Allison v. Davidson,* — Tenn. —, 39 S. W. 905, 909, an act providing that all persons might float logs and lumber on all streams and rivers in the state, on giving bond and security to protect the owners of milldams from loss or damage, was held to be unconstitu-

tional insofar as it applied to a non-navigable stream. The Court considered the problem as follows:

> ". . . The bed of this stream, as well as the use of the water, it being nonnavigable, belonged to the riparian proprietors. This being so, it results, as a matter of course, that these proprietors cannot be deprived of the beneficial as well as the exclusive use of their property, without their assent, for the benefit of private individuals, and the legislature cannot, by any act it can pass, legally authorize any such deprivation. It is to be remembered that this act of 1883 does not pretend to declare all the streams in this state navigable, and therefore we are not called upon to discuss the question of the power of the legislature to declare what is or what is not a navigable water course in this state. If a stream, however, is in fact nonnavigable, it is not a public way; and the writer is of opinion that it is not competent for the legislature, by any enactment, to make it one, and thus to take private property for public use without compensation. City of Grand Rapids v. Powers, (Mich.) 50 N. W. 661; People v. Elk River Mill & Lumber Co., (Cal.) 40 Pac. 531; Morgan v. King, (N. Y.) 91 Am. Dec. 58; Irwin v. Brown, supra. * * * The constitution forbids the taking of private property except for public use, and that upon the payment of a fair and just compensation for it. * * * The right to the beds of nonnavigable streams, and to the uninterrupted flow of their waters, are as much property rights of the riparian proprietors as is the ownership of a farm; and, if the latter is protected by the constitution, the former are, and to the same extent. To hold otherwise, it seems to us, would be to permit the erection of a legislative battering ram, to batter down and demolish utterly one of the most sacred bulwarks of the constitution, designed to protect rights of private property. . . ."

If the legislatures cannot take away the riparian owner's right to the bed of the Missouri River and accretions arising in that bed by legislation, they certainly could not do so by compact which would change the state line and the property line of the riparian owner. The legislature cannot divest the owner of his rights by simply providing that in the future "Iowa law" will apply since the result is to deprive him of his property if the Compact provisions are ignored. It not only takes away his ownership of the bed, but also deprives him of his right to accretions to that bed and it works a change in his property line which limits the right to additions to his land when the river moves to the east, but leaves him subject to great loss of land when the river moves to the west. But the Compact is now the law of Iowa and must be applied by Iowa. Iowa must recognize this change in her so-called "common law" effected by the Compact.

Nebraska contends that it could not take away the riparian owners' right to the bed of the stream or to accretions arising in that bed without payment of just compensation because of the requirements of the 14th Amendment to the Constitution of the United States. Such action would also violate Section 21 of Article I of the Constitution of the State of Nebraska which provides: "The property of no person shall be taken or damaged for public use without just compensation therefore." The comparable provision in the Constitution of the State of Iowa, Article I, Sec. 18 provides:

> "Private property shall not be taken for public use without just compensation first being made, or secured to be made to the owner thereof, as soon as

> the damages shall be assessed by a jury, who shall not take into consideration any advantages that may result to said owner on account of the improvement for which it is taken."

Nebraska would emphasize that these principles are an aid in determining the true meaning of the Compact insofar as applicable to the lands along the Missouri River. The law which is applicable is what follows from the agreement entered into between the parties which is to be distinguished from what may have been the governing principles previously under Iowa's so-called "common law".

Iowa agreed to recognize private titles in the Compact at a time when she was making no claim similar to the claims which she is making now to the beds of the Missouri River. She did not question these titles, or assert her alleged rights for 20 years thereafter. The Master further found that there is nothing in the history or negotiations leading up to the Compact indicating that Iowa ever intended to protect herself in the making of future claims of common law ownership of islands or abandoned beds of the Missouri River then in existence as against private title claimants (SMR 64). There also were abandoned Missouri River channels and cut-off lakes all along the Missouri River valley and the State of Iowa had made no claim to these abandoned channels. Suddenly, approximately 20 years later, Iowa wants to emphasize her "common law" so as to disregard what Nebraska contends she agreed to in 1943. Just as the states could change their common law boundary, Nebraska contends that the Compact controls and requires Iowa to recognize these property rights and this

changes her common law. If the states cannot change their common law by compact, the entire purpose of the Compact is defeated and becomes meaningless.

This is not a question of crippled sovereignty or the freezing of legal principles applicable. But it is a question of recognizing within the constitutional requirements, private property rights which can only be taken away pursuant to constitutional safeguards and guarantees of adequate compensation.

In *Hilt v. Weber,* 252 Mich. 198, 233 N. W. 159, 167, mentioned by the Master at page 190 of his Report, the Michigan Supreme Court considered state ownership of land between the meander line and Lake Michigan. Prior Michigan cases described as the Kavanaugh cases had indicated that the riparian owners' title went to the meander line along the Great Lakes and the title outside this meander line, subject to the rights of navigation, was held in trust by the state for the use of its citizens. The Kavanaugh cases had abrogated a rule of property in force in Michigan. The Michigan court recognized the harm that could result from taking sound language and wresting it from its proper setting and applying it to a different situation. The court recognized that the right to acquisitions to land, through accession or reliction, is one of the riparian rights. The court indicated that the Kavanaugh cases enumerated principles at variance with settled authority and said:

> "• • • The rules they stated are not as old as the rules they abrogated. When to that are added the considerations that they operated to take the title of private persons to land and transfer it to

the state, without just compensation, and the rules here announced do no more than return to the private owners the land which is theirs, the doctrine of stare decisis must give way to the duty to no longer perpetuate error and injustice.

"With much vigor and some temperature, the loss to the state of financial and recreational benefit has been urged as a reason for sustaining the Kavanaugh doctrine. It is pointed out that public control of the lake shores is necessary to insure opportunity for pleasure and health of the citizens in vacation time, to work out the definite program to attract tourists begun by the state and promising financial gain to its residents, and to conserve natural advantages for coming generations. The movement is most laudable and its benefits most desirable. The state should provide proper parks and playgrounds and camping sites and other instrumentalities for its citizens to enjoy the benefits of nature. But to do this, the state has authority to acquire land by gift, negotiation, or, if necessary, condemnation. There is no duty, power, or function of the state, whatever its claimed or real benefits, which will justify it in taking private property without compensation. The state must be honest."

The court went on to recognize that riparian rights are property, for the taking or destruction of which compensation must be made by the state. The previous Michigan decisions holding that riparian owners along the Great Lakes owned only to the meander line were overruled.

In like manner, Nebraska contends that Iowa must be honest with its citizens and with owners claiming through Nebraska titles prior to the Compact and Iowa's

purposes do not justify the taking of this private property without compensation.

The injustice resulting from any situation where the State of Iowa can attack private property owners is illustrated not only by the *Tyson v. Iowa* case in which only $12,680.00 was involved, but also by the Riley Williams case previously referred to in which only $2,070 was involved.

The Williams case graphically illustrates the disadvantages of the small landowner involved in a title fight with the State of Iowa and how the State of Iowa can pick and choose its defendants and situations in order to establish precedent which will assist her in making claim to many other areas along the Missouri River. The Corps of Engineer condemnation map in evidence indicates that Iowa was claiming area between the Nebraska state line and the right bank (west bank) of the Missouri River which had moved into Iowa (Ex. P-2695, R. Vol. XIV, pp. 1942). Consequently, Iowa is claiming the state line as the basis for commencement of her ownership and it is a revolutionary doctrine if a state can now accrete to a fixed state line.

In selecting lands to claim, the State of Iowa in its investigation did not examine county records, or if any examination was made, it was very little or nothing to speak of (SMR 84). When the landowner raised a claim of his Nebraska title which Iowa agreed to recognize by the Compact, Iowa immediately took the position that his claims arose through "spurious and fictitious instruments" (SMR 114-115), and, in Iowa's investigation, where it appeared that someone else was claiming the

land other than the State of Iowa, her officials automatically assumed that they were trespassers and had no right to be there (R. Vol. XXV, pp. 3628-3629). In addition, in the Schemmel case the State of Iowa disregarded all Nebraska records concerning these lands (SMR 154), interviewed no persons concerning formation of the land prior to the filing of suit (SMR 153) and did not discuss claims with any of the Schemmels (SMR 152). This was also true in the Nottleman Island case (SMR 112, 114, 115). In its lawsuits, Iowa puts in a minimum of evidence and then relies on the common law presumption that the river had arrived in the 1943 channel by accretion and not avulsion (SMR 153). Iowa has taken the position that if taxes are paid on the land, this is irrelevant and immaterial (SMR 113). The evidence is clear that in both the Nottleman Island and Schemmel Island areas the state officials disregarded all matters of record concerning the land, all matters of possession by the landowners, the payment of taxes by the landowners upon the land, and all eye witness knowledge concerning formation of the land (SMR 114, 153-154).

The Master further found that the volume of records substantiating all of these facts concerning formation and history of the land illustrates the tremendous amount of research, effort and expense in the collection of this type of data from old records in order to establish a factual situation which was well recognized between 30 and 40 years ago. The passage of time, death of witnesses, and loss or destruction of any of these records would obviously prejudice the landowner claimants in an action of this nature brought by the State of Iowa

(SMR 118). The Record is also replete with evidence that many of the records of the Corps of Engineers have been lost or destroyed (SMR 76), and many of them are misleading. This can be illustrated by the fact that Iowa has taken the position in different cases where Iowa was claiming land along the Missouri River that certain types of Corps' maps are correct in situations where they benefit Iowa but are incorrect or not trustworthy in situations where they might damage Iowa's claim (see PLAINTIFF'S RESUME' OF EVIDENCE BEFORE THE SPECIAL MASTER, pp. 482-484; R. Vol. XVIII, p. 2663; R. Vol. XVIII, p. 2666).

All of this has operated to fully substantiate the Master's findings that the mere claim of title by the State of Iowa constitutes a hardship on the farmer; and the State of Iowa, by merely making a claim to the land, clouds the title and is in violation of Section 3 of the Compact requiring her to recognize titles which had been good in Nebraska (SMR 116). If there is to be any stability of order along the Missouri River, the Compact must be construed in such a manner as to prevent the State of Iowa from contesting the title of landowners such as in the Babbitt and Schemmel cases and all other areas which were in existence at the time of the Compact. This is certainly consistent with the intent of the Compact and effectuates its purpose (SMR 134). Any other construction leads to oppression, injustice and absurd consequences, and such application should be avoided if at all possible. *U. S. v. Kirby,* 7 Wall. 482; *Carlisle v. United States,* 16 Wall. 147. The consequences of

Iowa's arguments are listed on pages 35 through 43 of Plaintiff's Reply Brief before the Special Master.

Because Iowa agreed to recognize titles in the Missouri River valley, this is not a case where Iowa is entitled to have all matters litigated in her courts as if she had no contractual commitment, and the filing of such a suit and the burdens consequent thereto constitutes not only a violation of the Compact but also a deprivation of the landowner's property without due process of law. In *St. Germain Irrigating Co. v. Hawthorn Ditch Co.*, 32 S. D. 260, 143 N. W. 124, 127 (S. D., 1913), the South Dakota Supreme Court considered a statute providing that when a suit was instituted to determine water rights, the State Engineer must make a complete hydrographic survey of the stream system, the cost of which would be apportioned among the parties taking water from the stream, and the Court held that this statute deprived the riparian owner or lawful appropriator who had used no more water than he was entitled to of his property by imposing burdensome costs and expenses upon him. The Court said:

> "It is also contended that section 16 is void as tending to deprive individuals of property rights and property, by way of costs and expenses, without due process of law. We are also of the opinion that this contention is well taken. This section among other things provides that, when a suit to determine water rights has been filed, the court shall by order direct the State Engineer to make a complete hydrographic survey of said stream system, and that the costs and expenses thereof be apportioned pro rata among all the parties taking waters from said stream in proportion to the amount of water allotted

> to each. It is a matter of common knowledge that there are many streams in this state, including the stream in question, where it would take many thousands of dollars to make such a survey. A riparian or other lawful appropriator lawfully using no more of the waters of said stream than justly entitled to could not be required without his consent to pay any portion of such expense without being deprived of his property without due process of law. Simply the filing of such a suit is not sufficient authority to so deprive him of his property. Such a procedure could only result in a fat benefit to some civil engineer."

Nebraska submits that simply the filing of these unjust lawsuits deprives the riparian owner of his property in violation of Iowa's solemn agreement in the Compact that such titles would be recognized as good by Iowa.

CONCLUSION

Nebraska is deeply appreciative of the thought and effort devoted by the Special Master to the Report, and Nebraska is generally in agreement with his findings of fact. Nebraska's objections to the Report primarily go to the extent and type of relief recommended.

If the Iowa-Nebraska Boundary Compact of 1943 is to have any meaning, and if there is to be any stability of order and certainty of land titles along the Iowa-Nebraska Boundary, Nebraska submits that not only must Iowa be restrained from further prosecution of *Iowa v. Babbitt* and *Iowa v. Schemmel* and such similar actions, but also principles should be stated by this Court that the Iowa-Nebraska Boundary Compact of 1943 supersedes Iowa's common law and requires that Iowa recognize

private land titles to islands and beds in and along the Missouri River and riparian rights without regard to where the boundary was located prior to 1943 and uneffected by the new jurisdictional line.

Nebraska respectfully requests the additional relief described in her exceptions to the Report of Special Master.

Respectfully submitted,

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PROOF OF SERVICE

I, Howard H. Moldenhauer, Special Assistant Attorney General of the State of Nebraska, and a member of the Bar of the Supreme Court of the United States, hereby certify that on December 20, 1971, I served a copy of the foregoing Exceptions of the State of Nebraska to the Report of Special Master and Brief in Support Thereof by depositing same in a United States Post Office, with first class postage prepaid, addressed to:

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Supreme Court, U.S.
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DEC 22 1971
E. ROBERT SEAVER, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 17, ORIGINAL

STATE OF NEBRASKA,
Plaintiff,

vs.

STATE OF IOWA,
Defendant.

IOWA'S EXCEPTIONS TO SPECIAL MASTER'S REPORT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 17, ORIGINAL

STATE OF NEBRASKA,
Plaintiff,

vs.

STATE OF IOWA,
Defendant.

IOWA'S EXCEPTIONS TO SPECIAL MASTER'S REPORT

Comes now the Defendant, the State of Iowa, and for her exceptions to the Report of Special Master Joseph P. Willson now on file herein, respectfully states to the Court as follows:

PRELIMINARY STATEMENT

This action was brought by the Plaintiff for the purpose of having this Court enforce and construe the Iowa-Nebraska Boundary Compact of 1943. 1971 Code of Iowa, Vol. 1, pages LXIV-LXV, Chapter 220, 57 U.S. Statutes at Large 494. Nebraska's allegation is that the State of Iowa is and has been violating said Compact by claiming ownership of certain lands in the vicinity of the Missouri River. Iowa does claim to own about 30 separate areas in the vicinity of said river; the evidence adduced before the

Special Master established that about 8½ of these areas had formed prior to 1943 and were in existence at the time the Boundary Compact became effective, and that the remainder of the areas (21½) have formed and come into existence in their present forms since 1943. It is undisputed that all of the areas which Iowa claims to own are now in Iowa, being east of the boundary fixed and established by the Boundary Compact in 1943.

Nebraska's allegation is that the areas which had formed prior to 1943 were lands which she ceded to Iowa by the Compact; that they were in Nebraska prior to 1943; and that they were owned by diverse private individuals under Nebraska law as of 1943. That Iowa promised to recognize private titles to all ceded lands. That Iowa violates this promise when she asserts ownership of them.

Iowa's contra assertion is that none of the lands which she is claiming to own were ever in the State of Nebraska; that all of them were always in Iowa, both before and after 1943; that none of them were ceded lands within the meaning and intent of the Compact. Iowa asserts that because the lands which were in existence in 1943 had formed in Iowa, ownership of them must be determined by Iowa law, and that under Iowa law they are state owned; that neither sovereignty nor ownership of these lands was changed or affected in any manner by the Boundary Compact of 1943.

Nebraska's allegation concerning the areas which have formed since 1943 is that they too are owned by diverse private individuals, although formed in Iowa admittedly, and that Iowa therefore also violates the Boundary Compact by claiming ownership of them. Nebraska's theory concerning the areas formed since 1943 is that even though the state boundary was fixed by the Compact, Nebraska riparian law still applies east of the boundary into Iowa so that ownership of areas in Iowa must still be determined by Nebraska riparian law.

Iowa's contra assertion is that certainly, since all the areas which have formed since 1943 are now in Iowa, they must have formed in Iowa, because it is agreed that the boundary line fixed and established by the Compact is a fixed and unmoving line. That therefore, ownership of them must be determined by Iowa law.

Nebraska is among the states which elected to have for her common law that private titles to riparian lands would run to the thread of the contiguous stream. *Kinkead* v. *Turgeon,* 74 Neb. 580, 104 N.W. 1061 (1906). Iowa is among the states which elected to have for her common law that private titles to riparian lands would run only to the ordinary high water mark on navigable streams, and that the state is the owner of the beds of all navigable streams within the state and is also the owner of any islands which may form therein. *McManus* v. *Carmichael,* 3 Iowa 1 (1856). *Holman* v. *Hodges,* 112 Iowa 714, 84 N.W. 950 (1901).

A fair generalization would be that the Special Master found for Nebraska and adopted her contentions with regard to the areas which had formed prior to 1943 and that he found for Iowa and adopted her contentions with regard to the areas which have formed since 1943.

A brief summary of the rules which the Special Master recommends and the relief which he would have this Court grant is as follows:

(1) The term "ceded lands" as used in the Compact should be interpreted and construed so as to include all lands which could possibly have been ceded, irrespective of whether a particular tract was actually in one state before the Compact and ceded to the other state by the Compact.

(2) Lands were "ceded" by Nebraska to Iowa by the Compact if there was title good in Nebraska to them prior to the Compact, irrespective of whether the particular tract was actually in Nebraska or not prior to the Compact.

(3) Nottleman Island in Mills County, Iowa, was a tract of land ceded by Nebraska to Iowa by the Compact within the above rule, and Iowa violated the Compact by commencing and prosecuting the suit entitled *Iowa* v. *Babbitt, et al.*, in the District Court of Mills County, Iowa, wherein Iowa asserted ownership of it and sought to quiet her title to it.

(4) Schemmel Island in Fremont County, Iowa, was a tract of land ceded by Nebraska to Iowa by the Compact within the above rule, and Iowa violated the Compact by commencing and prosecuting the suit entitled *Iowa* v. *Schemmel, et al.*, in the District Court of Fremont County, Iowa, wherein Iowa asserted ownership of it and sought to quiet her title to it.

(5) Iowa should be enjoined from claiming to own Nottleman Island and Schemmel Island, and enjoined from further prosecuting the quiet title suits above named.

(6) Iowa should be barred from using her common law to claim ownership of any lands in the vicinity of the Missouri River which were in existence in 1943. That is to say:

(a) Iowa should be barred from using her common law doctrine that the state owns navigable river beds, islands and abandoned channels.

(b) Iowa should be barred from using her doctrine that the sovereign state cannot be adverse possessed.

(c) Iowa should be barred from applying the presumption favoring accretion and against avulsion.

(d) Iowa should be barred from applying the presumption favoring the permanency of boundaries.

(7) Ownership of all areas which have formed since 1943 shall be determined by the law of the state in which they formed. That is to say: where islands have formed since 1943 east of the state boundary fixed by the 1943 Boundary Compact in such manner that they would be state owned by the Iowa common law doctrine of state ownership, such islands are state owned; where land has become river bed since 1943 east of the state boundary fixed by the 1943 Boundary Compact, such river bed would be state owned by the Iowa common law doctrine; where river bed has become abandoned river bed since 1943 east of the state boundary fixed by the 1943 Boundary Compact in such manner that they would continue state owned by the Iowa common law doctrine, such abandoned beds are state owned. In general, the same common law of Iowa which was being applied in Iowa to riparian lands, river beds and abandoned beds prior to 1943 continued and continues in full force and effect to determine ownership of riparian lands, river beds and abandoned beds in Iowa since 1943.

EXCEPTION No. I

The Defendant Excepts to That Part of the Special Master's Report Wherein He Concludes, by Implication, That the Plaintiff Has Pleaded and Proved the Existence of a Justiciable Controversy, in Which the Plaintiff Has an Interest Sufficient to Entitle Her to Maintain the Action, and As to Which the Supreme Court of the United States Should Exercise Its Original Jurisdiction.

ARGUMENT

The Special Master states, at the bottom of page 49 of his Report, that it is Nebraska's contention that this Court's Order of February 1, 1965, granting Nebraska leave to file her Complaint in this case settled the issue of jurisdiction. On pages 50 through 61, the Special Master quotes Iowa's contra contentions.

We find no specific findings of fact, rulings or recommendations by the Special Master relative to the aforesaid contentions, but it inheres in the Report that the Special Master recommends that the Court exercise its original jurisdiction in the case. His reasons for so recommending are set forth at page 78 of his Report, where he says that the meaning and application of the Iowa-Nebraska Boundary Compact of 1943 is of paramount interest to both states; at page 174, where he says that the courts and the states need an interpretation of the Compact; at page 190, where he says that both states can profit by a Supreme Court announcement; and at page 200, where he says that both states need a construction of the Compact.

Now that the evidence is in, and the arguments have been made, and the Special Master's Report has been made and filed, Iowa submits to the Court that the only proper and correct decision to be reached in this case is that Nebraska's Complaint and cause of action should be dismissed and denied.

It is generally held that all courts, including this Court, must examine and re-examine the limits of their jurisdiction in all cases and at every stage of every case. In *Hilton* v. *Dickinson*, 108 U.S. 165, 2 S.Ct. 424, 27 L.Ed. 688 (1883), this Court said (At page 168 U.S.):

> "* * * if on looking into a record we find we have no jurisdiction, it is our duty to dismiss on our own motion without waiting the action of the parties. * * *"

In *Minnesota* v. *Hitchcock*, 185 U.S. 373, 22 S.Ct. 650, 46 L.Ed. 954 (1902), this Court was re-examining its jurisdiction after the Special Master's Report had been filed *sua sponte*, and the following language was employed (At page 382 U.S.):

> "* * * It is the duty of every court of its own motion to inquire into the matter irrespective of the wishes of the parties, and be careful that it exercises no powers save those conferred by law. * * *"

Iowa believes also that after the evidence is in, this Court must determine whether or not Nebraska has met the test laid down in *Colorado* v. *Kansas*, 320 U.S. 383, 88 L.Ed. 116, 64 S.Ct. 176 (1943), as follows (At page 393 U.S.):

> "* * * Not every matter which would warrant resort to equity by one citizen against another would justify our interference with the action of a State, for the burden on a complaining State is much greater than that generally required to be borne by private parties. Before the court will interv: ; the case must be of serious magnitude and fully and clearly proved. * * *"

It should be noted that never in his Report to you does the Special Master say or find that Nebraska has "clearly proved" any of the facts which she alleges and relies upon

as a basis for this Court to exercise its original jurisdiction. The best he can say for any of Nebraska's evidence is that some of it, relating to certain matters, constitutes a "preponderance". When the Special Master determined that the facts relied on by Nebraska had not been clearly proved as required by *Colorado* v. *Kansas*, supra, he should have recommended dismissal of the case.

It is undisputed that Nebraska has no proprietary interest in the controversy which she is here asking this Court to determine. There is no issue as to where the present boundary between the States of Iowa and Nebraska is now located. Both parties agree that the present state boundary was located, fixed and established by the Iowa-Nebraska Boundary Compact of 1943. Thus, Nebraska's territorial integrity is not in question. Impairment of her taxation base is not threatened. Nobody questions Nebraska's right to exercise sovereignty over all territory within her borders. Iowa does not seek to exercise sovereignty beyond her own borders or into Nebraska. The State of Nebraska does not claim to own one single tract or parcel of land which the State of Iowa adversely claims to own. All thirty of the areas which the State of Iowa claims to own in the vicinity of the Missouri River and in the vicinity of the boundary are admittedly east of the boundary fixed by Compact in 1943 and therefore in the State of Iowa and subject to Iowa's jurisdiction and sovereignty. The Special Master could not find and properly did not find that any proprietary interests of Nebraska are involved.

This case is a "disputed boundary" case only in the sense that the location of the state boundary which existed prior to 1943 is in dispute. The question as to where the pre-1943 boundary was located only becomes an issue because the ownership of several tracts of land may depend upon whether they formed, prior to 1943, in Iowa and

east of the pre-1943 boundary or in Nebraska and west of the pre-1943 boundary. The salient point here is that the State of Nebraska claims to own none of these tracts of land; Nebraska's claim is that diverse private individuals own them, and that the State of Iowa therefore does not own them.

Accordingly, it is clear that Nebraska is asserting authority to commence and prosecute this action under the familiar doctrine of *parens patriae,* as trustee, guardian or representative of her citizens or some of them. Did she manage to bring herself within the rules of parens patriae?

The rules are summarized in 39 *Harvard Law Review,* at pages 1085 and 1086, as follows:

> "It is difficult to formulate a rule to determine when a state has a sufficient interest in a suit to satisfy the last mentioned requirement. When a state sues in the role of property owner, jurisdiction cannot be denied on the grounds that the state has no real interest in the suit. The clearest case of this kind is one involving a boundary dispute. In a majority of cases, however, the state's property interest is rather unsubstantial and is not at all the motivating cause of the suit. While counsel and the court generally try hard to find some property interest in the state, a standing has been accorded the state in some cases where its only interest is that of parens patriae, or guardian of the health, welfare and prosperity of its inhabitants. But the court is slow to allow original suits by a state in this capacity. Where the defendant is also a state, such reluctance is proper, in order not to interfere unduly with the policy of the Eleventh Amendment. The state must show a threatened injury to its residents as a whole, or to the members of a defined class of its residents, as such. So, while a state may maintain

> an original suit to enjoin a sister state from further injuring the real property of its citizens, it cannot recover in their behalf damages for past injuries."

In the recent case of *Hawaii* v. *Standard Oil Company*, 301 F.Supp. 982, 431 F.2d 1282 (1969), it was stated that the facts must show that a substantial portion of the complaining state's inhabitants are adversely affected by the challenged acts of the defendant.

It is readily apparent that the general citizenry of Nebraska have no interest whatsoever in the instant case, and counsel for Nebraska made no effort to establish that they do. Neither did counsel for Nebraska make any effort to prove how many of her citizens may be adversely affected by Iowa's claiming to own some thirty tracts of land along the boundary, all of which are definitely in Iowa and have been in Iowa for 28 years or more. Suffice to say the number of Nebraska citizens having any interest in this litigation is miniscule. In fact, when one considers that it is Iowa's expressed intention to devote whatever river lands she may own to use and enjoyment by the general public, it becomes apparent that Nebraska's prosecution of the instant case is contrary to the interests of her general citizenry.

Iowa does not deny that it is within the jurisdiction of this Court to interpret and enforce interstate compacts, but Iowa submits that said jurisdiction should only be exercised when application is made by the real party in interest, or one of the real parties in interest. The Special Master is simply wrong when he says in his Report that "both Nebraska and Iowa need a construction and an interpretation of the (Compact)". The record made before the Special Master establishes that the State of Nebraska has no interest in the matter and no construction or interpretation of the Compact can possibly result in any benefit or

injury to the State of Nebraska or its general citizenry or any class of its citizens.

By prosecuting this case, Nebraska is asking this Court, among other things, to determine land titles to lands which are admittedly in Iowa. She thereby asks this Court to abandon its historic policy of leaving the determination of land titles in each state to the state courts of the respective states. *Arkansas* v. *Tennessee,* 246 U.S. 158, 62 L.Ed. 638, 38 S.Ct. 301 (1918). Furthermore, Section 2 of the Nebraska enactment of the 1943 Boundary Compact specifically states: "The State of Nebraska hereby cedes to the State of Iowa and relinquishes jurisdiction over all lands now in Nebraska but lying easterly of said boundary line * * *". This was a clear statement by the State of Nebraska that jurisdiction to determine titles to ceded lands was being reposed in the courts of Iowa. Now, Nebraska asks this Court to divest the Iowa courts of that jurisdiction and to take said jurisdiction unto itself. The Special Master, when he recommends issuance of an injunction to prevent Iowa from prosecuting the quiet title suits now pending in the state courts of Iowa concerning Nottleman Island and Schemmel Island is, in effect, quieting the titles to said islands in the private claimants as against the State of Iowa.

Neither should this Court depart from its historic policy of refusing to issue advisory opinions. See *Alabama* v. *Arizona,* 291 U.S. 286, 78 L.Ed. 798, 54 S.Ct. 399 (1934), where the Court said (At pages 291-292 U.S.):

> "This Court may not be called upon to give advisory opinions or to pronounce declaratory judgments. *Muskrat* v. *United States,* 219 U.S. 346. *Willing* v. *Chicago Auditorium Assn.,* 277 U.S. 274, 288, and cases cited. *Nashville, C. & St. L. Ry.* v. *Wallace,* 288 U.S. 249, 261-262. Its jurisdiction in respect of controversies between States will not be exerted in the absence of

absolute necessity. *Louisiana* v. *Texas*, 176 U.S. 1, 15. A State asking leave to sue another to prevent the enforcement of laws must allege, in the complaint offered for filing, facts that are clearly sufficient to call for a decree in its favor. Our decisions definitely establish that not every matter of sufficient moment to warrant resort to equity by one person against another would justify an interference by this court with the action of a State. *Missouri* v. *Illinois*, 200 U.S. 496, 520-21. *New York* v. *New Jersey*, 256 U.S. 296, 309. *North Dakota* v. *Minnesota*, 263 U.S. 365, 374. Leave will not be granted unless the threatened injury is clearly shown to be of serious magnitude and imminent. *Missouri* v. *Illinois*, supra, 521. In the absence of a specific showing to the contrary, it will be presumed that no State will attempt to enforce an unconstitutional enactment to the detriment of another. *Cf. Ex parte La Prade*, 289 U.S. 444, 458. The burden upon the plaintiff states fully and clearly to establish all essential elements of its case is greater than that generally required to be borne by one seeking an injunction in a suit between private parties. *Connecticut* v. *Massachusetts*, 282 U.S. 660, 669."

In addition to the other reasons calling for dismissal which have been discussed hereinbefore, Iowa submits that Nebraska has failed to carry the burden of proof which she shouldered as Plaintiff. Taken in its most favorable light for Nebraska, the evidence only establishes that Iowa has asserted her claims of ownership by bringing quiet title actions or defending quiet title actions in courts of competent jurisdiction. Such conduct by Iowa, as distinguished from forcibly evicting the private adverse claimants, does not constitute violation of the 1943 Boundary Compact so as to call for an exercise of original jurisdiction by this Court.

EXCEPTION No. II

The Defendant Excepts to That Part of the Report Wherein the Special Master Construes and Interprets the 1943 Iowa-Nebraska Boundary Compact to Require Iowa to Recognize "Titles Good in Nebraska" Regardless of Whether the Lands in Question Were Ever in Nebraska or Not. (See first paragraph, page 173, where Special Master adopts Nebraska's contention No. 1, set out at page 164.)

ARGUMENT

It has been Iowa's position throughout this controversy and before, that she bound herself when she enacted the 1943 Boundary Compact to recognize as "good in Iowa" all titles which were "good in Nebraska" to lands which were in Nebraska prior to the Compact and which Nebraska "ceded" to Iowa by operation of the Compact. It has also been Iowa's position that there could not be a title "good in Nebraska" to any parcel of land which was not in Nebraska and thus subject to Nebraska title laws prior to and at the effective date of the Compact, July 12, 1943. It has also been Iowa's position that whether or not there was a title "good in Nebraska" to a particular parcel of land must be adjudged as of July 12, 1943, and that events occurring after that date can have no bearing on whether or not there was a title "good in Nebraska" as of that date. It has also been Iowa's position that the 1943 Boundary Compact had no application to or effect upon any titles to any lands except "ceded" lands; that is to say, if a parcel of land was in fact in Iowa before 1943 and remained in Iowa after the 1943 Compact, it could not be "ceded" land, and when Iowa claims ownership, such claim of ownership could not possibly constitute violation of the Compact. It has also been Iowa's position that when land has been washed away and destroyed, the title to it is also washed away and destroyed, and that when new land later emerges in that same

spot under the sky, a new title commences. This is the common law of both Nebraska and Iowa. *Yearsley* v. *Gipple*, 104 Neb. 88, 175 N.W. 641 (1919). *Tyson* v. *Iowa*, 283 F.2d 802 (1960). *Wallis* v. *Clinkenbeard*, 214 Iowa 343, 242 N.W. 86 (1932).

Iowa's exception taken to this portion of the Special Master's Report is based upon two general propositions: (1) That the Special Master, under the guise of interpretation or construction, actually amends, changes and enlarges the Compact to restrict Iowa from claiming ownership of lands which the Compact, properly construed, does not restrict her from claiming. (2) The Special Master's language used in discussion of the matter is so indefinite and uncertain that his Report, if approved, would lead to more disputes than it would put at rest.

We again refer to Section 2 of the Nebraska enactment of the Compact because the terminology is so important:

> "The State of Nebraska hereby cedes to the State of Iowa and relinquishes jurisdiction over *all lands now in Nebraska* but lying easterly of said boundary line and contiguous to lands in Iowa." (Emphasis added)

The phrase "all lands now in Nebraska" is not uncertain, indefinite, or subject to more than one meaning. The phrase involved in *Alabama* v. *Georgia*, 64 U.S. 505, 511, 23 How. 505, 16 L.Ed. 556 (1859), was "west of a line beginning on the western bank of the Chattahoochee River, where the same crosses the boundary between the United States and Spain, running up the said river and along the western bank thereof". Alabama contended that the western boundary of Georgia was the low water mark and Georgia contended for the high water mark. Alabama averred that the high water mark was not intended "not only on account

of the uncertainty in ascertaining and locating the same, but * * * the jurisdiction of the State of Georgia would pass far west of the river at its ordinary height * * *; * * * and your complainant has ever claimed and exercised jurisdiction all along and upon said bank to low water mark * * *".

The Court then stated on pages 512-513:

> "The contract of cession must be interpreted by the words of it, according to their received meaning and use in the language in which it is written, as that can be collected from judicial opinions concerning the rights of private persons upon rivers, * * *."

And in conclusion, the Court said at page 515:

> "* * * , that by the contract of cession, Georgia ceded to the United States all of her lands west of a line beginning on the western bank of the Chattahoochee River where the same crosses the boundary line between the United States and Spain, running up the said Chattahoochee River and along the western bank thereof."

Thus, in *Alabama* v. *Georgia*, supra, we see the Court rejecting the argument that a literal translation was not intended. Surrounding circumstances and conduct of the parties were not allowed to vary or change the literal meaning of the phrase employed. Where the words of the Compact are not ambiguous, they are literally translated so as to carry out the *expressed* intentions of the parties, and they are not subject to construction or interpretation.

In the case at bar, the Special Master concludes that the Compact should be liberally construed so as to leave individuals occupying or claiming river lands secure in their positions as of the date of the Compact. (Paragraph 1, page 173.) This should be done, he says, because Iowa

was not asserting her ownership claims along the river at the time of the Compact or prior thereto. (Paragraph No. 5, pages 63-64.) His finding that Iowa was not asserting her ownership claims in 1943 and prior is clearly erroneous. The following items of evidence were admitted and are uncontradicted to demonstrate that Iowa was asserting her ownership of river lands during the period in question:

Exhibits D-636, D-637, D-638, D-644 and D-646 are minutes of official meetings of the Iowa Conservation Commission in 1939, 1942 and 1943 at which the Commission was dealing with Missouri River lands owned by the State of Iowa.

In the case entitled *Sioux City* v. *Betz*, 232 Iowa 84, 4 N.W.2d 872 (1942), Sioux City was claiming to own the disputed land (accretion land in the Missouri River) by a Patent issued to it by the State of Iowa in 1938. Issuance of Patent indicates assertion of ownership by Iowa Executive Council.

In the case entitled *Solomon* v. *Sioux City*, 243 Iowa 634, 51 N.W.2d 471 (1952), Sioux City was also claiming to own the disputed land (another tract of accretion land in the Missouri River) by a Patent issued to it by the State of Iowa in 1940.

Iowa asserted ownership of a tract of Missouri River accretion land near Council Bluffs in the case entitled *State of Iowa* v. *Carr*, 191 Fed. 257, decided in 1911.

The Judicial Department of Iowa consistently and without any deviation applied the Iowa doctrine of state ownership from 1856 down to the present time. For examples, see cases cited at pages 83-84, Iowa's Appendix to Brief and Argument before Special Master.

The State of Nebraska (Judicial Department) knew in 1935 that Iowa was asserting her common law claims of ownership to Missouri River areas. See *Independent Stock Farms* v. *Stevens,* 128 Neb. 619, 259 N.W. 647 (1935).

At the time and immediately prior to the adoption of the Boundary Compact in 1943, the parties engaging in it were well aware that Iowa was asserting her ownership of Missouri River lands by reason of her common law doctrine of state ownership of navigable river beds, islands forming therein, and abandoned channels. It is not possible that the State of Nebraska can now deny knowledge of facts which her own Supreme Court knew and wrote about. The basis upon which the Special Master would give the words of the Compact more than "their received meaning and use in the language in which it is written" does not exist.

Iowa would also point out that the Compact is not merely a contract between two sovereign states; it is also a statute of Iowa and a statute of Nebraska. It was a solemn enactment made only after protracted negotiations and arduous and conscientious study. The language finally employed was carefully chosen. It is not within the jurisdiction of this Court to attribute any meaning to the language employed beyond its "received meaning" or any different than its "received meaning" where its "received meaning" is plain, unequivocal, and unambiguous.

The rule that the courts cannot legislate, or amend legislation, or supply deficiencies in legislation under the guise of construing or interpreting statutes is well recognized. See Division II, page 25, and Division IX, page 72, of Defendant's Brief and Argument before the Special Master, and cases cited therein.

As hereinabove mentioned, Iowa agreed in the Compact to recognize titles which were "good in Nebraska" at the time of the Compact to all lands which were "ceded" by Nebraska to Iowa. The Special Master's construction of this language in the Compact is that Iowa, by entering into the Compact, agreed to recognize any and all titles emanating from Nebraska whether such titles concern ceded lands or not. He rationalizes this construction by attributing a meaning to the word "cede" not in accord with any usual, ordinary or legal definition of the term. His discussion of the meaning of "cede" commences near the bottom of page 79 and ends near the top of page 89.

In effect, the Special Master concludes that all lands along the river must be treated as "ceded" lands if there was, in 1943, a private title or claim of title emanating from either state as of 1943. Thus, the determination of whether or not a particular tract of land was "ceded" by Nebraska to Iowa is made to depend on whether or not there was, as of 1943, a Nebraska title or claim of title to it. Whether or not the tract was actually in Nebraska prior to 1943 becomes irrelevant by the Special Master's construction. Iowa submits that whether or not the tract was actually in Nebraska prior to 1943 should be the controlling factor, and whether or not there was a Nebraska title or claim of title should be irrelevant.

The fallacy in the Special Master's construction above mentioned is demonstrated as follows: Prior to 1943, the main channel of the Missouri River moved laterally within the flood plain for varying distances ranging up to several miles, and the Iowa-Nebraska boundary was a moving boundary, which moved with all gradual and accretionary movements of the channel. When the channel moved toward Iowa, Iowa lost territory and Nebraska gained, and vice versa. When Nebraska gained, a title or claim

of title would emanate from Nebraska, but often the old Iowa title would remain on the books in Iowa as at least a claim of title, although the land had been washed away and the old Iowa title would be of no validity. Now, suppose the main channel moves gradually back toward Nebraska washing away all the accretion land which Nebraska had gained by the prior movement toward Iowa, and suppose an island forms in Iowa, east of the main channel, and behind the westerly movement of the main channel toward Nebraska. By Iowa law, such island would be state owned, being an accretion to the state owned bed of the river. The effect of the Special Master's proposed construction of the Compact would be that Iowa cannot assert its ownership of the Island because there is a title or claim of title emanating from Nebraska and Iowa agreed to recognize all titles and claims of title emanating from Nebraska. The intentions of the parties, to be gathered from the language employed, was that *good* titles emanating from either state would remain unimpaired. Nowhere in the Compact is there any mention of "private" titles as distinguished from "public" titles. All good titles, including titles belonging to the State of Iowa, are afforded equal protection by the Compact. The Special Master's construction places private titles on a plane above public titles; in fact, he destroys the public title wherever there is a private title or claim of title.

In this respect, the Special Master's construction violates the rule of construction stated by this Court in *Massachusetts* v. *New York*, 271 U.S. 65, 70 L.Ed. 838, 46 S.Ct. 357 (1926), as follows (at page 89 U.S.):

> "* * * all grants by or to a sovereign government, as distinguished from private grants, must be construed so as to diminish the public rights of the sovereign only so far as is made necessary by an unavoidable

construction. *Charles River Bridge* v. *Warren Bridge*, 11 Pet. 420, 544-548, *Shively* v. *Bowlby*, supra."

The language of Section 3 of the Iowa-Nebraska Boundary Compact of 1943 is:

> "Titles, mortgages and other liens *good in Nebraska* shall be good in Iowa as *to any lands Nebraska may cede* * * *." (Emphasis added)

The term "titles" is clear and unambiguous, and where not limited to "private titles", is certainly meant to include "all titles", both private and public. Yet, the Special Master construes the term "titles" as used in the Boundary Compact to mean "private titles" and not to include "public titles" held in trust by either the State of Iowa or the State of Nebraska. He limits the term "titles" to a narrower meaning than normal and customary usage gives it. There is no reason appearing in this record nor any reason in fact for the Special Master to divine or assume that the intent of the states when entering into the Compact was to protect only "private titles" to the exclusion of "public titles". The language employed clearly indicates their intention to protect both.

Only one adjective is used in connection with the word "titles" in the Compact and that adjective is "good". Iowa submits that the term "good titles" was employed by the parties because they did not elect or wish to bind themselves to recognize any titles less than "good". In other words, they did not bind themselves to recognize a color of title, or an indicia of title, or a claim of title. Only "titles good" in the ceding state were to be recognized as "good" in the receiving state. There was no promise or agreement concerning any titles less than "good".

The Special Master's Report has the further effect of absolutely reversing all legal presumptions which have

heretofore been recognized relating to river boundaries. The Special Master states at page 79 that "* * * the states did not know what specific areas lying on the left bank or eastern side of the new boundary had previously been within the jurisdiction of Nebraska. They both accepted the fact that any possible such areas were 'ceded' to the other state by this general language."

Now, keep in mind that it is an undisputed fact that the main channel of the Missouri River as of July 12, 1943, was flowing in the designed channel along the entire length of the boundary, and that therefore, the Compact fixed and established the new boundary as the center line, not only of the designed channel, but also as the center line of the Missouri River as it was then flowing. The Special Master's rule above quoted says that all land east of the river which could possibly have been in Nebraska before the Compact shall be deemed to have been in Nebraska and therefore ceded to Iowa by the Compact.

The presumption which has historically prevailed as regards river boundaries was that, whenever and wherever a boundary is described as "the river" or "center of the river" or the "center of the main channel of the river" or by words of similar import, it will be presumed that from time to time and at all times, the river is in fact the boundary, and anybody claiming that the river was not the boundary at any particular place or time had the burden of proving that fact by clear, satisfactory and convincing evidence. *Shapleigh* v. *United Farms,* 100 F.2d 287; *Wyckoff* v. *Mayfield,* 130 Ore. 687, 280 Pac. 340; *Bouvier* v. *Stricklett,* 40 Neb. 793, 59 N.W. 550; In *Plummer* v. *Marshall,* 59 Tex.Civ.App. 650, 126 S.W. 1162, at page 1163 S.W., the rule was stated as follows:

> "The party who asserts the channel of a water course recognized as the boundary line is not in fact, at the point of controversy, the true boundary, resting his contention upon a sudden shifting of the course of the channel, assumes the burden of proving that fact."

In deciding the previous dispute between Nebraska and Iowa, this Court said (at page 366 U.S.):

> "In case of doubt, every territory terminating on a river is presumed to have no other boundary than the river itself; because nothing is more natural than to take a river for a boundary when a settlement is made; and wherever there is a doubt, that is always to be presumed which is most natural and most probable."

Nebraska v. *Iowa,* 143 U.S. 359, 36 L.Ed. 186, 12 S.Ct. 396 (1892). See also, *Arkansas* v. *Tennessee,* 246 U.S. 158, 62 L.Ed. 638, 38 S.Ct. 301 (1918); *Jefferis* v. *East Omaha Land Co.,* 134 U.S. 178, 33 L.Ed. 872, 10 S.Ct. 518 (1890).

In *Kitteridge* v. *Ritter,* 172 Iowa 55, 151 N.W. 1097, 1098 (1915), the Iowa Supreme Court stated simply:

> "The land being concededly on the east side of the Missouri River, it is presumed to be in Iowa."

Applying this presumption to the instant case, it would be presumed that, as of 1943 immediately before the Compact became effective, all land east of the river and therefore also east of the new boundary was in Iowa and not ceded by Nebraska to Iowa in the Compact. The Special Master's rule not only ignores but absolutely turns around this long standing and universally recognized presumption often referred to as "the presumption favoring permanency of boundaries".

Another presumption which has often been utilized by many courts, including this Court, in determining river boundary disputes is commonly known as the "presumption in favor of accretion as against avulsion". Special Master Marvin Jones recently employed this presumption in his Report to this Court in *Louisiana* v. *Mississippi,* No. 14 Original, October Term, 1962. See his discussion commencing on page 19 of his Report, where he says that:

> "* * * the general rule of the 'live thalweg' is preferable and will be applied in all cases, unless there has been a clear and convincing avulsion * * *."

The Oregon Supreme Court said, in *Wyckoff* v. *Mayfield,* 130 Ore. 687, 280 Pac. 340, that:

> "* * * the presumption is, following the rule of the value of natural movements or fixed boundaries, that if any change occurred at all, it was by accretion and not by a sudden and violent force. * * *."

Both the Florida and Oregon Courts have stated simply that "there is a presumption of accretion or erosion as against avulsion." *Municipal Liquidation* v. *Tench,* (Fla.) 153 So. 728, 731. *Gubser* v. *Town,* 202 Ore. 55, 273 P.2d 430.

The presumption is that whenever a river has moved laterally from one place to another, it is presumed that such movement was by the gradual process of washing away one bank and forming accretions to the other bank so that the boundary followed such movement and remained in the river, and it is presumed that the river did not move by a sudden avulsion from the old channel to the new channel so that the boundary would remain in the old abandoned channel. Application of this presumption in the instant case would also lead to the proposition that all lands east of the Missouri River in 1943 were in

Iowa and therefore not ceded by Nebraska to Iowa in the Compact.

When the Special Master says that both states were agreeing when they engaged in the Compact, that all lands which could possibly be considered as ceded would be treated as ceded, he writes a proviso into the Compact which is not there, and he reverses both of the presumptions mentioned above.

This Court should hold and determine that all lands east of the river in 1943 were in Iowa prior to the Compact except those lands which can be proved to have been in Nebraska by clear, satisfactory and convincing evidence. That therefore, no lands which were east of the river in 1943, and therefore east of the boundary established by the Compact, were "ceded" by Nebraska to Iowa except those lands which can be clearly and convincingly established as having been in Nebraska prior to the Compact. That it is factually and legally impossible for there to have been a "title good in Nebraska" as of 1943 to any land which was not in Nebraska and subject to her dominion and jurisdiction as of 1943.

EXCEPTION No. III

The Defendant Excepts to That Part of the Report Wherein the Special Master Proposes the Following Rule: "In Any Proceeding Between a Private Litigant and the State of Iowa Involving a Claim of Title Good under the Law of Nebraska, Alleged to Have Been Ceded to Iowa under Sections 2 and 3 of the Compact and Contiguous to the Missouri River on the Iowa Side, the State of Iowa Shall Not Invoke Its Common Law Doctrines Either As a Plaintiff or As a Defendant." (See in italics, bottom of page 174, top of page 175, and full paragraph on page 175.)

ARGUMENT

In the next paragraph after the italicized portion above referred to, the Special Master goes into detail concerning his proposed rule. He would have this Court instruct all trial courts, state and federal, trying a land ownership case involving the State of Iowa, to first determine whether or not there is a claim of title against Iowa's claim based on Nebraska law as it existed in 1943. If the trial court finds that such a claim is involved, he shall then determine whether or not the claimant "shows a title supportable under Nebraska law". Later in the same paragraph, he says the private claimant "must show title good in Nebraska". If the private claimant shows title "good in Nebraska", then he would bar Iowa from overwhelming such title by invoking its several common law doctrines. He would bar Iowa from asserting that the sovereign State of Iowa cannot lose its title as result of adverse possession by a private individual. *United States* v. *Insley,* 130 U.S. 263, 266, 32 L.Ed. 968, 9 S.Ct. 485 (1889). *Manatt* v. *Starr,* 72 Iowa 677, 34 N.W. 784 (1887). *Board of Park Comm.* v. *Taylor,* 133 Iowa 453, 108 N.W. 927 (1906). *Sioux City* v. *Betz,* 232 Iowa 84,

4 N.W.2d 872 (1942). He would bar Iowa from asserting ownership by operation of her common law that the state owns all beds of navigable rivers, all abandoned beds of navigable rivers, and all islands formed in navigable rivers within the boundaries of the state. *Holman* v. *Hodges,* 112 Iowa 714, 84 N.W. 950 (1901). *Iowa* v. *Raymond,* 254 Iowa 828, 119 N.W.2d 135 (1963). He would bar Iowa from asserting the presumption of accretion as against avulsion. *Kitteridge* v. *Ritter,* 172 Iowa 55, 151 N.W. 1097 (1915); *Dartmouth College* v. *Rose,* 257 Iowa 533, 133 N.W.2d 687 (1965).

Iowa excepts to this portion of the Report, basically and principally, for the reason that the 1943 Boundary Compact contains no words, no language, no phrases which can possibly be construed, interpreted, stretched or twisted so as to make it say what the Special Master is saying it says. And there are no facts of record which would entitle the Court to say that this is the meaning of the Compact by implication.

The single so-called fact upon which the Special Master claims power to re-write the Compact is that "At that time Iowa was not contesting these property rights". (Report, page 88) It is the Special Master's theory that because Iowa was not asserting her ownership of Missouri River lands in 1943, this warrants construing the Compact as a promise by Iowa not to claim ownership of the Missouri River lands then in existence forever afterwards.

As we have heretofore pointed out in our discussion of Exception No. II, the Special Master is simply in error when he finds that Iowa was not applying her common law doctrines to lands in the vicinity of the Missouri River in and prior to 1943. But even if it were true that Iowa was not contesting these property rights at that

time, such fact would not justify reading into the Compact the repealers of Iowa common law which he reads into it.

Continuously from 1856, *McManus* v. *Carmichael,* 3 Iowa 1, the Iowa courts and the federal courts applying Iowa common law have uniformly and consistently adhered to the doctrine that the state is the owner of all beds of all navigable waters in the state and all islands formed therein and all abandoned channels which become abandoned by avulsion. See cases cited at pages 83-84, Appendix to Defendant's Brief and Argument before Special Master for a sampling of these cases. See also *Iowa* v. *Carr,* 191 Fed. 257, D.C. Iowa (1911); and *Tyson* v. *Iowa,* 283 F.2d 802 (1960). For applications of the presumption of accretion as against avulsion, see *Kitteridge* v. *Ritter,* 172 Iowa 55, 151 N.W. 1097 (1915); and *Dartmouth College* v. *Rose,* 257 Iowa 533, 133 N.W.2d 687 (1965). The Iowa common law being applied to riparian lands and navigable waters both before and after 1943 was not exceptional; it was in conformity with the common laws of many of her sister states.

Should this Court determine that the Compact is ambiguous or indefinite and requires interpretation or construction, the Court should seek to ascertain the true intent of the parties to be gathered from the language employed by them to express their intentions. There is certainly nothing in the conduct of the courts to lead Nebraska or anybody else to believe that Iowa was intending to change her common law, repeal her common law, suspend her common law, limit the application of her common law so that it would not apply to certain lands in the vicinity of the Missouri River, convey some of her public lands to unknown grantees, or do any of the things which the Special Master now says she did when she enacted the Compact.

Iowa's prosecution of the case entitled *Iowa* v. *Carr*, 191 Fed. 257 (1911), was a clear assertion by the Iowa executive branch that Iowa's common law doctrines were in full force and effect along the Missouri River. Her refusal to sell Wilson Island in 1939 and her refusal to sell again in 1941 were clear assertions that she owned the island—and Wilson Island is one of the 30 areas involved in this case, which Iowa still claims to own. See last paragraph, page 166, of Special Master's Report. See also pages 60-91, Appendix to Defendant's Brief and Argument before the Special Master, for additional evidence of Iowa's adherence to her doctrine of state ownership along the Missouri River.

We can understand why the Special Master might feel that the State of Iowa was not doing enough in and prior to 1943 to assert, protect, defend and develop her state owned areas along the Missouri River. But the record made before the Special Master clearly establishes that it was erroneous of him to find that Iowa was doing nothing.

The interpretation which the Special Master places on Iowa's conduct, or lack of conduct, in and prior to 1943, is not warranted. The Special Master says, in effect, that because Iowa was not contesting private property claims along the Missouri River prior to and in 1943, the Compact is made construable as a promise by Iowa never to contest such claims. This, he says, is proper construction of the Compact even though the Compact says no such thing. We submit that if other reasons existed in 1943 and prior years to explain Iowa's conduct, or lack thereof, then the Court is not warranted in attributing a certain other reason or meaning to it, and is not warranted in using its meaning as a basis for construing the Compact. The true reason for Iowa's lack of diligence or zeal, if it be considered that she was lacking in

diligence or zeal, in protecting and developing her state owned lands along the Missouri River in 1943 and prior was that said lands and the river itself were so unstable that protection and development were impossible.

For almost a century prior to 1943, the river and all land in its proximity had been considered worthless. The river had been an implacable foe, an undefeatable enemy. Floods came at least twice yearly, and usually several more times yearly. The channel wandered violently, back and forth, washing away nearby lands, creating new lands, creating new channels, all in utter disregard of the wishes of the mere men trying to live and work in its vicinity.

In the early 1930's along came the U. S. Army Corps of Engineers, with all the resources of the United States at its disposal. A worthy adversary for the mighty river, thought the people of the area; it would be interesting to see who would be the winner. Odds were with the river in the eyes of most area residents; after all, the river was the undefeated champ; the upstart challenger was considered to have only an outside chance.

So, the Corps of Engineers joined battle. First, they designed a channel on paper; then gradually they pushed the river into the design; by 1943, the river was almost entirely in the design from Sioux City downstream to the Iowa-Missouri border. But the battle was not won. In 1943, the country and particularly the U. S. Army Corps of Engineers was engaged in World War II. Money and manpower were diverted from the Missouri River battlefield to the battlefields of Europe and the Pacific. The river continued to attack. Stabilizing structures along the south of Omaha were heavily damaged; stabilizing structures upstream from Omaha to Sioux City were almost totally destroyed, and the river reverted to the wild.

By 1948, the first battle of the war—Corps of Engineers v. Mississippi River—must be counted a victory for the river.

Commencing in about 1948, the Corps of Engineers again turned its attention to the Missouri River War. During the first battle, the Corps had learned some things; they learned that the Missouri River War could not be won without controlling floods by means of a series of upstream dams in the Dakotas; they learned that the curves which they had designed previously were too sharp and they had to be gentled if the river were to be confined; they learned that pile dikes ballasted with small quantities of stone could not withstand the river's pressures and that only pile dikes heavily ballasted and reinforced with large quantities of stone would suffice.

Thus, the battle was joined again. The channel was redesigned upstream from Omaha to Sioux City; the river was placed in the new design; the Dakota dams were built. Despite everything the Corps could do, the most disastrous flood of the Missouri River in all recorded history occurred in 1952. Shortly after the great flood of 1952, Gavins Point Dam in South Dakota was closed, and the Corps announced that henceforth, there would be no more floods of the magnitude of the 1952 flood.

Little wonder that residents of the area took this pronouncement by the Corps with a grain of salt. The Corps had lost the first battle of the war; they had lost the second battle of the war; what reason was there now to believe that the war had been won. It would take years for the people to realize that, this time, it was true, the war had been won. Confinement of the river into the new designed channel was not completed until about 1959, but no great floods have occurred since 1952.

The State of Iowa was more alert to the fact that the Corps of Engineers v. Missouri River war had been won by the Corps than most residents of the area. In the late 1950's the state realized that the disastrous floods of the past were truly a thing of the past; that no more would the channel lash back and forth, destroying land, creating new land, creating new channels, or abandoning old channels. The state realized that there was a reasonable prospect for stability along the river.

Whereas, the state had theretofore considered the river lands of such doubtful permanency and of such little value to the public for recreational or any other purposes, it now realized that the Corps was presenting to the people an unprecedented opportunity for development of public facilities. At the same time, the demand for public facilities was multiplying. The State of Iowa was the only public authority which could protect and defend the public interest along the river because Nebraska had elected long ago to relinquish her river beds, islands and abandoned channels into private hands.

Accordingly, in the latter 1950's, the State of Iowa single-handedly commenced the fight to protect and defend the public interest along the river. Little did Iowa expect that her chief adversary would be the State of Nebraska, whose citizens would benefit equally with those of Iowa.

It is obvious from reading the Special Master's Report that he considers the State of Iowa to be a latecomer on the scene, and that for this reason strained constructions may be placed on the Compact designed to bar Iowa from asserting her claims. Iowa submits that his construction is invalid and his reason for it is equally invalid. *United States* v. *U. P. RR. Co.*, 91 U.S. 72, 23 L.Ed. 224 (1875).

It will be seen by reading his discussion of the proposed rule commencing on page 173 and ending on page 175 of his Report that the Special Master's proposed rule to which Iowa is here excepting would have very narrow and limited application. It would apply only against one claimant of Missouri River lands. It would apply only to tracts of land which existed in 1943, which were ceded to Iowa by the Compact, which are alleged to have been privately owned in Nebraska as of 1943, which are contiguous to the Missouri River on the Iowa side, and which are south of Omaha. Iowa submits that interpolation of this rule into the Compact by the Special Master constitutes the creation of a second title law in Iowa to be applied in determining titles to a few tracts of land, which differs from the Iowa title law applicable to determine titles to all other lands in the state. This violates the rule that a state's laws must have equal application to all lands within its boundaries.

The Special Master's proposed construction of the Compact also violates the rule against "implied repealers". See Earl T. Crawford text on *Statutory Construction,* Sec. 228 at page 422, Sec. 309 at page 629, Sec. 310 at page 630. *Reeves & Co.* v. *Russell,* (No.Dak.) 148 N.W. 654, 659; *Bandfield* v. *Bandfield,* (Mich.) 75 N.W. 287, 288.

EXCEPTION No. IV

The Defendant Excepts to That Part of the Report Wherein the Special Master Adjudges That the State of Iowa Does Not Own Nottleman Island and Recommends That Iowa Be Enjoined from Claiming It. (See Paragraph No. 5, on page 201, and see page 111, of Report.)

ARGUMENT

Nebraska, as Plaintiff, selected the two areas along the river as to which she would adduce detailed evidence to establish private ownership. The Court might assume, and it is a fact, that Nebraska selected the two areas along the entire boundary where the evidence tending to establish private ownership is strongest. The areas which she selected were Nottleman Island and Schemmel Island.

These two areas were selected because both had formed prior to 1943 and were in existence at the time of the Compact. Of the 30 areas involved, Nottleman Island is probably oldest of all, having formed shortly prior to 1923. Schemmel Island formed during the 1930's as a result of the Corps of Engineers channelization work in those years. (Schemmel Island will be discussed in Exception No. V.)

From the outset in this case, Nebraska asserted that Nottleman Island was in Nebraska immediately prior to July 12, 1943, and was therefore ceded to Iowa by operation of the Compact for two reasons: (1) That the island formed at a time when the thalweg of the Missouri River was east of it, and (2) That Iowa had recognized that the island was in Nebraska and that it was therefore in Nebraska prior to 1943 by prescription.

After the evidence was in and both parties had rested, the Special Master stated from the bench, and stated to counsel in chambers, and stated in a written memo to coun-

sel that it was his opinion that Nebraska had failed to prove that the thalweg was east of the island when it formed and that Nebraska had therefore failed to prove that Nottleman Island was in Nebraska prior to July 12, 1943, by reason of how it formed and where the boundary was when it formed, and that Nebraska has therefore failed to sustain her burden of proving theory No. (1). See Special Master's statement at page 372, Transcript of Oral Arguments. See also pages 264, 266, 278, 315-317, 359, 379, 383, 386 and 387, Transcript of Oral Arguments.

We refer to the remarks of the Special Master during oral arguments for the purpose of demonstrating that even he, after all evidence was in and both parties had rested, was uncertain as to whether Nebraska had adduced a *preponderance* of evidence to establish that Nottleman Island formed in Nebraska. He resolved this uncertainty in his Report and found that Nebraska had adduced a "fair preponderance of the evidence" on the matter. (See Paragraph No. 2, page 164, of Special Master's Report.) Iowa's point is that the Special Master did not find the evidence adduced by Nebraska to be clear, satisfactory or convincing, and in the absence of clear, satisfactory and convincing evidence, he should have found that Nebraska failed to carry the burden of proof which she shouldered as Plaintiff. We believe that the Special Master chose his words "fair preponderance" very carefully, and that he very deliberately did not characterize Nebraska's evidence as "clear, satisfactory or convincing".

There are several rules of law, rules of evidence and presumptions which dictate that Nebraska was required to prove her facts by clear, satisfactory and convincing evidence in the instant case.

First, the burden on a complaining state suing a sister state is to fully and clearly establish all essential elements

of her case, and is greater than that generally required to be borne by one seeking an injunction in a suit between private parties. *Connecticut* v. *Massachusetts,* 282 U.S. 660, 669, 75 L.Ed. 602, 51 S.Ct. 286 (1931). *Alabama* v. *Arizona,* 291 U.S. 286, 291-292, 78 L.Ed. 798, 54 S.Ct. 399 (1934).

Second, it is undisputed that the main channel of the Missouri River was west of Nottleman Island in 1943 and for several prior years. By the "presumption favoring the permanency of boundaries", it is presumed that the pre-Compact boundary was in the main channel west of the island and that the island was therefore in Iowa. This presumption could only be overcome by Nebraska by clear, satisfactory and convincing evidence that the boundary was someplace else.

Third, it is Nebraska's claim that in 1943, the pre-Compact boundary was east of the island although admittedly the Missouri River was west of the island. It is Nebraska's claim that separation of the river from the boundary came about as the result of an avulsion. It is presumed by the presumption favoring accretion as against avulsion that no such avulsion occurred at Nottleman Island. This presumption could only be overcome by Nebraska by clear, satisfactory and convincing evidence.

Iowa's exception taken to the Nottleman Island portion of the Special Master's Report is that he failed to apply these usual, applicable and ordinary rules of evidence against Nebraska, and then, he compounds his error by finding that Nottleman Island was in Nebraska prior to 1943 by recognition or prescription.

The evidence taken in its most favorable light for Nebraska establishes that the first human occupancy or use of Nottleman Island occurred between 1926 and 1930, probably in 1928. The 1926 aerial photo of the island shows

no evidence of human endeavor (Exhibit D-693). The 1930 aerial photo shows small patches of clearing or farming (Exhibit D-595-A). Ruth Dooley testified that she stayed on the island during the summer of 1929 (Defendant's Appendix, page 94). It is undisputed that the Shipley family (which first occupied the north part of the island) and John Nottleman (who first occupied the south part) entered upon the island as trespassers, and were squatters in common parlance. That is to say, the evidence shows that they owned no riparian land, either in Nebraska or in Iowa, to which the island could have been an accretion; they had no title or claim of title to the island when they moved upon it.

Again taking the evidence in its most favorable light for Nebraska, the first exercise of any dominion over Nottleman Island by Nebraska or any official of Nebraska was in 1933, when Mr. Fitch, the then County Surveyor of Cass County, Nebraska, surveyed the island (Exhibits P-735 and P-2345). There is no evidence that Mr. Fitch surveyed the island in his official capacity and it appears, therefore, that he surveyed it in his capacity as a private licensed land surveyor. He recorded his plat in the Cass County, Nebraska records and from this recording, the island was placed on the Nebraska tax rolls. It was first taxed in Nebraska in 1934 (Exhibit P-550).

The purpose of this brief recitation of facts is to show that Nebraska's alleged exercises of dominion and sovereignty over Nottleman Island commenced no sooner than 1933. Therefore, as of 1943, Nebraska had been exercising dominion no longer than 11 years. If one dates Nebraska's exercising of dominion from the beginning of taxation, the period was only 10 years. Based on this evidence, the Special Master concluded that Nottleman Island was in Nebraska as of July 12, 1943, by prescription, acquiescence or recognition.

Iowa takes exception to this conclusion (1) because the alleged period of prescription was entirely too brief, and (2) because there is absolutely no evidence of any knowledge on the part of the State of Iowa or any of its agents, officials or employees that Nebraska was exercising dominion in any manner.

From the outset, Nebraska recognized that the period of prescription prior to 1943 was entirely too short, so she attempted to prove that Iowa acquiesced after 1943 and until about 1960, thus adding some 17 years to the period. Counsel for Iowa are aware of no case to the effect that a state may lose its territory by 28 years of acquiescence, and certainly none to the effect that territory may be lost in 11 years. See *Indiana* v. *Kentucky,* 136 U.S. 479, 34 L.Ed. 329, 10 S.Ct. 1051 (1890), where the time period was "over seventy years"; *Arkansas* v. *Tennessee,* 310 U.S. 563, 84 L.Ed. 1362, 60 S.Ct. 1026 (1940), where the period was 122 years; *Maryland* v. *West Virginia,* 217 U.S. 1, 54 L.Ed. 645, 30 S.Ct. 268 (1910), where the period was 122 years; *Rhode Island* v. *Massachusetts,* 45 U.S. 591, 4 How. 659, 11 L.Ed. 1116 (1846), where the period was 125 years; *Michigan* v. *Wisconsin,* 270 U.S. 295, 70 L.Ed. 595, 46 S.Ct. 290 (1926), where the period was about 76 years.

The most recent case to involve acquiescence or prescription is *Illinois* v. *Missouri,* No. 18 Original, October Term, 1969, in which Hon. Harvey M. Johnsen, Special Master, found that "The Cottonwoods" had been in Missouri's domain with Illinois' acquiescence for about 50 years. Judge Johnsen notes at page 39 of his Report that 50 years "is a shorter length of time than the periods which appear to have been involved in the situations of the Court's previous reported decisions." Missouri also claimed Beaver Island and Roth Island by acquiescence and prescription extending over a period of about 10 years,

but Judge Johnsen refused to find that they were Missouri's by acquiescence or prescription.

The facts of record concerning acquiescence and prescription at Nottleman Island are similar to the facts at Beaver Island and Roth Island in Judge Johnsen's case, and are entirely dissimilar from the facts at The Cottonwoods in Judge Johnsen's case. A new and dangerous precedent would be set if this Court were now to hold that a state may acquiesce and territory may be acquired from her by a sister state in a period as brief as 11 years.

Additionally, Nebraska must lose on the issue of acquiescence and prescription at Nottleman Island because the record made before the Special Master is absolutely devoid of any evidence that the State of Iowa or any of her officers, agents or employees had any knowledge that Nebraska or any of her governmental subdivisions were exercising any sovereignty over Nottleman Island. Hon. Gunnar H. Norbye disposed of Arkansas' claim based on acquiescence and prescription in *Arkansas* v. *Tennessee*, No. 33 Original, October Term, 1969, at pages 11 and 12 of his Report, as follows:

> "It is not necessary to discuss in detail the evidence regarding the alleged exercise of dominion and sovereignty of Arkansas as to the lands in question. * * * *But there is a total lack of evidence that the State of Tennessee as a sovereign State has ever recognized or acquiesced in the claim of sovereignty of these lands by the State of Arkansas or its residents.*" (Italics added).

It is noteworthy that Judge Johnsen found ample evidence in his record in *Illinois* v. *Missouri*, supra, to establish that the State of Illinois and her responsible officials well knew that Missouri was exercising dominion over The Cottonwoods during all or almost all of the 50 year period.

It could be that Iowa has become estopped from claiming ownership of Nottleman Island by reason of her failure to claim it until some 17 years after the Boundary Compact of 1943, and this may very well be a proper issue to be tried in a case involving the ownership of the island. But the case at bar is not a case involving the ownership of Nottleman Island or any other land. Whether or not the island is owned by the State of Iowa is an issue properly triable in the state courts of Iowa, that being the state in which the island is located, and it being universally recognized that determination of land titles in the several states is exclusively within the jurisdiction of the courts of each state. *Hawkins* v. *Barney,* 30 U.S. 294, 5 Pet. 457, 8 L.Ed. 190 (1831). *Arkansas* v. *Tennessee,* 246 U.S. 158, 175, 62 L.Ed. 638, 38 S.Ct. 301 (1918).

Although Nebraska does not plead or urge estoppel in this case, having mentioned that Iowa might be accused of laches or estoppel in state court, we should note that the facts relating to estoppel by Iowa at Nottleman Island are totally unlike the facts in *Iowa* v. *Carr,* 191 Fed. 257 (1911), where the court found Iowa was estopped from claiming the land there in dispute. In *Iowa* v. *Carr,* valuable improvements had been made on the disputed land by the adverse claimants. At Nottleman Island, there are no valuable improvements and all adverse claimants who testified admitted under cross-examination that if it were now adjudged that the island is property of the State of Iowa, they would still realize net profits from their years of farming state-owned land.

As hereinabove mentioned, Nebraska set out to prove that Iowa acquiesced for an additional 17 year period after the Boundary Compact became effective in 1943. Acquiesced in what? Iowa couldn't acquiesce in Nebraska's exercising sovereignty, dominion or jurisdiction over Not-

tleman Island after July 12, 1943, because Nebraska didn't exercise sovereignty, dominion or jurisdiction over the island after the Compact. Nebraska could not and did not exercise sovereignty over Nottleman Island because by the Compact, she had contracted, promised and agreed not to. It is not factually or legally possible that Iowa acquiesced after 1943 because the thing she is accused of acquiescing to was no longer happening.

Iowa submits that the Special Master is in error when he determines that Nottleman Island was ceded by Nebraska to Iowa in the Boundary Compact of 1943; that he is in error when he determines that there was "title good in Nebraska" to Nottleman Island as of 1943 because the island was not in Nebraska at that time; and that he is in error when he recommends issuance of an injunction by this Court to enjoin Iowa from further prosecuting the quiet title case entitled *Iowa* v. *Babbitt, et al.*, in the District Court of Mills County, Iowa.

EXCEPTION No. V

The Defendant Excepts to That Part of the Report Wherein the Special Master Adjudges That the State of Iowa Does Not Own Schemmel Island and Recommends That Iowa Be Enjoined from Claiming It. (See Paragraph No. 5, page 201. See also page 111.)

ARGUMENT

Nebraska asserts that Iowa violates the 1943 Boundary Compact by claiming ownership of Schemmel Island in Fremont County, Iowa, for the same general reasons which Nebraska asserts regarding Nottleman Island and which we have been discussing under EXCEPTION NO. IV. That is, it is Nebraska's assertion that Schemmel Island was in Nebraska prior to the Compact, that there was good title in Nebraska to it, that it was ceded to Iowa by the Compact; that there was no "title good in Nebraska" to the island as of 1943; that the island is property of the State of Iowa by reason of the facts of how it formed and by reason of the operation of Iowa law upon those facts.

The facts concerning the formation of Schemmel Island are very different from the facts at Nottleman Island. See Special Master's remark on page 462, Transcript of Oral Arguments:

> MR. MURRAY: We think, Judge, that Nottleman and Schemmel Islands are markedly different on their facts as in evidence in this case.
>
> THE COURT: I agree with you.

The evidence taken in its most favorable light for Nebraska establishes that the land which today constitutes Schemmel Island commenced forming in 1932; Iowa's evidence tends to fix 1936 as the year in which formation

commenced. The four year time difference is not important.

Aerial photographs taken and maps made by the Corps of Engineers in the 1920's and early 1930's show that the future site of the island was in the Missouri River during those years. (See Exhibits D-1124, D-1093-A, D-1121, D-1122, D-1092-A, D-1123, D-291-A, all reproduced at pages Otoe-4 through Otoe-16 of Appendix to Defendant's Brief and Argument before the Special Master.) By Nebraska's evidence, the oldest tree found on the island commenced growing in 1932; Iowa's experts said the same tree commenced growth in 1936. Other evidence establishing that the land which constitutes Schemmel Island today did not exist before 1932 is in the record, but we will not encumber this Brief with a recitation of it.

Nebraska contends and the Special Master found that "The Schemmels acquired the first Nebraska deeds to the land in 1938 which trace back to the 1905 court sale and 1908 Otoe County Treasurer's Deed * * *". (Report, page 147.) The so-called chain of title is: to one Hanks by the said court sale and Treasurer's Deed in 1905 and 1908 (Exhibits P-138 and P-141); from Hanks to one George Ward by Warranty Deed in 1918 (Exhibit P-1529); from George Ward to Schemmels by Quit Claim Deeds in 1938 (Exhibits P-192, P-193 and P-2644).

Iowa contends that the Quit Claim Deeds which the Schemmels obtained from George Ward in 1938 conveyed nothing because whatever land George Ward acquired in 1918 was washed away and its identity destroyed. By the law of Nebraska, when one's land is washed away, the owner loses it and the chain of title is broken; and when new land reappears in that spot under the sky, a new title commences in whomsoever the new land may form

as an accretion to. *Yearsley* v. *Gipple*, 104 Neb.88, 175 N.W. 641 (1919). This is the law of accretion generally, applied in *Tyson* v. *Iowa*, 283 F.2d 802 (1960), to disallow the Harrop claims to the land there in dispute. This is why Iowa has referred to the 1938 deeds from Ward to Schemmel as spurious and fictitious; they are pieces of paper represented to convey land but actually conveying nothing.

When the Special Master adjudges that the Schemmels held "title good in Nebraska" to Schemmel Island as of 1943, he violates his own rule set out at page 175 of his Report, wherein he states that the private litigant must show "a title supportable under Nebraska law". Later in the same paragraph, he states: "To emphasize again the private litigant must show a title 'good in Nebraska'." The language of the 1943 Boundary Compact was that Iowa would recognize "titles * * * good in Nebraska", and this she willingly does; but Iowa did not agree to recognize every scrap of paper put forth as a "title good in Nebraska".

The Special Master violates another of his own rules when he recommends that Iowa be enjoined from pursuing its claim of ownership at Schemmel Island. In the same paragraph on page 175 of his Report, he says: "But it should be understood that Iowa is not foreclosed from contesting under Nebraska law the private litigant's alleged Nebraska good title". We submit that his proposed injunction would certainly foreclose Iowa's right to contest the Schemmel claim of good Nebraska title at Schemmel Island.

What is a trial court, either federal or state, to understand when the Special Master says, on one hand, that Iowa must only recognize titles *good* coming from Nebraska, and then, on the other hand, enjoins Iowa to recognize a title less than *good* coming from Nebraska at Schemmel Island?

Another serious inconsistency exists in the Special Master's Report as it concerns Schemmel Island: At Nottleman Island, he adopted Nebraska's theory of acquiescence and prescription to find that the state boundary was east of the island as of 1943 and that Nottleman Island was therefore ceded to Iowa by the Compact; but at Schemmel Island, he found the pre-1943 boundary was in the Iowa Chute despite clear evidence that all local officials and all local residents considered that the boundary was not in the Iowa Chute after the river moved westward from the Iowa Chute prior to 1905.

Iowa simply submits that if acquiescence and prescription is to be the rule at Nottleman Island, it should also be the rule at Schemmel Island. There is no ground for using the rule to bar Iowa from claiming ownership of Nottleman Island, and then ignoring it or violating it to bar Iowa from claiming ownership of Schemmel Island, especially when the facts concerning acquiescence and prescription are even stronger in Iowa's favor at Schemmel Island than were the facts at Nottleman Island in Nebraska's favor.

The evidence at Schemmel Island is that the Missouri River channel moved easterly into Iowa until 1895, when it reached its farthest easterly location in a channel referred to and known as the "Iowa Chute". By 1905, the channel had retreated westerly from the Iowa Chute and it has been west of the Iowa Chute ever since. Whether the westerly movement was by avulsion or by accretion became the subject of expert testimony. Iowa believes that the weight of this testimony was definitely in her favor and in favor of the proposition that the westerly movement was accretionary, not avulsionary; that therefore, the state boundary moved westerly with the river after 1895 just as it had moved easterly prior to 1895 when the river moved easterly.

To establish that the river moved westward out of the Iowa Chute by an avulsion between 1895 and 1905, Nebraska introduced the expert testimony of Dr. William N. Gilliland, a geologist, of Rutgers University, who testified that the natural Missouri River at Otoe Bend was a "typical meandering stream". Then, he testified how meanders form, enlarge and move downstream in "typical meandering streams"; and how "point bars" are cut off. It was Dr. Gilliland's opinion, based on elementary theories of geology and hydraulics applicable to "typical meandering streams", that the Missouri River moved westward from the Iowa Chute between 1895 and 1905 by an avulsion.

Iowa tendered the testimony of Dr. Lucien M. Brush, an expert hydraulogist and geomorphologist, of Princeton University, who testified that the natural Missouri River at Otoe Bend was not a "typical meandering stream"; that from the mouth of the Platte River downtsream almost to St. Joseph, Missouri, the natural Missouri River was a "braided stream". Dr. Brush's point was that Dr. Gilliland's theories concerning movements of "typical meandering streams" would have no application to Otoe Bend and that his theory concerning what happened between 1895 and 1905 at Otoe Bend was invalid, being based on a false premise.

Iowa also tendered the research and expert testimony of Dr. Robert V. Ruhe and Dr. Thomas Fenton, of Iowa State University. These men had made exhaustive and detailed studies of the soils, elevations, contours, scarps, and of the maps and aerial photographs of Otoe Bend, Schemmel Island and the Iowa Chute. They had found a series of seven westerly-facing scarps between the left bank of the Iowa Chute and the left bank of the 1905 channel, this indicating a gradual movement of the channel westerly from the Iowa Chute in those years. They found

no easterly-facing scarps in the area and this eliminates any possibility that the channel left the Iowa Chute by any avulsion. Dr. Brush concurred in these conclusions.

But the conclusive evidence establishing that the boundary did not remain in the Iowa Chute after the river moved west of it is the acquiescence and prescription evidence.

In 1921, in *Payne* v. *Hall*, 192 Iowa 780, 185 N.W. 912, the Iowa Supreme Court held that the river had moved westward from the Iowa Chute by accretion and not by avulsion. That case involved the ownership of land contiguous on the north to the land between the Iowa Chute and Schemmel Island. (Exhibit D-747.)

Tax records of Fremont County, Iowa, for the years prior to 1934 have been destroyed, but records from 1934 on show that the land west of the Iowa Chute was taxed in Iowa. (Exhibits D-1200, D-1200-A, D-1201, D-1201-A, D-1202, D-1202-A, D-1203, D-1203-A.)

In 1929, C. A. Shannon, County Surveyor of Otoe County, Nebraska, prepared a map of Otoe County showing the state boundary line to be west of the island site, and the entire island site to be in Iowa. (Exhibit D-272.)

Albert J. Propp owns and operates a farm consisting of 260 acres east and 160 acres west of the Iowa Chute. He has lived on this farm since 1912. He and his father before him have possessed and operated this unit peaceably since 1912, paying their taxes in Iowa. The Givens family has farmed land adjoining the Propp land on the north and lying on both sides of the Iowa Chute. Taxes were paid in Iowa and the entire unit was always considered to be Iowa land.

All maps from and including the U. S. Geologic Survey Map of 1905 down to date designate all land east of the river at Otoe Bend as being "Iowa".

If it is true that the state boundary was east of Nottleman Island by acquiescence and prescription prior to 1943, then it follows as night follows day that the state boundary was in the Missouri River at Otoe Bend by acquiescence and prescription and that Schemmel Island formed in Iowa east of the state boundary.

CONCLUSION

Iowa resisted Nebraska's Motion for Leave to file its Complaint in this case because she did not believe that a justiciable controversy exists between the states and because she did not believe that Nebraska is a "real party in interest" so as to entitle her to maintain the action. At that time no evidence had been introduced and Iowa understands that Nebraska was permitted to file her Complaint so that she would thus be afforded an opportunity to prove the existence of a justiciable controversy and to prove that she has a real interest therein. Now that the evidence is in, Iowa again submits that Nebraska's Complaint should be dismissed and denied, because Nebraska having had an opportunity to prove the essential elements of her case, has failed to do so.

Even if the Court considers that this be a proper case for exercise of its original jurisdiction to construe the Iowa-Nebraska Boundary Compact of 1943, Iowa submits that the Court should confine itself to construing the Compact. That it should not invade the jurisdiction of the state courts of Iowa by quieting the title to Iowa land or enjoining Iowa from asserting its ownership claims in courts of competent jurisdiction.

In construing the Compact, Iowa simply asks that the term "cede" and the term "titles good in Nebraska" be given their usual, ordinary and received meanings. The legislators who drafted and enacted the Compact must be

deemed to have meant what they said, not what the Special Master would read into the Compact now, some 27 years after its enactment.

The term "cede" means to assign or transfer sovereignty over land and necessarily implies that the land was in the ceding state at the time of cession. The term "good title" means title of such quality that it can be defended against all possible adverse claimants, against the world as it is sometimes said.

WHEREFORE the Defendant State of Iowa respectfully prays that its exceptions hereinabove stated be sustained.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 17, ORIGINAL

STATE OF NEBRASKA,
Plaintiff,

vs.

STATE OF IOWA,
Defendant.

IOWA'S REPLY TO NEBRASKA'S EXCEPTIONS TO SPECIAL MASTER'S REPORT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 17, ORIGINAL

STATE OF NEBRASKA,
Plaintiff,

vs.

STATE OF IOWA,
Defendant.

IOWA'S REPLY TO NEBRASKA'S EXCEPTIONS TO SPECIAL MASTER'S REPORT

Comes now the Defendant, the State of Iowa, and for her Reply to Nebraska's Exceptions to the Special Master's Report now on file herein, respectfully states to the Court as follows:

PRELIMINARY STATEMENT

On pages 3, 4 and 5 of Iowa's Exceptions to the Special Master's Report, Iowa attempted to distill seven propositions or rules which she believes are contained in the Report. On pages 35 and 36 of Nebraska's Exceptions, Nebraska restates two general principles of law which she believes are contained in the Report, and then she mentions that there are three other recommendations by the Special Master with which she agrees. From these

statements by Iowa and Nebraska, it will be seen that there is no substantial disagreement as to what the Special Master's Report is intending to say and recommend.

The rule set forth by the Master in italics commencing near the bottom of page 174 and continuing onto page 175 of his Report deals with areas which Iowa claims to own and which were in existence when the Compact was adopted in 1943. Iowa has excepted to this rule altogether on the ground that it is not a proper interpretation or construction of the Compact. Nebraska agrees with the rule as far as it goes, but contends it should be broader.

The rule set forth by the Master on page 193 of his Report deals with areas which Iowa claims to own and which have formed in Iowa since 1943. Iowa agrees with this rule and has stated no exception to it. Nebraska excepts to the first sentence of this rule, and Nebraska states at the bottom of page 35 of her Exceptions that this constitutes her "basic exception to the Master's findings".

This Reply by Iowa will be mainly a reply to Nebraska's "basic exception". Iowa's reply to Nebraska's other exceptions will be stated as briefly as possible. Division I of this Reply will be directed to Nebraska's exceptions other than her "basic exception". Division II will be directed to her "basic exception".

DIVISION I

In Division II of Nebraska's Exceptions, commencing on page 2 and continuing onto page 11, Nebraska states twelve "exceptions to findings of fact".

For reply to Exception No. (1) on page 2, Iowa states: Insofar as facts are related, stated or found by the Master at pages 50 to 61 of his Report, said facts are true and correct and are sustained by evidence in the record made before the Master.

For instance, it was established during the pre-trial phase of this case that the State of Nebraska does not claim to own any tract or parcel of land which the State of Iowa adversely claims to own. All lands, river beds, abandoned river beds and islands which Iowa claims to own in the vicinity of the Missouri River are on the east side of the boundary and in Iowa. All lands which Nebraska claims to own in the vicinity of the river are in Nebraska. (See LIST OF AREAS OWNED BY THE STATE OF IOWA ALONG THE MISSOURI RIVER AND DISCLAIMER voluntarily filed by Iowa with Special Master Walter L. Pope. See also, Iowa's Interrogatories No. 1 and No. 2, and Nebraska's Answers thereto.)

There is no evidence concerning how many Nebraskans or persons claiming by Nebraska titles there are or may be who are claiming to own river lands adversely against Iowa's claim of ownership. Nebraska made no effort to prove this fact. Iowa had no burden to prove it. The meager record made concerning this fact proposition fairly establishes that there are only a miniscule number of private individuals claiming adversely to the State of Iowa and that Nebraska does not represent her general citizenry or any class thereof when prosecuting this action.

For reply to Exception No. (2) on page 2, Iowa states: The fact stated in the quotation from the Master's Report is true. There is insufficient evidence to establish even a title good in Nebraska as to any area which existed in 1943 and which Iowa claims to own. There is no evidence whatsoever as to whether or not there was a title good in Nebraska as of 1943 as to State Line Island, Copeland Bend, Auldon Bar or St. Mary's Bend, these being the areas south of Omaha which Iowa claims to own, other than Nottleman Island and Schemmel Island.

For reply to Exception No. (3) commencing on page 2, Iowa states: The facts stated by the Master on page 181 of his Report and quoted on page 4 of Nebraska's Exceptions are true. (See Exhibits D-636, D-637, D-638, D-644, D-646, and D-1048.)

For reply to Exception No. (4) commencing on page 3, Iowa states: The Master's finding that the "1943 Compact contains no terms, phrases or language that can be construed as saying that Iowa repealed her historic common law when she adopted the Compact" is a true and correct finding. (See the 1943 Iowa-Nebraska Boundary Compact.)

For reply to Exception No. (5) on page 8, Iowa states: We do not understand that Nebraska is excepting to the Master's findings concerning how the land formed at Tyson Bend which became the subject of litigation in *Tyson* v. *Iowa,* 283 F.2d 802. Nebraska simply says that the decision by the U. S. District Court and affirmed by the Circuit Court in that case was wrong. Nebraska is excepting to the Master's conclusion that said decision was right. It is and always has been Iowa's position that the decision of *Tyson* v. *Iowa* is right and that the basic rules announced therein are applicable to determine other areas which have formed in like manner along the Missouri River.

The basic rules derived from *Tyson* v. *Iowa* are: (1) When privately owned lands are washed away and destroyed by action of the river waters, the private title to such lands is also washed away and destroyed, and by Iowa law, title passes to the State. (2) When new land forms, ownership of it shall be determined by the law of the state in which it forms.

The Master says in his Report that these rules are applicable to determine ownership of all areas which have formed since 1943 and Iowa submits that he is correct in this. Iowa's exceptions to the Master's Report are bottomed on the proposition that these rules should also be applied to determine ownership of areas which had formed prior to 1943, and Iowa's basic exception to the Report is on account of his failure to apply said rules to both the areas formed pre-1943 and the areas formed post-1943.

Nebraska's Exception No. (6) commencing on page 8 is well taken.

For reply to Exception No. (7) on page 9, Iowa states: Whether there were 11 or 15 canals dredged by the Corps of Engineers prior to 1943 is a matter of no importance or significance. Iowa objects to any implication that each and every "canal" dredged by the Corps constituted a "man-made avulsion" or that every canal was so dredged and located that it cut off a piece of Nebraska and left it on the Iowa side.

One of Nebraska's principal contentions is that neither state nor anybody knew where the pre-1943 state boundary was; that the Compact was entered into for the purpose of (1) fixing a new boundary and (2) avoiding the necessity of ever having to determine where the pre-1943 boundary was. Iowa submits that Nebraska is totally inconsistent when she urged the Master and now urges this Court to find and determine that there were avulsions at

many locations prior to 1943 which stranded Nebraska land on the Iowa side of the river while contending that nobody knew or knows where the pre-1943 boundary was.

For reply to Exception No. (8) on page 10, Iowa states: The Compact contains no terms which can be construed to mean that the states were agreeing to repeal the presumption favoring accretion as against avulsion; and there are no circumstances surrounding the enactment of the Compact which render it so construable. The Master erroneously construes the Compact as an agreement by Iowa not to use the presumption in litigation concerning the ownership of areas along the river which had formed prior to 1943. Nebraska excepts to the Master's failure to construe the Compact as a total repealer of the presumption in all litigation concerning the ownership of river land. Iowa's reply to Nebraska's exception is reassertion of her position above stated: The Compact is not construable as an agreement to repeal the presumption at all.

For reply to Exception No. (9) on page 10, Iowa states: The Master quoted Nebraska's proposed statement concerning the post-1943 material facts (SMR 91-102), and quoted Iowa's proposed statement concerning the same matters (SMR 102-108). At the top of page 109, the Master accepted Iowa's proposed statement, and thereby by implication rejected Nebraska's. The record sustains the Special Master's said decision.

For reply to Exception No. (10) on page 10, Iowa states: Nebraska urged the Master to make many various findings of fact at pages 102-123 of her proposed findings, some of which may be true, but some of which are not true. Since Nebraska has elected to except to the failure of the Master to adopt said findings *en masse*, Iowa's reply is that the Master's failure to adopt said findings *en masse* is not erroneous.

For instance, Nebraska urged the Master to find as a matter of fact that Winnebago Bend Canal and California Cut-off Canal were dredged in Nebraska. Both Nebraska and Iowa stated frankly that they were not adducing all available evidence concerning Winnebago Bend or California Cut-off; that only enough evidence was being adduced concerning those areas to demonstrate the general nature of the problems existing there. The Master understood this; hence his refusal to find facts at those locations; he was correct in his refusal to find facts as urged by Nebraska at pages 102-123 of her proposed findings.

The Master's refusal to find the facts urged by Nebraska as aforesaid is also a recognition of the inconsistency of positions taken by Nebraska. As mentioned hereinbefore, on the one hand, Nebraska wanted the Master to find that the pre-1943 Boundary cannot be located or determined; on the other hand, she wanted the Master to find that certain areas were "in Nebraska" prior to 1943, and that canals were dredged "in Nebraska" prior to 1943. Nebraska wants one rule at some locations, another rule at other locations. The Master recognized that if he were to construe the Compact as a recognition and agreement by the states that the pre-1943 boundary could not and would not be located, then that rule must apply to the entire boundary, not to a few areas where Nebraska might want to apply it.

Iowa agrees that Dr. Weakly was Nebraska's tree expert as stated in Exception No. (11) on page 10.

Nebraska's Exception No. (12) on page 11 is well taken.

Commencing on page 13 of her exceptions, Nebraska enumerates seven exceptions to "relief recommended by the Master and categorization of the issues".

For reply to Exception No. (1) commencing on page 13, Iowa states: The Master fairly stated one of the issues in Proposition II on page 1 of his Report. Furthermore the Master's answer to the issue is correct. And this is true regardless of whether the issue be stated as the Master stated it or whether it be stated as Nebraska would state it. That is to say: Ownership of land which has formed since 1943 in the vicinity of the Missouri River must be determined by the title laws of the state in which it formed, using the boundary fixed and established by the Compact to determine in which state they formed; more specifically, Nebraska title laws do not extend, project or apply beyond the boundary into Iowa.

The Special Master determined that neither this rule nor its application divests any riparian rights or titles from any riparian owner. He is right about this. The matter will be discussed in detail in DIVISION II hereinafter.

Iowa does not believe or understand that Exception No. (2) on page 14 is really an exception. In any event, Iowa does not understand what portion of the Master's Report is being excepted to.

For reply to Exception No. (3) commencing on page 14, Iowa states: By the Compact, Iowa agreed to recognize "titles - - - good in Nebraska"; the Master recommends that Iowa be required to recognize "titles - - - good in Nebraska"; Iowa recognizes its obligation to recognize "titles - - - good in Nebraska". Nebraska says that the Master is in error when he fails to foreclose Iowa from contesting whether or not an alleged title was a "title - - - good in Nebraska". In arguing for her Exception No. (3) on page 15, Nebraska repeats four times that Iowa must be required to recognize "the titles", or "the titles of private landowners", or "the title". Every time, Ne-

braska omits the word "good". This omission of the word "good" when Nebraska is discussing what Iowa agreed to recognize is not accidental. Nebraska well knows that many alleged or purported titles to Missouri River lands are not "good" titles by Nebraska law and were not "titles - - - good in Nebraska" as of 1943.

The Special Master is correct in his conclusion that Iowa only bargained to recognize "titles - - - good in Nebraska". After all, this being the terminology of the Compact, the conclusion was inevitable and inescapable.

Having reached the conclusion that Iowa only agreed to recognize "titles - - - good in Nebraska", the Master recognized that he could not foreclose Iowa from contesting whether or not an alleged title was "good". To foreclose Iowa from contesting would have been the equivalent of requiring Iowa to recognize every alleged title, every purported title, every color of title and every piece of paper emanating from Nebraska. The Master was correct in concluding that Iowa should not be foreclosed from contesting the validity of all alleged "good - - - titles" in courts of competent jurisdiction.

For reply to Exception No. (4) commencing on page 15, Iowa states: The Special Master's recommended rule is that, since 1943, Nebraska titles have terminated at the state boundary fixed and established by the 1943 Boundary Compact, just as they terminated at the state boundary which had theretofore existed. The Master, in his Report, sets forth several reasons why he concluded that application of this rule does not divest any private riparian landowner of any vested titles or rights which he theretofore possessed. The reasons why Iowa believes that the Special Master is correct in this matter will be discussed in DIVISION II hereinafter.

For reply to Exception No. (5) commencing on page 18, Iowa state: This exception again puts forth Nebraska's "vested rights" theory. Again, Iowa replies that no "vested rights" are divested by the Special Master's proposed rule. The Master's reasons and Iowa's reasons for so believing will be discussed in detail in DIVISION II.

For reply to Exception No. (6) commencing on page 19, Iowa states: Again, in this exception, Nebraska puts forth her "vested rights" theory. Again, Iowa replies that no "vested rights" are divested, and the subject will be discussed in detail in DIVISION II hereof.

For reply to Exception No. (7) commencing on page 20, Iowa states: In this exception, Nebraska puts forth the rules which she was urging the Master to adopt in lieu of the single, simple rule which he did adopt for determining ownership of river areas which have formed since 1943. After having adopted the rule that ownership of areas formed since 1943 is to be determined by the title laws of the state in which they formed, the Master had to reject the rules promulgated by Nebraska in Exception No. (7) because they are inconsistent with the rule he adopted and recommends in his Report. Also, he rejected the rules promulgated by Nebraska in Exception No. (7) because they are not valid interpretations of the 1943 Boundary Compact. There are no terms, phrases or language in the Compact to mean that Iowa was conveying away her state owned river beds in the Missouri River or repealing her historic common law regarding state ownership of navigable river beds. The Compact affirmatively states that "The State of Nebraska hereby cedes to the State of Iowa and relinquishes jurisdiction over all lands - - - lying easterly of said boundary"; thus, the Compact affirmatively states that Nebraska jurisdiction, Nebraska sovereignty and Nebraska law shall cease

application at the boundary, shall no longer apply easterly of the boundary and shall not apply in Iowa. Nebraska's Exception No. (7) will be further discussed in DIVISION II of this Reply.

DIVISION II

Nebraska states, at the bottom of page 35 of her Exceptions, that her "basic exception" to the Special Master's Report is her exception to the following rule adopted and recommended by the Master, to-wit:

> "Ownership of areas which have formed since July 12, 1943, shall be determined by the law of the state in which they formed, the boundary fixed by the Iowa-Nebraska Boundary Compact of 1943 being the line which shall determine in which state they formed."

Throughout her SUMMARY OF ARGUMENT and ARGUMENT, Nebraska contends that application of the above rule would divest private riparian landowners of "vested rights" which they possessed before the Compact. The Special Master rejected this contention and Iowa believes that this Court should reject it.

The logical first inquiry to be made is: What were the "vested rights" of a Nebraska riparian landowner in and prior to 1943? Nebraska says he owned the bed of the navigable stream contiguous to his land to the thread or thalweg of that stream. Nebraska asserts that this doctrine became the common law of Nebraska in *Kinkead* v. *Turgeon*, 74 Neb. 580, 109 N.W. 744 (1906).

A reading of *Kinkead* discloses that there was no issue in the case as to ownership of the bed of any navigable stream. The issue was as to the ownership of an *abandoned bed* of a navigable stream, to-wit: the Missouri River.

In both of the Nebraska Supreme Court's opinions in the *Kinkead* case, previous decisions of that Court and the decision of the Supreme Court of the United States in *County of St. Clair* v. *Lovingston*, 23 Wall. 46, were reviewed. The Nebraska Court determined that all prior pronouncements had been in cases where the facts were different from the facts in *Kinkead*. Prior pronouncements were therefore classed as *obiter*, and the Court therefore stated at 74 Neb., page 581, that "- - - we approach the question unhampered by any previous adjudication." Hence, the Nebraska Court was saying, in effect, that the riparian owners had no "vested rights" to the bed of the contiguous navigable river prior to 1906.

At 74 Neb., page 583, the question is stated as follows: "- - - the question here presented as to the right of a riparian owner to an *abandoned* river bed of a navigable stream. - - -" (Italics added.) The question is answered at 75 Neb. 590-591, as follows: "- - - and so with the river, the public right of navigation attaches to the new channel of the stream by virtue of the change of its waters, over which alone the right of navigation can exist, and the abandoned bed, which is of no avail for public use as a means of travel, *reverts* to the riparian owners to the thread of the channel where the waters flowed. - - -" (Italics added.)

Thus, there was no issue in *Kinkead* as to ownership of the bed of a navigable stream while it is under the waters of the stream. The issue was as to ownership of the *former* bed of the navigable stream *after* that bed had been *abandoned* by an avulsion. And the law of the case is that *after abandonment*, the bed *reverts* to the riparian owner.

Hence, whatever was said in *Kinkead* concerning ownership of the bed before abandonment was *obiter dicta*

or *dicta*, or at best *judicial dicta*. Neither *obiter dicta nor judicial dicta* has the status of a *decision* or an *adjudication*. 29 Words and Phrases 13 (Obiter Dictum); 12 Words and Phrases 557 (Dictum); 23 Words and Phrases 494 (Judicial Dictum); *Lancaster County* v. *McDonald*, 73 Neb. 453, 103 N.W. 78, 81. So far as Iowa's counsel have been able to ascertain, it has never even been asserted in any case we have been able to discover that a "vested right" can arise from either *obiter dicta* or *judicial dicta*. Iowa submits that no Nebraska riparian landowners possessed any "vested rights" to the bed of the Missouri River contiguous to their riparian lands as of 1943 as a result of the Nebraska Supreme Court's decision in *Kinkead* v. *Turgeon*, supra.

We proceed next to consider other Nebraska cases which might be considered to be the "- - - line of cases commencing with *Kinkead* v. *Turgeon* - - -" mentioned by Nebraska at page 33 of her Exceptions. The only case Nebraska cites is *State* v. *Ecklund*, 147 Neb. 508, 23 N.W.2d 782 (1946); Nebraska notes that *State* v. *Ecklund* was decided after the Compact; for that reason, it is hardly possible that any "vested rights" could have existed as of the effective date of the Compact by reason of *State* v. *Ecklund*. Furthermore, it is stated in the Court's opinion at 147 Neb., page 520, that the Platte River, where the disputed land was located, was non-navigable; for this reason alone, it cannot be said that any "vested rights" to beds of or islands in navigable rivers may be derived from *State* v. *Ecklund*.

Concerning other Nebraska cases: *Higgins* v. *Adelson*, 131 Neb. 820, 270 N.W. 502 (1936), involved accretions in being to an island in the non-navigable Platte River. *Independent Stock Farm* v. *Stevens*, 128 Neb. 619, 259 N.W. 647 (1935), involved the ownership of land which

had formed by gradual accretion to the land of the plaintiff; that is to say, the land had risen above the water; the land was in being; there was no issue as to ownership of any river bed. *Frank* v. *Smith*, 138 Neb. 382, 293 N.W. 329, 134 A.L.R. 458 (1940), involved land in the vicinity of the non-navigable North Platte River. *Yearsley* v. *Gipple*, 104 Neb. 88, 175 N.W. 641 (1919), also involved ownership of accretion land which had theretofore formed, not the bed of the river. *Thies* v. *Platte Valley P. P. & I. District*, 137 Neb. 344, 289 N.W. 386 (1939), involved the non-navigable North Platte River. *Hardt* v. *Orr*, 142 Neb. 460, 6 N.W.2d 589 (1942), involved the ownership of an island in being in the non-navigable North Platte River. *Conkey* v. *Knudsen*, 135 Neb. 890, 284 N.W. 737 (1939); *Conkey* v. *Knudsen*, 141 Neb. 517, 4 N.W.2d 290 (1942); *Conkey* v. *Knudsen*, 143 Neb. 5, 8 N.W.2d 538 (1943); and *State ex rel. Conkey* v. *Ryan*, 136 Neb. 334, 285 N.W. 923 (1939), all related to one and the same body of accretion land which was already in being, had risen above the waters of the Missouri River, and there was no issue in any of these cases concerning ownership of any river bed.

In *Yates* v. *Milwaukee*, 10 Wall. 497, quoted by Nebraska at page 57 of her Exceptions to Special Master's Report, this Court set forth the proposition that it was not bound by the common law of a State, holding that the title of the owner of a riparian lot extends to center of the stream, and stated:

> "As to the first of these propositions, it does not seem to be necessary to decide whether the title of the lot extends to the thread of the channel of the river, though if the soil was originally part of the public lands of the United States, as seems probable, the case of *The Railroad Company* v. *Schurmier* (7 Wal-

> lace 272), would limit the *title* to the margin of the stream." (pages 503-504.)

The riparian right the Court thereafter considered in the decision as vested was not title to thread of stream but rather as stated:

> "* * *; and among those rights are access to the navigable part of the river from the front of his lot, * * *." (page 504.)

and right to make wharf, etc., subject to general rules and regulations as the Legislature may see proper to impose. Following this decision, it would appear that even if the common law of Nebraska grants riparian owners title to the thread of navigable streams in the state, it is void, or this Court would limit the title to the margin of the stream, "if the soil was originally part of the public lands of the United States" (page 504), which they were, as both Iowa and Nebraska were created out of the territory known as the Louisiana Purchase, and were definitely public lands of the United States. The Court then stated the Supreme Court of Wisconsin had gone further by asserting the doctrine that the *title* of the owner of such a lot extends to the center of the stream. In regard to this extension of the doctrine, the Court said at bottom of page 506 and top of 507:

> "* * *, the case of the Railroad Company v. Schurmier decided that if the lot, as thus described, came to the margin of the stream, no title to the precise locality supposed to be dedicated ever passed from the United States."

The riparian owner had, however, right of access to navigable portion of stream.

It is the position of Iowa that from the foregoing, it is apparent that the common law of the State of Nebraska

did not in fact give the Nebraska riparian owners along the Missouri River title or ownership of the bed of the navigable channel of the river, and they acquired no property right to such bed until it was abandoned by the river. In the event this Court believes Iowa counsel has misinterpreted the doctrine set out in the *Kinkead* and *Ecklund* cases, supra, then Iowa submits the Nebraska court had no jurisdiction over the bed of the navigable waters of the Missouri River as title to some had never passed from the United States, as set out in *Yates* v. *Milwaukee,* supra.

Next, and still discussing the possible "vested rights" of a Nebraska riparian landowner beyond the bank of the Missouri River prior to 1943, Iowa urges that the easternmost private boundary of Nebraska landowners under Nebraska law was always the state boundary. They never had any "vested rights" beyond the state boundary. While is it true that the pre-1943 state boundary was also the thalweg of the Missouri River along most of the boundary, we think it is inaccurate of Nebraska to say that private boundaries of Nebraska landowners along the Missouri River were "the thalweg of the river". A more accurate statement would be that private boundaries of these Nebraska landowners was "the state boundary". This is true because wherever the state boundary was west of the thalweg of the river prior to 1943, Nebraska rights and titles terminated at the boundary and did not extend to the thalweg. Carter Lake, which was involved in *Nebraska* v. *Iowa,* 143 U.S. 359, 36 L.Ed. 186, 12 S.Ct. 396 (1892), is typical of this situation where the boundary was west of the thalweg of the river as of and prior to 1943. In other words, if a Nebraska riparian owner had any "vested rights" in the bed of the Missouri River to the thalweg prior to 1943, it was due to the coincidental fact that the thalweg

was also the state boundary, and his rights were always limited to the Nebraska side of the boundary.

The power and jurisdiction of the United States, acting through the U. S. Army Corps of Engineers, to move and stabilize the thalweg as it might deem necessary or desirable has always been recognized, and so long as these movements were within the bed of the river, it has been unquestioned that no private vested rights were divested or involved. If the thalweg and the state boundary could be moved by the Corps without impairing "vested rights" before the Compact, we submit that the state boundary could be moved by the Legislatures of Iowa and Nebraska by adoption of the Compact without impairing any "vested rights".

We next approach and discuss the question of whether or not it was within the power of the Nebraska Legislature to amend or change the common law of Nebraska by adoption of the 1943 Boundary Compact. At page 190 of his Report, the Special Master finds and concludes that the Nebraska Legislature did indeed possess this power, and that to the extent necessary to sustain his interpretation of the Compact, it should be considered that the Compact was an exercise of that power. The Special Master cites *Western Pac. Ry. Co.* v. *Southern Pac. Co.*, 151 F. Rep. 376, 399, as authority. The language employed by the Court in that case is pertinent:

> "But it is said that the predecessors in interest of the appellee had a vested right to future alluvion, acquired before the adoption of the provision of the Civil Code above quoted and before the adoption of the present Constitution, a right to all alluvion that might be deposited upon its shore land in all time to come, and that this right is sustained by the dictum of the

court in County of St. Clair v. Lovingston, 23 Wall. 46, 23 L.Ed. 59. In the course of the opinion in that case, it was said: 'The riparian right to future alluvion is a vested right. It is an inherent essential attribute of the original property.' The controversy in that case did not even remotely relate to the right to future alluvion, but related only to alluvion then existing. We cannot think that the court meant to announce the doctrine that the right to alluvion becomes a vested right before such alluvion actually exists. The language so used was quoted from the language, also obiter, of Bullard, J., in Municipality No. 2 v. Orleans Cotton Press, 18 La. 122, 36 Am. Dec. 624, in which it was said, in substance, that, if the Legislature had attempted to declare that thereafter owners of tracts of land fronting on a river should no longer be entitled to any alluvion which might be formed, such act would be held unconstitutional, on the ground that the right to future alluvion is vested.

In Pearsall v. Great Northern Ry. Co., 161 U. S. 646-673, 16 Sup. Ct. 705, 40 L.Ed. 838, the court quoted with approval from Cooley's Principles of Constitutional Law, 332, as follows:

'Rights are vested, in contradistinction to being expectant or contingent. They are vested when the right to enjoyment, present or prospective, has become the property of some particular person or persons as a present interest. They are expectant when they depend upon the continued existence of the present condition of things until the happening of some future event. They are contingent, when they are only to come into existence on an event or condition which may not happen or be performed until some other event may prevent their vesting.'

Within that definition of vested rights, there can be no question, we think, that the right to future possible accretion could be divested by legislative action. To say that one who acquires from the state title to tide lands acquires therewith a vested right to all possible future accretion is to impose a restriction on the power of the state to occupy or improve for the public benefit the adjacent submerged lands. Said the Supreme Court of Washington, in Eisenbach v. Hatfield, 2 Wash. 236-250, 26 Pac. 539, 12 L.R.A. 632:

'But appellee claims that he has a vested right to future accretion to his land, and cites as authority to sustain his position the case of County of St. Clair v. Lovingston, 23 Wall. 46, 23 L.Ed. 59. And the court in that case does say that the riparian right of future accretions is a vested right. But we are unable to see how one can have a present vested right to that which does not exist, and which may never have an existence. It seems to us that the more reasonable doctrine is announced in the case of Taylor v. Underhill, 40 Cal. 471, in which case the court says: "The plaintiff, as a riparian owner, has also a right to accretions to his land, and it is said the claim of defendant will be a cloud upon his title to such accretion. But, as yet, there is no such property, and there may never be. He cannot ask the court to interfere in advance, and prevent a cloud being cast upon his title to that which may never have an existence."'

The Supreme Court of Iowa, by its decision in Chicago, Burlington & Quincy Ry. Co. v. Porter Bros. & Hackworth, 72 Iowa 426, 34 N.W. 286, in effect denied that the right to future accretion is a vested right. In that case the railroad company, under a statute of the state authorizing it to occupy without payment

of damages any of the state lands, had constructed its railroad along the Mississippi river below the ordinary high-water mark. The defendants were owners of the land bounded by the river. The court said:

'The lawful appropriation of the land by the Rock Island Railroad Company cut off accretions to defendant's land and established a line beyond which no right of accretion can be acquired.'

In Sage v. Mayor, 154 N.Y. 61, 47 N.E. 1096, 38 L.R.A. 606, 61 Am. St. Rep. 592, it was held that, in every grant of lands bounded by navigable waters made by the government or by the state as trustee for the public, there is reserved by implication the right to improve the water front in aid of navigation for the public benefit without compensation to the riparian proprietor, and the decision in Shively v. Bowlby, 152 U.S. 1, 14 Sup. Ct. 548, 38 L.Ed. 331, sustains the power of a state to cut off, without compensation, the right of a riparian proprietor to future accretion. We know of no decision in which this doctrine has been questioned. If it is within the power of the state to thus appropriate and improve tide land or submerged land in front of a riparian proprietor, and thus deprive him of the right to future accretion, what tenable ground is there for saying that the state may not by a statute accomplish the same result, and for holding that the state of California by its statute of 1872 could not lawfully make provision, as it did, that the limits of lands owned by riparian proprietors of bays and arms of the sea could not be extended over the lands then held by the state in trust for the public by virtue of any accretion that might thereafter be deposited thereon?"

So, it was within the power of the Nebraska Legislature to say "ownership of all lands and river beds easterly of the new boundary shall henceforth be determined by the title laws of Iowa", and it is the Special Master's conclusion that this is, in effect, what the Nebraska Legislature was saying when it adopted the Compact. And this interpretation of the Compact does not constitute any unconstitutional taking of anybody's private vested titles or rights without compensation.

The Special Master notes that the Nebraska Supreme Court would have had the same power and right to change the common law of Nebraska if it had elected to do so, citing *Hilt* v. *Weber,* 252 Mich. 198, 233 N.W. 159 (1930), as authority.

Nebraska seems to feel that the Special Master was derelict or in error in failing to answer the following question: "Did the Compact operate to change the boundaries of the private property owners from the thalweg or middle of the main channel of the Missouri River to the fixed Compact line?" (See Nebraska's Exceptions, page 13.) Iowa submits that it was unnecessary for the Master to answer this question. It was only necessary for him to determine that his construction of the Compact does not divest any private persons of any vested titles or rights. That the Special Master so determined inheres in his Report.

The Special Master's rule is that, since 1943, Nebraska titles have terminated at the Compact Boundary, and easterly from the Compact boundary there are only Iowa titles. (SMR—page 191.) In other words, Iowa law applies in Iowa; Nebraska law applies in Nebraska. During the trial and arguments, the Special Master often spoke of this as his "source of title" theory. His rule is that Nebraska titles which were ceded to Iowa by the Compact did not

become good Nebraska titles in Iowa, but became good Iowa titles in Iowa. This is a necessary construction of the Compact to be in accord with *Hawkins* v. *Barney* 5 Pet. 457 (1831), and other similar cases; it is necessary in order to avoid freezing of the status of the ceded lands in both states; it is necessary in order to enable "living law" to be applicable to them; it is necessary in order to avoid the existence and application of diverse title laws within a single jurisdiction—either Iowa or Nebraska.

Nebraska notes at page 51 of her Exceptions that the case of *Hughes* v. *Washington,* 389 U.S. 290 (1967), is factually distinguishable from the case at bar. Iowa agrees.

First, no private riparian landowner claiming adversely to the State of Iowa is claiming that his rights are derived from a federal grant, as was Mrs. Hughes in the cited case. If federal law is involved at all in the instant case, it is involved in the context in which it was discussed in *Yates* v. *Milwaukee,* supra, and it operates in favor of Iowa's position, not Nebraska's.

Second, the accretions which were the subject of controversy in the *Hughes* case were already in existence and under any rule of accretion law, Mrs. Hughes' title to them had vested. In the instant case, the Special Master specifically notes at page 191 of his Report that: "At this point we are discussing areas north of Omaha which were formed since 1943 by the changes in the river either natural or by the Engineers. In 1943 these were expectant or contingent accretions. Iowa is claiming these areas not in 1943, but in 1961 and thereafter. So far as we know there were no accretions in 1943."

Third, the Court found in the *Hughes* case that there had been a "startling" change by the Washington Supreme Court in its interpretation of Article 17 of the 1889 Constitution. In fact, there had been a complete reversal of

interpretations within 20 years. (See page 297 U.S.) There has been no such "startling" or "unpredictable" change by the Iowa Supreme Court. Continuously and consistently since 1856, the Iowa court has adhered to the doctrine of state ownership of navigable river beds; it has applied the presumption of accretion as against avulsion wherever applicable; it has applied the presumption favoring the permanency of boundaries wherever applicable. There has never been even a bill introduced in the Iowa Legislature to change the common law of Iowa as it was being promulgated by the Court, this constituting tacit approval of that common law by the legislative branch. Commencing as early as 1911 (*Iowa* v. *Carr*, 191 Fed. 257, D.C. Ia.) the executive branch was attempting to enforce the common law of Iowa regarding state ownership of river beds and islands forming therein.

Nebraska now says that her legislators who entered into the Boundary Compact in 1943 on her behalf had reason to expect that Iowa, by enacting the Compact, was superseding Iowa's common law and agreeing that thereafter, the Compact would be "determinative of all rights to be recognized or established by it". (See bottom of page 8, top of page 9, Nebraska's Exceptions.) Iowa should be held to that interpretation of the Compact, Nebraska says, because after abiding by that interpretation for some 15 or 20 years, Iowa changed her policy and conduct in a startling and unpredictable manner. There is no evidence in the case at bar that Iowa ever changed her policy or her common law relating to state ownership of navigable river beds or that she ever made any "startling" or "unpredictable" change whatsoever. There is no evidence that the Nebraska Legislature ever expected that repealer of the Iowa common law would flow from the Compact; there is no evidence of any grounds for that expectation; there is no ground or reason for any inter-

pretation of the Compact which would construe it as a total or partial repealer of Iowa common law to be applied in the future to any lands or river beds in Iowa.

Finally, the Special Master's proposed rule here under discussion should be approved by this Court because the adoption of any other rule for the determination of the ownership of areas which have formed since 1943 would produce bad results, confusion and uncertainty.

Nebraska has said over and over again during the pendency of this case that the Compact was intended to settle all future disputes and put at rest all future controversies along the boundary, and that it should be interpreted and construed so as to make it accomplish that purpose. Iowa submits that if the propositions promulgated in (A), (B), (C) and (D) at pages 20-21 of Nebraska's Exceptions were to be adopted, this purpose of the Compact would be absolutely destroyed.

For instance, if the Compact were interpreted as a give-away by Iowa of all of her state owned river bed in the Missouri River (and all accretions thereto), as proposed by Nebraska in paragraph (A), page 20, the next logical question is: Who are the grantees and beneficiaries of these gratuitous gifts? Nebraska proposes no answer to this difficult question. There is no simple answer. An answer probably could only be derived from years of litigation.

In paragraph (B) commencing on page 20, Nebraska proposes that the rule of *Tyson* v. *Iowa*, 283 F.2d 802 (1960), be reversed and disavowed. This would be the effect of Nebraska's proposal in (B) although she does not say so at that point in her exceptions. The rule of *Tyson* has been the law of the river for 12 years. It is good law. Both private parties and the State of Iowa have acted on it continuously since 1960 in claiming or not claiming owner-

ship of river areas. Many uncertain ownership questions on both sides of the river have been peaceably settled on the basis of the *Tyson* rule. If the *Tyson* rule were now struck down, and Nebraska's proposed rule substituted for it, it would be like opening Pandora's Box again. Every riparian landowner, including the State of Iowa, would have to re-examine his title and rights in the light of the new rule. The *Tyson* case laid many controversies at rest; they should remain at rest.

If Iowa titles continued to be good Iowa titles in Nebraska and if Nebraska titles continued to be good Nebraska titles in Iowa after the Compact, as Nebraska contends when she says that private boundaries were unchanged by the Compact, one arrives at the unconscionable and anomalous situation that now, some landowners in Iowa own to the thread of the contiguous navigable river and other ownerships end at the ordinary high water and likewise, most landowners in Nebraska will own to the thread while some will end at the ordinary high water. The only way to avoid this incongruous result is to hold that Iowa law applies in Iowa and Nebraska law applies in Nebraska, as the Special Master did. This does not result in the changing of private boundaries or in the divesting of any vested private rights, for reasons hereinbefore discussed.

Also, adoption of Nebraska's proposed rule (B) would clearly violate the rule of construction that all statutes, grants and compacts shall be construed so the public interest will be derogated and diminished as little as possible. *Massachusetts* v. *New York*, 271 U.S. 65, 70 L.Ed. 838, 46 S.Ct. 357 (1926).

Nebraska's proposed rule (C) on page 21 of her Exceptions is totally inconsistent with her general position in this case. Generally, she has contended that it was one

of the purposes of the 1943 Boundary Compact to avoid any necessity of ever having to ascertain where the pre-1943 boundary was located. Yet in rule (C) she proposes a rule which would apply only to those locations where the river had been entirely in Nebraska prior to the Compact. Inevitably, application of this rule would require determinations as to where these locations are.

Nebraska's proposed rule (C) would finally lead to the result that the boundary of landowner A owning land in Iowa contiguous to the Missouri River would be the ordinary high water mark, while the boundary of landowner B owning land in Iowa contiguous to the same river would be the thread of the stream, and landowner C also in Iowa would own the entire bed of the stream. Iowa submits that no such result was intended by the drafters of the Compact.

Nebraska's proposed rule (D) on page 21 of her Exceptions is a perversion of what the Compact actually says. Nebraska would have it say: "Iowa - - - contracted away any rights she may have had to contest titles along the Missouri River - - -". The Compact says: "Titles, - - - good in Nebraska shall be good in Iowa as to any lands Nebraska may cede to Iowa - - -". Iowa has said throughout this case that she is ready, willing and able to abide by the provisions of the Compact, but she does not feel that she should be required to abide by Nebraska's perversion of it.

In DIVISION II of this Reply, we have been dealing with that part of the Master's Report which has to do with areas which have formed since enactment of the Compact in 1943. That is to say, we are dealing with lands which have come into existence by natural or Engineer induced movements of the river since 1943, river beds which have become river beds by natural or Engineer

induced movements of the river since 1943, abandoned river beds which have become abandoned river beds by natural or Engineer induced movements of the river since 1943. By the historic law of accretion, as it is in effect in both Iowa and Nebraska, there can be no "titles - - - good in Nebraska" as to any areas above described which have come into existence on the Iowa side of the Compact boundary since 1943. *Yearsley* v. *Gipple*, 104 Neb. 88, 175 N.W. 641 (1919); *Tyson* v. *Iowa*, 283 F.2d 802 (1960). By proposing rule (D), Nebraska would have this Court bar Iowa from contesting Nebraska purported titles even where there can clearly be no good Nebraska titles because any previous titles have been washed away and destroyed since the Compact. The Special Master refused to adopt any such rule and we submit that he was correct in his refusal.

CONCLUSION

Basically, Iowa believes that the Special Master's rule for determining ownership of areas formed since 1943 is fair, just, equitable and a proper construction of the Compact. There is noting wrong with the rule that "Ownership of areas which have formed since July 12, 1943, shall be determined by the law of the state in which they formed, - - -". Iowa's query is: If this be the rule for determining ownership of areas formed since 1943, why shouldn't it also be the rule for determining ownership of areas formed before 1943? Iowa's criticism of the Special Master's Report heretofore made in Iowa's Exceptions to the Report, is that he failed to apply the same rule to the areas formed pre-1943.

There is nothing new or different about a rule which states that ownership of land shall be determined by the law of the state in which it comes into existence. It is in accord with all precedent and authority. What would

be new and different and violative of precedent and authority would be this Court's limitation of the rule's application to areas which have formed since July 12, 1943, and its failure to apply it also to areas which formed prior to July 12, 1943. This fundamental right of sovereignty is as old as the first sovereign nation. The 1943 Boundary Compact contains no terms, provisions or language construable as a forfeiture of said fundamental right of sovereignty. The Compact should therefore be construed so as to permit the Courts of Iowa to freely determine all title disputes relating to lands within her borders.

Dismissal of Nebraska's Complaint and cause of action in this case would be one way to accomplish this result. An alternate way to accomplish this result would be adoption of the simple and straightforward rule that "Ownership of all areas along the boundary shall be determined by the law of the state in which they formed".

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No. 17, Original

STATE OF NEBRASKA, PLAINTIFF,

VS.

STATE OF IOWA, DEFENDANT.

REPLY BRIEF OF PLAINTIFF, STATE OF NEBRASKA, TO IOWA'S EXCEPTIONS TO SPECIAL MASTER'S REPORT

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STATE OF NEBRASKA, PLAINTIFF,

VS.

STATE OF IOWA, DEFENDANT.

REPLY BRIEF OF PLAINTIFF, STATE OF NEBRASKA, TO IOWA'S EXCEPTIONS TO SPECIAL MASTER'S REPORT

INTRODUCTORY STATEMENT

Plaintiff does not accept Defendant's statement of facts, interpretation of the cited cases, or analysis of the evidence by Iowa in her EXCEPTIONS TO SPECIAL MASTER'S REPORT. It would extend this Reply Brief unduly to attempt to comment upon every point. Lack of comment herein should not be construed to mean agreement or approval by Nebraska.

SUMMARY OF ARGUMENT

Nebraska contends that the Iowa-Nebraska Boundary Compact of 1943 was adopted as a compromise between the two states in an attempt to settle and lay to rest all

of the problems which existed along the Iowa-Nebraska Boundary insofar as the states' interests were concerned. This Compact should be liberally construed so as to give meaningful effect to all of its provisions. The states, rather than determining their existing rights in and to the lands along the Missouri River by judicial proceedings, instead entered into a Compact to compromise and adjust these rights. They did so recognizing all of the uncertainty and confusion which existed with regard to both the establishment of land titles and location of the boundary along the 190 mile border between Nebraska and Iowa. Specific affirmative provisions were placed in the Compact to provide for the recognition of private titles by the states in Section 3, and limitations were placed upon the conduct of the states in Section 4. The Compact was adopted in general terms with a view to public convenience and the avoidance of controversy and this great object should be effectuated.

The Compact superseded the prior law and now governs not only the location of the boundary, but the obligations of the states to recognize private titles to lands along the Missouri River. If the language and purpose of the Compact is to be effectuated, Nebraska submits that a determination is necessary that Iowa cannot make claims of "title" to the bed and abandoned beds of the Missouri River, or to lands along the Missouri River, under her so-called common law. Nebraska also contends that although the Compact changed the jurisdictional line between the states to a fixed line, private property boundaries remained as before. The Nebraska riparian owner continued to hold his title to the thalweg or middle of

the main channel of the Missouri River and to own the bed and accretions to that bed on his side of the thalweg regardless of whether located in Nebraska or Iowa. Claims to lands between private individuals resulting from movements of the Missouri River following the Compact should not be limited or abridged by the state line when the river moves from Nebraska into Iowa, and the Nebraska riparian owner should not be deprived by the Compact of his title to the bed of the Missouri River and his right to accretions to that bed and islands arising in that bed. Iowa must recognize all claims of titles good under the law of Nebraska and should not be able to invoke any common law doctrines which might have been in effect prior to the Compact. The Compact changed Iowa's common law and Iowa, by the Compact, contracted away any rights she may have had to contest titles along the Missouri River based upon any doctrine of sovereign ownership to the bed or abandoned beds of the Missouri River.

Iowa's contentions in her Exceptions are all directed either toward the prevention of a determination of the meaning and effect of the Compact by anyone other than her own officials or the creation again of all of the problems which existed in connection with the determination of boundaries along the Missouri River in 1943 but with solutions determined by Iowa's rules in disregard of the provisions of the Compact. Iowa would apply only Sections 1 and 2 of the Compact to establish the boundary and then necessarily rely upon presumptions and the present application of a common-law doctrine that Iowa "owns" the beds and abandoned beds of the Missouri

River which certain employees or officials of the State of Iowa may selectively choose. Iowa would now require landowners to establish the location of the Iowa-Nebraska boundary prior to the adoption of the Compact in 1943. This is exactly what the Compact was intended to avoid. Iowa has ignored the factual history leading up to the Compact and the conduct of the states at the time of and following the adoption of the Compact. She would put the entire burden upon the landowners of proving the location of a boundary which, because of past violent fluctuations of the Missouri River, she has admitted was "virtually impossible to describe".

She has also recognized that the 1943 compromise was necessary to re-define the location of the state's boundary because the new channel did not always follow the old river bed. Yet, Iowa now takes the position that there is a presumption that the boundary was in the Missouri River in 1943, and Iowa can now rely upon that presumption to establish that claims of titles good under the law of Nebraska at the time of the Compact must not be recognized by the State of Iowa. This is completely inconsistent with the Compact.

Iowa further takes the position that the statutes of limitation do not run against the sovereign. The result of this is that the passage of time has worked only to Iowa's benefit, and title and boundary problems which were completely settled as between private individuals may be raised by the State of Iowa at any time. Only Iowa benefits from the loss or destruction of records, death of witnesses and the passage of time. Iowa has

used and is using these arguments and the presumptions to enable her to acquire lands without the payment of compensation in violation of the Compact.

Many of Iowa's Exceptions are directed at the facts of formation of the Nottleman Island and Schemmel Island areas. Plaintiff in this Reply Brief has referred to several discrepancies in Iowa's categorization of the evidence and submits that the Master's findings concerning formation of those two areas in Nebraska, and the Nebraska and Iowa recognition of that fact, are amply supported by the evidence. However, Nebraska agrees with the Master that this burden of determining the location of the pre-Compact boundary is not necessary because the states avoided such a requirement by the Compact and Iowa agreed to recognize the titles to those areas. However, the extent of the evidence indicates the great burden and expense placed upon any landowner in having to establish the prior boundary and further emphasizes the fact that it is unjust and unfair to require such a determination under the Compact.

Iowa's interpretation results in the Compact having settled nothing except to create a vehicle for the establishment by Iowa of claims to title to lands, twenty years or more following the Compact. It would allow the discretionary application of such claims determined by individuals exercising judgment decisions inconsistently along the entire boundary.

Iowa argues that the Court should not decide this case because it lacks jurisdiction; her officials are not

bound by the Compact except they can utilize the boundary line established by it to assert jurisdiction; because Iowa has jurisdiction she now has "title"; and if anyone is to disprove Iowa's title he must establish the boundary between the states as it existed prior to the Compact, something which the two states attempted to avoid in 1943 as being practically impossible. The landowner is faced with impediments that Iowa is a sovereign and is immune from any statutes of limitation, and that there is a presumption that the Missouri River was the boundary in 1943, even though the Corps of Engineers may have placed the river entirely in Nebraska at that point by the digging of a canal in Nebraska prior to the Compact. Nebraska submits that the Compact could not possibly result in such injustice. The issues which Iowa is attempting to interject today were settled 28 years ago when the states agreed to adopt the Iowa-Nebraska Boundary Compact of 1943.

The Compact must be read to settle and lay to rest all of these problems, and Iowa should be restrained and enjoined from questioning or attacking titles to lands along the Missouri River. Any other determination leads to oppression, unfairness, injustice and absurd consequences; and as a practical matter, Iowa's position results in a government of men and not of laws along the Missouri River.

REPLY TO EXCEPTION NO. I OF THE STATE OF IOWA

Iowa has again taken exception to the jurisdiction of this Court in its Exception No. I. When this case was first filed in July of 1964, Iowa at that time objected to the jurisdiction of this Court and the matter was briefed and argued on January 25, 1965. On February 1, 1965 the Court granted leave to file the bill of complaint and entered an order appointing a Special Master (379 U. S. 996). Nebraska certainly admits that the Court may inquire into its jurisdiction at any time, but contends that jurisdiction is clear in this case.

Iowa has stated on page 6 of her Exceptions that: "We find no specific findings of fact, rulings or recommendations by the Special Master relative to the aforesaid contentions (relating to jurisdiction), but it inheres in the Report that the Special Master recommends that the Court exercise its original jurisdiction in the case." Iowa has apparently overlooked the Master's statement on page 200 of his Report that ". . . the Supreme Court has jurisdiction to decide these issues: . . ." The Master has made it clear throughout the Report that Iowa is violating the Iowa-Nebraska Boundary Compact of 1943. Jurisdiction also inheres in the Special Master's findings that Iowa violated the Iowa-Nebraska Boundary Compact of 1943 by claiming ownership of Nottleman and Schemmel Islands (SMR 1), and this is so even under Iowa's theory that the issue is concerning where the boundary line between the two states was immediately prior to the effective date of the Boundary Compact (SMR 111). These statements, together with the Master's statement

at page 200, that "the Supreme Court has jurisdiction" could hardly be clearer.

The Iowa-Nebraska Boundary Compact of 1943 was entered into by the States of Iowa and Nebraska with the consent of the Congress of the United States under the authority of Article I, Section 10 of the Constitution of the United States which provides that "No State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State. . . ."

Article III, Sec. 2 of the Constitution of the United States provides:

> "In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the Supreme Court shall have original Jurisdiction."

As set forth in Section 1251, Title 28, U. S. C. A. (June 25, 1948), c. 646, 62 Stat. 927, Par. (a) (1):

> "(a) The Supreme Court shall have original and exclusive jurisdiction of '(1) all controversies between two or more states;' "

Mr. Justice Frankfurter described the nature and effect of a Compact in *West Virginia ex rel. Dyer v. Sims*, 341 U. S. 22 at 28, in the following language:

> "But a compact is after all a legal document. Though the circumstances of its drafting are likely to assure great care and deliberation, all avoidance of disputes as to scope and meaning is not within human gift. Just as this Court has power to settle disputes between States where there is no compact, it must have final power to pass upon the meaning and validity of compacts. It requires no elaborate argument to reject the suggestion that an agreement

> solemnly entered into between States by those who alone have political authority to speak for a State can be unilaterally nullified, or given final meaning by an organ of one of the contracting States. A State cannot be its own ultimate judge in a controversy with a sister State. To determine the nature and scope of obligations as between States, whether they arise through the legislative means of compact or the 'federal common law' governing interstate controversies (*Hinderlider v. La Plata Co.*, 304 U. S. 92, 110), is the function and duty of the Supreme Court of the Nation. Of course every deference will be shown to what the highest court of a State deems to be the law and policy of its State, particularly when recondite or unique features of local law are urged. Deference is one thing; submission to a State's own determination of whether it has undertaken an obligation, what that obligation is, and whether it conflicts with a disability of the State to undertake it is quite another."

This Court has repeatedly accepted jurisdiction in matters involving disputes as to the location of the boundary between two states and the matter is so well settled that the jurisdictional question, if one can be said to exist, is seldom discussed in the Court's opinions. *Nebraska v. Iowa*, 143 U. S. 359, Decree at 145 U. S. 519; *Indiana v. Kentucky*, 136 U. S. 479; *Arkansas v. Tennessee*, 310 U. S. 563; *Michigan v. Wisconsin*, 270 U. S. 295; *Arkansas v. Tennessee*, 397 U. S. 88, Decree at 399 U. S. 219.

This Court has also recognized that the litigious solution is sometimes awkward and unsatisfactory and has sometimes deemed it appropriate to emphasize the practical constitutional alternative provided by the Com-

pact clause. In *Hinderlider v. LaPlata Co.*, 304 U. S. 92, 105-106, Mr. Justice Brandeis commented as follows:

> ". . . resort to the judicial remedy is never essential to the adjustment of interstate controversies, unless the States are unable to agree upon the terms of a compact, or Congress refuses its consent. The difficulties incident to litigation have led States to resort, with frequency, to adjustment of their controversies by compact, even where the matter in dispute was the relatively simple one of a boundary. In two such cases this Court suggested 'that the parties endeavor with the consent of Congress to adjust their boundaries.' *Washington v. Oregon*, 214 U. S. 205, 217, 218; *Minnesota v. Wisconsin*, 252 U. S. 273, 283. In *New York v. New Jersey*, 256 U. S. 296, 313, which involved a more intricate problem of rights in interstate waters, the recommendation that treaty-making be resorted to was more specific; and compacts for the apportionment of the water of interstate streams have been common."

The states attempted to settle their boundary problems and differences in 1943 as has been discussed in Plaintiff's Brief in support of her exceptions. Although for many years the Compact apparently seemed to have accomplished its purpose, it now appears that it did not settle the dispute between Iowa and Nebraska as indicated by the evidence submitted in this case. Should the Court refuse to take jurisdiction now to consider the controversy which has developed over the meaning and enforcement of the Compact, it would certainly tend to discourage states from entering into agreements which have previously been encouraged by this Court. This was recognized at an early date in our history by Mr. Justice Baldwin in the case of *Rhode Island v. Massachu-*

setts, 12 Pet. 657, in which the Supreme Court took jurisdiction in a controversy over the boundary between Rhode Island and Massachusetts. The case included a contention that a line between the states had been previously agreed upon and the question of the validity and efficacy of prior agreements was brought into issue. Massachusetts objected to the jurisdiction of the Supreme Court. Mr. Justice Baldwin pointed out that, at the time of the adoption of the Constitution, there were existing controversies between eleven states respecting their boundaries which had arisen under their respective charters and had continued from the first settlement of the Colonies. He then stated at pages 724-726:

> "By the first clause of the tenth section of the first article of the constitution, there was a positive prohibition against any state entering into 'any treaty, alliance or confederation'; no power under the government could make such an act valid, nor dispense with the constitutional prohibition. In the next clause, in a prohibition against any state entering 'into any agreement or compact with another state, or with a foreign power, without the consent of congress; or engaging in war, unless actually invaded, or in imminent danger, admitting of no delay.' By this surrender of the power, which, before the adoption of the constitution, was vested in every state, of settling these contested boundaries, as in the plentitude of their sovereignty they might; they could settle them neither by war, nor in peace, by treaty, compact or agreement, without the permission of the new legislative power which the states brought into existence by their respective and several grants in conventions of the people. If congress consented, then the states were in this respect restored to their original inherent sovereignty; such consent being

the sole limitation imposed by the constitution, when given, left the states as they were before, as held by this court in *Poole v. Fleeger,* 11 Pet. 209; whereby their compacts became of binding force, and finally settled the boundary between them; operating with the same effect as a treaty between sovereign powers. That is, that the boundaries so established and fixed by compact between nations, become conclusive upon all the subjects and citizens thereof, and bind their rights; and are to be treated to all intents and purposes, as the true real boundaries. 11 Pet. 209; s.p. 1 Ves. sen. 448-9; 12 Wheat. 534. The construction of such compact is a judicial question, and was so considered by this court in the *Lessee of Sims v. Irvine,* 3 Dall. 425-54; and in *Marlatt v. Silk,* 11 Pet. 2, 18; *Burton v. Williams,* 3 Wheat. 529-33, &c.

"In looking to the practical construction of this clause of the constitution, relating to agreements and compacts by the states, in submitting those which relate to boundaries to congress, for its consent, its giving its consent, and the action of this court upon them; it is most manifest, that by universal consent and action, the words 'agreement' and 'compact', are construed to include those which relate to boundary; yet that word boundary is not used. No one has ever imagined, that compacts of boundary were excluded, because not expressly named; on the contrary they are held by the states, congress and this court, to be included by necessary implication; the evident consequence resulting from their known object, subject-matter, the context, and historical reference to the state of the times and country. No such exception has been thought of, as it would render the clause a perfect nullity for all practical purposes; especially, the one evidently intended by the constitution, in giving to congress the power of dissenting to such compacts; not to prevent the states from settling their own boundaries, so far as merely affected their

relations to each other; but to guard against the derangement of their federal relations with the other states of the Union, and the federal government; which might be injuriously affected, if the contracting states might act upon their boundaries at their pleasure.

"Every reason which has led to this construction, applies with equal force to the clause granting to the judicial power jurisdiction over controversies between states, as to that clause which relates to compacts and agreements; we cannot make an exception of controversies relating to boundaries, without applying the same rule to compacts for settling them; nor refuse to include them within one general term, when they have uniformly been included in another. Controversies about boundary are more serious in their consequences upon the contending states, and their relations to the Union and governments, than compacts and agreements. If the constitution has given to no department the power to settle them, they must remain interminable; and as the large and powerful states can take possession, to the extent of their claim, and the small and weak ones must acquiesce and submit to physical power; the possession of the large state must consequently be peaceable and uninterrupted; prescription will be asserted, and whatever may be the right and justice of the controversy, there can be no remedy, though just rights may be violated. Bound hand and foot by the prohibitions of the constitution, a complaining state can neither treat, agree, nor fight with its adversary, without the consent of congress; a resort to the judicial power is the only means left for legally adjusting, or persuading a state which has possession of disputed territory, to enter into an agreement or compact, relating to a controverted boundary. Few, if any, will be made, when it is left to the pleasure of the state in possession; but when it

is known, that some tribunal can decide on the right, it is most probable that controversies will be settled by compact.

"There can be but two tribunals under the constitution who can act on the boundaries of states, the legislative or the judicial power; the former is limited, in express terms, to assent or dissent, where a compact or agreement is referred to them by the states; and as the latter can be exercised only by this court, when a state is a party, the power is here, or it cannot exist. For these reasons, we cannot be persuaded, that it could have been intended to provide only for the settlement of boundaries, when states could agree; and to altogether withhold the power to decide controversies on which the states could not agree, and presented the most imperious call for speedy settlement."

This Court also accepted jurisdiction of *Georgia v. South Carolina,* 257 U. S. 516, involving an interpretation of the Beaufort Convention establishing the boundary between those two states; *Massachusetts v. New York,* 271 U. S. 65, involving the Treaty of Hartford; and of *Kentucky v. Indiana,* 281 U. S. 163, involving interpretation of a contract between those states to build a bridge.

As the settlement of complex boundary problems by compact has been encouraged by the Court, it would only seem logical that any disagreement between the states concerning the meaning of such compacts should be decided by this Court in an action between the states as contracting parties.

The length of the Missouri River along the Iowa-Nebraska boundary in 1941 was approximately 190 miles (R. Vol. XII, p. 1728). In 1890 this mileage had been

approximately 210 miles. Prior to 1943, the uncertain status of the boundary and questions of title to lands along the river was applicable to almost the entire length of the boundary. Had the states desired to locate the actual boundary in 1943 it would have obviously been extremely time consuming and expensive. This is particularly so not only in light of the many natural avulsions which had occurred along the Missouri River, but also because of the work of the United States Army Corps of Engineers in physically moving the river into a stabilized channel by the digging of numerous canals and the construction of dikes and revetments. Not only did the Corps cut through bank land in stabilizing the channel, but it also moved the river around islands and bars without washing them away.

As the Master mentioned, much of the evidence in this case concerned the factual history of two areas along the Missouri River. The Nottleman Island area extends approximately three miles along the river and the Schemmel Island area extends approximately two miles. This action was filed in July of 1964, and tried before the Special Master in 1969 so there were approximately five years following the filing of the case during which the parties engaged in extensive discovery and investigatory proceedings primarily involving just five miles of boundary. This is in addition to the independent investigation made prior to the filing of suit. The voluminous files, exhibits, depositions, interrogatories and other discovery proceedings, and the size of the record in this case, bear witness to the time, effort and expense necessary to making any such determination of the former boundary. Had

the states decided to make such a determination for its entire 190 mile length, they might have done so in 1943 but obviously the Compact was intended to avoid this result (SMR 65; see also Summary of Testimony of Victor M. Petersen in PLAINTIFF'S RESUME' OF EVIDENCE BEFORE THE SPECIAL MASTER, pp. 411-417; R. Vol. XIV, pp. 1872-1880; and Exhibit P-1057, R. Vol. XIV, p. 1879).

If the boundary problems were serious enough to be the subject of a compact in the first place, certainly the states have an interest in having the Compact complied with sufficient to require the exercise of jurisdiction by this Court. Iowa's statement that:

> "This case is a 'disputed boundary' case only in the sense that the location of the state boundary which existed prior to 1943 is in dispute" (Iowa's Exceptions, p. 8),

requires the determination of facts which the states attempted to avoid by the Compact. If Iowa's approach is correct, then the Compact becomes meaningless and the problems which existed in 1943 and were considered almost impossible of solution at that time, have just been postponed for an additional twenty or thirty years to such a time as Iowa can acquire the land by relying upon presumptions only, because the facts have become even more clouded and obscured by the passage of time.

Iowa has also made the statement on page 8 of her Exceptions that "Iowa does not seek to exercise sovereignty beyond her own borders or into Nebraska". However, this statement is not in accord with the facts. The

evidence clearly showed, and the Master found, that Iowa's survey of Nottleman Island extended approximately fifty feet into Nebraska (SMR 140) and Iowa's own expert witness, Dr. Lubsen, admitted that Iowa's survey was in error (R. Vol. XV, pp. 2199-2200, 2219-2220; see also R. Vol. IV, p. 451).

Iowa, in the aforementioned statement, also has conveniently avoided the fact that Iowa's descriptions of the boundaries of many of the areas which Iowa is claiming extend into Nebraska. Pursuant to agreement with Judge Pope, while he was Special Master, Iowa agreed to file a list of areas which she is claiming and Iowa furnished maps with these areas outlined (Exhibit P-2651, R. Vol. XII, p. 1656). In addition to Nottleman Island, her maps describing the areas claimed showed that 14 of the 32 areas extended across the Compact line into Nebraska (R. Vol. XII; Ex. P-2653, p. 1663; Ex. P-2654, p. 1674; Ex. P-2655, p. 1696; Ex. P-2663, p. 1712; Ex. P-2664, pp. 1714, 1716; Ex. P-2665, p. 1718; Ex. P-2666, p. 1721; Ex. P-2667, p. 1723). Although Iowa then attempted to justify these descriptions as "merely sketches" (R. Vol. XIII, p. 1813), there is no other way that Nebraska or anyone else is able to determine just what Iowa is claiming until Iowa has made and described her claim. Iowa should be judged not by what she *says* but by what she *does*.

The evidence clearly established serious discrepancies in the manner in which Iowa was surveying the boundary. Iowa's surveyor, Mr. Hart, used different and inconsistent methods in locating the Compact line, sometimes using straight lines of 500 foot chords to establish

his curve when the lines on the bank were also 500 foot chords and at other times adjusting his lines so that the length was different from the length of the chords along the bank. Obviously they had to be of a different length since it is impossible to have two parallel curves formed by straight chords in which the chords are of the same length (R. Vol. XV, p. 2217).

All of Iowa's claims extend to Iowa's concept of where the Compact line is, but the evidence shows that Iowa's methods of locating this Compact line on the ground have been improper, inconsistent and arbitrary. The Master also found that Iowa's traverses along the eastern side of both Nottleman and Schemmel Islands had no basis in fact. They followed no geographical feature marking the left bank ordinary high water mark as contended by the State of Iowa. The Nottleman Island traverse went through water, low swamp, and brush and across flat land (SMR 140). The Schemmel Island traverse went through an alfalfa field, across flat open ground, crossing a high bank at right angles, and across land with no depression or banks (SMR 163). The Master stated that these were apparently arbitrary determinations by Iowa's surveyor without justification in fact (SMR 163). He then added:

> "It is another indication of the lack of precision in the work of the State of Iowa, inadequate investigation and arbitrary approach of her officials" (SMR 140 and 163).

Iowa's repeated statements that she is not claiming land to the west of the Compact line and that all of the land which she is claiming is "in Iowa" must be tested by the

facts and the evidence rather than by what Iowa says. Iowa's utilization of the purported Compact line as the western boundary of the areas she claims further emphasizes that she is relying upon Sections 1 and 2 of the Compact to establish her jurisdiction and her claim of title. But for the Compact, her claims and the problems of establishing her jurisdiction would have to be different.

Iowa has also suggested at page 7 of her Exceptions that the case must be of serious magnitude and fully and clearly proved. Nebraska submits that Iowa's conduct has jeopardized land titles in the entire Missouri River valley along the 190 mile boundary. The Iowa Conservation Commission published Part 1 of the Missouri River Planning Report (Ex. P-2609, R. Vol. I, pp. 87-88)under date of January, 1961 and the case of *Tyson v. Iowa,* 283 F. 2d 802, was decided by the United States Court of Appeals, 8th Circuit on November 16, 1960. Immediately thereafter, Nebraska's legislature, which at that time met biennially, passed Legislative Resolution 38 (Ex. P-1006, R. Vol. XIV, p. 1944) on June 13, 1961 which requested the Board of Educational Lands and Funds to direct the State Surveyor ". . . to make or cause to be made such surveys as may be necessary or helpful in determining the boundary of this state where the same is formed by the Missouri River, or may be necessary or helpful in protecting the interests of this state or the citizens thereof from the direct or indirect claims of other states to lands along the Missouri River; and that such board undertake an aggressive program to obtain and file in its offices such maps, charts, surveys, records and other documents and materials as may be

essential or helpful in determining the boundary or titles to lands along such river, all within the limits of amounts appropriated therefore".

Then at its next session, the Legislature of the State of Nebraska passed Legislative Resolution 47 on May 28, 1963 (Ex. "Q" attached to the Complaint; Ex. P-1005, R. Vol. XIII, p. 1854) directing the Attorney General to examine into Iowa's actions and initiate any necessary original actions in the Supreme Court of the United States to insure compliance by Iowa officials with the 1943 Boundary Compact.

The evidence has also shown that both states have been concerned with the present problems relating to the boundary. Nebraska authorized boundary commissions in 1947 (Ex. P-2234, R. Vol. XIII, pp. 1854-1855); 1957 (Ex. P-2223, R. Vol. XIII, p. 1855 and Ex. P-2235, R. Vol. XIII, p. 1855) and 1959 (Ex. P-2340 and P-2233, R. Vol. XIII, p. 1855). (See pages 43 to 46 of PLAINTIFF'S RESUME' OF EVIDENCE BEFORE THE SPECIAL MASTER). In 1957 the Iowa Legislature created a special committee to confer with the Legislature of the State of Nebraska to make a study concerning the present boundary (Ex. P-2293, R. Vol. XIII, p. 1850; Ex. P-2294, R. Vol. XIII, p. 1849; Ex. P-2295, R. Vol. XIII, p. 1850 and Ex. P-2298, R. Vol. XIII, p. 1849). This act recognized that the Missouri River had been altered and in some instances the entire river "now flows through the State of Nebraska and Iowans do not have access to it except by going through parts of Nebraska".

A report of the Iowa Boundary Commission appears in the 1959 Journal of the House (Ex. P-2297, R. Vol.

XIII, p. 1850) and Journal of the Senate of the State of Iowa (Ex. P-2296, R. Vol. XIII, p. 1850) which report at that time stated ". . . at the present time approximately twenty-six (26) miles of the Missouri River lies west of the established Iowa-Nebraska boundary and wholly within the State of Nebraska whereas approximately thirteen (13) miles of the Missouri River lies wholly east of the Iowa-Nebraska boundary line and is within the boundaries of the State of Iowa, which involves several thousand acres of land". The report also recognized that the boundary as it now exists ". . . no longer, in many instances, follows the middle of the channel of the Missouri River but is wholly an intangible line which may be several hundred feet from the river, thus making it most difficult to ascertain the location of the line, without a survey, which causes difficulty in determining whether the Iowa or Nebraska laws apply in regard to law enforcement, title to real estate and other problems which may arise as to which state has jurisdiction . . ." (Ex. P-2297, R. Vol. XIII, p. 1850). (See also pages 46-56 of PLAINTIFF'S RESUME' OF EVIDENCE BEFORE THE SPECIAL MASTER discussing the evidence concerning the Iowa legislative and governmental history since the Compact).

Bills were proposed in the 1961 (Ex. P-2304, P-2299, R. Vol. XIII, pp. 1850-1851) and 1963 Iowa Legislatures to resolve the dispute between Iowa and Nebraska in regard to the boundary (Ex. P-2306, R. Vol. XIII, p. 1851). A REPORT OF SUBCOMMITTEE OF JUDICIARY 1 appears as a part of Ex. P-2306 which includes the statement:

". . . Ownership of land definitely established prior to changing of the channel would not be affected by changing state statutes, and the Conservation Commission could only acquire title to such land by purchase or condemnation. The right of the Conservation Commission of Iowa to develop such areas which were swamp or waste lands prior to the straightening and stabilizing of the Missouri river is indeed questionable because of the legal questions pointed out above. At least no one has pointed out to the sub-committee that this question has been legally determined . . ." (This report is extensively quoted on pages 51 to 53 of PLAINTIFF'S RESUME' OF EVIDENCE BEFORE THE SPECIAL MASTER).

Some of the statements in the report would seem to cast doubt upon the conduct of the Iowa State Conservation Commission in now asserting title to lands which had been established in private owners prior to the Compact.

The Iowa Governor's Advisory Committee sent a report to the Governor dated December 1, 1964 (Ex. P-2319, R. Vol. XIII, p. 1851) making certain recommendations including:

"That the State of Iowa and the State of Nebraska shall file a friendly suit in the U. S. Supreme Court to establish guide lines to determine title of lands transferred in a boundary compact with reference to individual land owners and claims upon lands by states, and such other questions as the attorneys may desire". (This report is quoted extensively on pages 54 to 56, PLAINTIFF'S RESUME' OF EVIDENCE BEFORE THE SPECIAL MASTER).

The Governor in his Address to the 1965 Iowa Legislature urged the Assembly ". . . to ratify the settlement

of the Iowa-Nebraska Boundary dispute recommended by the boundary committees of both states, in order to settle long-pending questions of land ownership and to open up the Western Slope of Iowa to commercial, industrial and recreational development". (Ex. P-2319, R. Vol. XIII, p. 1850). He added:

> "The settlement of the Iowa-Nebraska Boundary dispute, recommended elsewhere in this message, will open up a vast potential area for wildlife and outdoor recreation in western Iowa" (Ex. P-2319, R. Vol. XIII, p. 1851).

In light of these statements and activities by the Legislatures of the two states, it is difficult to understand Iowa's position in her Exceptions that this case is not of serious magnitude. If the present problems are ever to be solved by a new compact, a determination must first be made of what the existing situation actually is and what effect the provisions of the Iowa-Nebraska Boundary Compact of 1943 had not only upon the boundary itself but also upon the lands adjacent to that new boundary.

There is in evidence no specific legislative sanction of Iowa's legal position in the defense of this case and from the statements of Iowa's Governor and the aforementioned activity of her Legislature, it appears that there may be some diversity of opinion within Iowa's own governmental branches. It is difficult to understand how Iowa can presently take the position that the Special Master is wrong when he stated in his Report that "both Nebraska and Iowa need a construction and an interpretation of the (Compact)" (Iowa's Exceptions, p. 10). There

is ample evidence supporting that statement and the Special Master's findings that ". . . a determination of the meaning and application of the Iowa-Nebraska Boundary Compact is of paramount interest to both states and is essential if the two state's boundary problems are ever to be solved" (SMR 78).

It is submitted that the cases concerning jurisdiction cited by Iowa are not in point. The case of *Hawaii v. Standard Oil Company,* 301 F. Supp. 982, reversed at 431 F. 2d 1282 (cert. granted 401 U. S. 936), did not involve a Compact situation. Even the note in 39 Harvard Law Review 1085 cited by Iowa concludes with the statement, "On the whole, then, the method of settling interstate disputes by original suit in the Supreme Court must be regarded as subordinate to the other method provided in the Constitution, that of compacts".

Iowa has attempted to engage in another battle of words by contending that Nebraska did not "clearly prove" the facts, but the Special Master's findings that Iowa violated the Compact are certainly clear and convincing. A violation is a violation regardless of the descriptive words which might be added. The evidence is overwhelmingly in support of Nebraska's charges of violation of the Compact by the State of Iowa.

Iowa has also suggested that Nebraska should have established the number of citizens adversely affected by Iowa's claiming to own the thirty tracts of land along the boundary (Iowa's Exceptions, p. 10), but Nebraska would point out that Iowa's claims and conduct cloud the titles to all of the lands along the boundary. In fact, Iowa was asked by interrogatory:

> "Describe generally the location of all abandoned channels of the Missouri River presently located in Iowa to which the State of Iowa does not claim ownership".

The answer was:

> "We believe that the entire flood plain of the Missouri River from the hills in Iowa to the hills in Nebraska was once the channel of the Missouri River, hence, the entire flood plain which is not presently occupied by the river may be termed abandoned channel, and this encompasses thousands of acres. There is no practical means of describing even generally the vast portion of the flood plain which Iowa does not claim to own" (R. Vol. XI, p. 1603).

If Iowa is claiming abandoned channels, but admits that the entire area has been at some time occupied by the river, then certainly her claims or the possibility that she may assert such claims at some indefinite time in the future, cloud the titles of all of these lands.

REPLY TO EXCEPTION NO. II OF THE STATE OF IOWA

The Special Master determined that the Iowa-Nebraska Boundary Compact of 1943 required Iowa to recognize that:

> ". . . under the factual situation existing in 1943 and prior thereto, the possessor of a private title to land contiguous to the Missouri River on July 12, 1943, 'good in Nebraska', need not prove that his land was formed on the west side of the pre-1943 river boundary in order to require Iowa to recognize it under Sections 2 and 3 of the Compact" (SMR 164, 173).

Iowa has taken exception to this proposition (Iowa's Exceptions, p. 13).

Iowa's position totally ignores the factual situation which existed in 1943 with regard to which the parties contracted. Iowa has not taken exception to the facts which the Master found concerning the pre-Compact history and the situation along the boundary at the time that the Compact was negotiated (SMR 62-69). The numbered findings 1 through 19 at pages 63-69 of the Master's Report have been referred to in Plaintiff's Brief in support of her Exceptions. These facts make it abundantly clear that the states recognized the boundary was not located in the Missouri River in many places and that the boundary line in those places had not been determined and was almost impossible of determination. They intended to settle all of their problems arising from the indefinite nature of the boundary and the actions of the Missouri River and the Corps of Engineers in channelizing the river. Iowa was making no claim to abandoned river beds or islands under any common law claim of title to beds and abandoned beds of the Missouri River. There were abandoned Missouri River channels and cut-off lakes all along the Missouri River valley and Iowa was making no claim to these abandoned channels. There was nothing of record in the Iowa governmental agencies indicating claims to these areas in spite of requirements of the Iowa Code which would require the state to keep such records. Both states agreed that there was no record of lands actually transferred from one state to the other by the Compact and the states did not provide for the identification of such lands. The Iowa Conservation Commission

did not express any interest in these lands until the latter part of the 1950's. At the time of the Compact, and for more than a decade thereafter, Iowa was paying no attention to the islands and abandoned channels of the Missouri River. The Compact treated all areas generally with recognition to private titles to be given general application. The states really didn't care where the boundary was located but attempted to make a settlement which would lay to rest all of their problems. At that time, there were areas to the left bank side of the Compact line which were being taxed in Nebraska and the local officials of each state and individuals in the vicinity recognized that such areas were originally in Nebraska and were transferred by the Compact. Also, under Nebraska law, a person could obtain title by ten years open, notorious and adverse possession under claim of right without any requirement of a record title. Consequently, there may have been titles to lands east of the designed channel which were in Nebraska or considered as a part of Nebraska to which the individual owner did not have a record title but could have had good title under the Nebraska law of adverse possession.

Another important factor brought out by the evidence is that establishment of titles in the Missouri River valley, all of which Iowa has admitted has been abandoned channel at some time in the past, are subject of an entirely different and more complicated type of evidence than areas which are not affected by the river. These titles do not all flow from a patent but may start in some other manner. They could be described as accretions to any of several differently numbered sections, half sections, or quarter sections as the river moved. They also

could be described by the re-establishment of the original government sections, whether or not this was technically proper, or they might be described as tax lots.

There is in evidence a complete set of maps comparing the location of the designed channel of the Missouri River as referred to in the 1943 Boundary Compact with the original Nebraska government survey (Ex. P-2173, R. Vol. XIII, p. 1803). This exhibit shows the 1943 designed channel in many places several miles from where the river was located when Nebraska was admitted into the Union. Although this exhibit merely shows the difference in the location of the Missouri River between those two dates, it shows that the river moved several miles laterally in many places along its length. This exhibit does not show all of the movements of the river but only the net difference between the two dates, but even this is so substantial as to make the difficult title problems self evident. There is also in evidence a complete set of aerial photographs of the entire length of the Iowa-Nebraska boundary which shows numerous abandoned oxbow lakes and cut-off channels (R. Ex. P-2181, R. Vol. XIII, p. 1801). These movements of the river and the complex title and boundary problems were major reasons establishing the need for the Iowa-Nebraska Boundary Compact of 1943.

The Compact was not adopted in a vacuum but was making reference to an admittedly indefinite and confusing situation. The titles referred to were those in the Missouri River valley.

The Special Master properly took all of these factors into consideration in determining the meaning of the

Compact. In the construction of agreements or compacts, the fundamental rule is to ascertain the substantial intent of the parties and, in making this inquiry, it is proper to examine into the state of things existing at the time and the circumstances under which the agreement was made. The history leading up to the Compact is relevant in determining the proper construction and effect of the Compact as applicable to titles along the Missouri River. In the case of *Chesapeake & Ohio Canal Co. v. Hill*, 15 Wall. 94, the Court had before it the construction of a contract for the taking of water from a canal and Mr. Justice Bradley stated at pages 99-101:

> "The large investment of capital made by the appellee in sole reliance on the water-power which the lease secures, with the full knowledge which the appellants had of this reliance and intended investment, renders it necessary that we should look carefully to the substance of the original agreement, of January, 1864, as contradistinguished from its mere form, in order that we may give it a fair and just construction, and ascertain the substantial intent of the parties which is the fundamental rule in the construction of all agreements. * * *
>
> "* * * And in making this inquiry we have a right to examine into the state of things existing at the time and the circumstances in which the lease was made. This kind of evidence is especially pertinent when the inquiry is as to the subject matter of the agreement."

In determining the subject matter of the Boundary Compact and the titles which should be recognized, it is significant that the Compact was the result of years and years of controversy and uncertainty and a recognition of many cut-offs by the Missouri River, both natural and

man-made, leaving land of each state isolated on the other side. In referring to the construction of an Act of Congress, Mr. Justice Davis stated in *U. S. v. Union Pacific Railroad Co.*, 91 U. S. 72 at 79:

> ". . . The act itself speaks the will of Congress, and this is to be ascertained from the language used. But courts, in construing a statute, may with propriety recur to the history of the times when it was passed; and this is frequently necessary, in order to ascertain the reason as well as the meaning of particular provisions in it. *Aldridge v. Williams*, 3 How. 24; *Preston v. Browder*, 1 Wheat. 120."

In *Sullivan v. Kidd*, 254 U. S. 433, a case involving the construction of a treaty between Great Britain and the United States relating to the tenure and disposition of real and personal property, the Court through Mr. Justice Day stated at page 439:

> "Writers of authority agree that treaties are to be interpreted upon the principles which govern the interpretation of contracts in writing between individuals, and are to be executed in the utmost good faith, with a view to making effective the purposes of the high contracting parties; that all parts of a treaty are to receive a reasonable construction with a view to giving a fair operation to the whole. Moore, International Law Digest, vol. 5, 249."

In *Nielsen v. Johnson*, 279 U. S. 47, a Danish citizen died residing in Iowa, leaving as his sole heir his mother, a resident and citizen of Denmark. Iowa attempted to assess an inheritance tax against the estate and the administrator contended that the tax was void as in conflict with the treaty between the United States and Denmark. The Iowa Supreme Court upheld the statute fixing

the tax as not in conflict with the treaty. Mr. Justice Stone, in considering Iowa's contentions, stated at pages 51-52:

> "The narrow and restricted interpretation of the Treaty contended for by respondent, while permissible and often necessary in construing two statutes of the same legislative body in order to give effect to both so far as is reasonably possible, is not consonant with the principles which are controlling in the interpretation of treaties. Treaties are to be liberally construed so as to effect the apparent intention of the parties. *Jordan v. Tashiro*, 278 U. S. 123; *Geofroy v. Riggs*, 133 U. S. 258, 271; *In re Ross*, 140 U. S. 453, 475; *Tucker v. Alexandroff*, 183 U. S. 424, 437. When a treaty provision fairly admits of two constructions, one restricting, the other enlarging rights which may be claimed under it, the more liberal interpretation is to be preferred, *Asakura v. Seattle*, 265 U. S. 332; *Tucker v. Alexandroff, supra; Geofroy v. Riggs, supra*, and as the treaty-making power is independent of and superior to the legislative power of the states, the meaning of treaty provisions so construed is not restricted by any necessity of avoiding possible conflict with state legislation and when so ascertained must prevail over inconsistent state enactments. See *Ware v. Hylton*, 3 Dall. 199; *Jordan v. Tashiro, supra;* cf. *Cheung Sum Shee v. Nagle*, 268 U. S. 336. When their meaning is uncertain, recourse may be had to the negotiations and diplomatic correspondence of the contracting parties relating to the subject matter and to their own practical construction of it. Cf. *In re Ross, supra*, at 467; *United States v. Texas*, 162 U. S. 1, 23; *Kinkead v. United States*, 150 U. S. 483, 486; *Terrace v. Thompson*, 263 U. S. 197, 223.
>
> "The history of Article 7 and references to its provisions in diplomatic exchanges between the United States and Denmark leave little doubt that its

purpose was both to relieve the citizens of each country from onerous taxes upon their property within the other and to enable them to dispose of such property, paying only such duties as are exacted of the inhabitants of the place of its situs, as suggested by this Court in *Peterson v. Iowa, supra*, p. 174; and also to extend like protection to alien heirs of the non-citizen."

The Court, interpreting the language with "that liberality demanded for treaty provisions" reversed the Iowa Supreme Court's decision. See also *Factor v. Laubenheimer*, 290 U. S. 276 and *Jordan v. Tashiro*, 278 U. S. 123.

Nebraska contends that the Compact should be liberally construed to protect the rights of the individuals owning or claiming lands along the Missouri River because Sections 3 and 4 were obviously inserted for their benefit.

The Compact should not be restrictively construed to enlarge the rights of the states at the expense of the landowners who were not personally parties to the Compact.

Iowa would attempt to avoid any contractual commitments imposed upon her by the Compact by implying that the Compact was limited to the effect of being legislation (See p. 17, Iowa's Exceptions). However, the Courts have always recognized a distinction between reciprocal legislation of states and the contractual commitment imposed by a Compact. This distinction was mentioned by Mr. Chief Justice Hughes in the case of *Massachusetts v. Missouri*, 308 U. S. 1 at 16-17 where the Court stated:

> "But, apart from the fact that there is no agreement or compact between the States having constitutional sanction (Const. Art. 1, § 10, par. 3), the enactment by Missouri of the so-called reciprocal legislation cannot be regarded as conferring upon Massachusetts any contractual right. Each State has enacted its legislation according to its conception of its own interests. Each State has the unfettered right at any time to repeal its legislation. Each State is competent to construe and apply its legislation in the cases that arise within its jurisdiction. If it be assumed that the statutes of the two States have been enacted with a view to reciprocity in operation, nothing is shown which can be taken to alter their essential character as mere legislation and to create an obligation which either State is entitled to enforce as against the other in a court of justice."

Iowa should not be able to relegate the terms of the Compact to the status of mere state legislation. To do so would be to disregard the basic principles of Compact and Constitutional law which have existed in this nation since its founding.

In determining the meaning of such compacts and agreements, it is proper to look at the practical construction placed upon them by the parties. Want of assertion of power by those who presumably would be alert to exercise it is significant in determining whether such power was actually conferred. The State of Iowa delayed for almost twenty years in laying claim to the Schemmel and Babbitt lands (Nottleman Island) and in adopting her program of land acquisition along the Missouri River. An official of the Iowa State Conservation Commission as far back as 1951 stated by letter that Nottleman Island was not state property but belonged to some of the individ-

uals presently claiming it. The Iowa Attorney General's office had notice of these claims of the landowners both in 1947 and again in 1951.

The local governmental agencies recognized these titles and the lands were placed on the tax rolls following the Compact and were being taxed in Iowa. The County officials and taxing officials served in offices created by the statutes of the State of Iowa and their procedures are governed by Iowa statute. At the same time, there was nothing of record in any Iowa governmental agency, including those required by statute to keep records of public and state-owned lands, which indicated a claim by the State of Iowa to these lands; and in some specific situations where Iowa had notice that lands constituted former river beds or abandoned river beds, Iowa's officials failed to take any action to establish Iowa's claim. This course of conduct was consistent with an interpretation of the Compact that all titles along the Missouri River were originally intended to be protected and Iowa had no claim to those lands.

In the case of *Pigeon River Improvement, Slide & Boom Co. v. Cox,* 291 U. S. 138, the Court construed the Webster-Ashburton Treaty along the boundary between Minnesota and Canada and in doing so held it appropriate to look to the practical construction which had been placed upon the treaty. In *Choctaw Nation of Indians vs. U. S.*, 318 U. S. 423, the Court considered Indian treaties concerning the allotment of land to the Indians, and Mr. Justice Murphy said at pages 431-432:

> "* * * Of course, treaties are construed more liberally than private agreements, and to ascertain their

> meaning we may look beyond the words to the history of the treaty, the negotiations, and the practical construction adopted by the parties. *Factor v. Laubenheimer,* 290 U. S. 276, 294-295; *Cook v. United States,* 288 U. S. 102, 112."

The long lapse of time in pressing any claims by the State of Iowa or its Conservation Commission may be significant in determining whether there is any validity to these claims. Mr. Justice Frankfurter, in considering the power of the Federal Trade Commission, stated in *Federal Trade Commission v. Bunte Brothers, Inc.,* 312 U. S. 349 at 351-352:

> "That for a quarter century the Commission has made no such claim is a powerful indication that effective enforcement of the Trade Commission Act is not dependent on control over intrastate transactions. Authority actually granted by Congress of course can not evaporate through lack of administrative exercise. But just as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred. See *Norwegian Nitrogen Co. v. United States,* 288 U. S. 294, 315. * * *"

In *Sullivan v. Kidd,* 254 U. S. 433, 442 Mr. Justice Day stated:

> "While the question of the construction of treaties is judicial in its nature, and courts when called upon to act should be careful to see that international engagements are faithfully kept and observed, the construction placed upon the treaty before us and consistently adhered to by the Executive Department of the Government, charged with the supervision of our foreign relations, should be given much weight."

Nebraska considers it significant that for many years following the Compact, Iowa made no claim to the areas listed in the Missouri River Planning Report with the possible exception of Wilson Island, but the evidence regarding the origination of Iowa's claim to Wilson Island is vague and inconclusive. Iowa did not offer evidence establishing or documenting her utilization of Wilson Island prior to the Planning Report or at the time of the Compact. Except for the discrepancies in her description of areas claimed, Iowa made no claim to any areas west of the Compact boundary either before or after the Compact. She apparently did change her position in 1965 after the filing of this action (R. Vol. XXIV, p. 3574), but the lawyer who had that idea is not with them any more (R. Vol. XXV, p. 3638).

If it is assumed that Iowa's officials were carrying out their duties in administering lands which the state owned, then their failure to claim these lands is certainly consistent with Nebraska's position that Iowa actually had no claim to such areas under the Compact. Statements by Iowa's officials have been referred to in Plaintiff's Exceptions indicating that the Conservation Commission was paying no attention to these lands along the Missouri River. Iowa has attempted to gloss over these facts by citing certain general language from court cases, but the State of Iowa and the Iowa State Conservation Commission officials were not applying any doctrine of state ownership to these specific areas. The Planning Report recognizes that quiet title actions are necessary in almost every area referred to in the Report except those acquired by purchase (Ex. P-2609, R. Vol. I, p. 87-88). The Master's findings that Iowa was not asserting her

ownership claims in 1943 are amply supported by the evidence and by the testimony of Iowa's own officials. Nebraska supports the Master's conclusion that the Compact should be liberally construed so as to leave individuals occupying or claiming river lands secure in their property rights as recognized immediately prior to adoption of the Compact (SMR 88).

Not only did Iowa fail to claim abandoned river channels in the known avulsion of the Flowers Island case, but also as late as 1956 acknowledged that she had no claim of ownership of what was an abandoned channel in that same area in the case of *Kirk v. Wilcox* (R. Vol. XII, p. 1684; Ex. P-2339, R. Vol. XIII, p. 1684; see PLAINTIFF'S RESUME' OF EVIDENCE BEFORE THE SPECIAL MASTER, pp. 349-363). Iowa also failed or refused to claim abandoned channel of the Missouri River in the Walter Pegg area (see PLAINTIFF'S RESUME' OF EVIDENCE, pp. 389-392). She failed to claim land in the abandoned channel around Nebraska City Island which resulted from a cut-off in the 1880's (see PLAINTIFF'S RESUME' OF EVIDENCE BEFORE THE SPECIAL MASTER, pp. 409-411; Ex. P-2689, R. Vol. XIII, p. 1843), and Iowa even purchased some of the land in this abandoned channel which appeared on some of the early Missouri River Commission maps as "River Bed of 1881" (Ex. P-2689, R. Vol. XIII, p. 1843; Ex. D-1159-ABC, R. Vol. XVII, p. 2537 and testimony of Mr. Jauron, R. Vol. XXV, pp. 3653-3658).

The record also shows that Iowa disclaimed ownership of approximately 5,000 acres of land in Harrison County, Iowa, which had originally formed as an island in the bed of the Missouri River and was originally described

as Kirk Bar (see PLAINTIFF'S RESUME' OF EVIDENCE BEFORE THE SPECIAL MASTER, pp. 363-382). Iowa, through its Attorney General and Assistant Attorney General, entered disclaimers to Kirk Bar in 1965 (Ex. P-1755, R. Vol. X, p. 1409) and disclaimed other portions of the area in 1963 (Ex. P-1761, R. Vol. X, p. 1411). This land had not been on the Iowa tax rolls from at least 1949 through December 19, 1967, the date of the deposition of L. C. Myrland, Monona County, Iowa Assessor. Consequently, at the same time that Iowa was claiming the Babbitt and Schemmel areas which she was taxing south of Omaha, she was disclaiming thousands of untaxed acres of former river bed in Harrison County, Iowa. Certainly the law, and the application of the law, should be the same whether it be in Fremont County or Harrison County, Iowa and it should be administered in the same manner all along the boundary.

In 1932, prior to the Compact, Iowa had purchased land in the abandoned river bed of Lake Manawa which is a lake immediately south of Council Bluffs, Iowa (Ex. P-2678, R. Vol. XII, p. 1771; PLAINTIFF'S RESUME', pp. 427-428). This lake formed as the result of a cut-off of the Missouri River which occurred in 1881 constituting another well recognized avulsion. However, Iowa evidently deemed it necessary in the 1930's to purchase some of that abandoned channel, and she did not at that time attempt to obtain it without payment of compensation under any common law doctrines.

In addition, Iowa's inconsistent application of its so-called "law" is illustrated by the testimony of Mr. Lloyd P. Bailey, Superintendant of Land Acquisition

for the Iowa State Conservation Commission. Mr. Bailey was referred to Ex. P-2667 (R. Vol. XII, p. 1723) a Corps of Engineer map which showed the California Bend area, and identified an area which looked like an old river bed considerably to the east of the area in California Bend which Iowa is presently claiming. Although he testified his department now claims former abandoned river channels more than just a year or two old if the evidence is still available, they weren't making any claim to it. He stated:

> "They possibly would have a claim to it, sir, but they aren't claiming it." (R. Vol. XIX, p. 2712).

The Report of the Missouri River Commission for 1890 contains a series of maps under the title MISSOURI RIVER COMMISSION LOCATION OF BORINGS IN THE VICINITY OF BLAIR, NEB., surveyed 1883 by Geo. S. Morison and one of these maps shows the ox-bow area and written in this area are the words "CUT-OFF 1881". (Ex. P-2686, R. Vol. XIII, p. 1843). This cut-off appears as a water and marsh area on the 1947 Corps of Engineer tri-color map (Ex. P-2667, R. Vol. XII, p. 1723) and is located approximately two or three miles east of the present designed channel of the river at various points. This was an easterly bend which cut off area which remained on the Iowa side of the river, but Iowa has made no claim to any abandoned river bed or channel in that 1881 cut-off. In addition, in California Bend, where the Corps of Engineers dredged a canal through Nebraska land prior to the Compact (see PLAINTIFF'S RESUME' OF EVIDENCE BEFORE THE SPECIAL MASTER, pp. 396-405), Iowa failed to claim land in the

abandoned channel resulting from the cut-off dug by the Corps in 1939 (Ex. P-2716, R. Vol. XXVI, p. 3707).

Most of the areas which Iowa eventually claimed were selected by Mr. Jauron, who was given special duty by the Iowa Conservation Commission as Missouri River Coordinator in 1958. His testimony established that personal decisions were made by either himself or individuals in the Attorney General's office concerning whether or not abandoned river beds were ignored or claimed (R. Vol. XXIV, p. 3577). It did make a difference if he found an abandoned river bed whether the river bed was wet or dry, and he didn't believe that he picked out any "dry river beds the year round." (R. Vol. XXIV, p. 3577). He had every reason to believe that at one time the river was in certain areas which were old river ox-bows which were not claimed (R. Vol. XXV, pp. 3599-3600) and Mr. Jauron said the determining factor of the legal department was whether or not they could ever place the river in that location by exhibits (R. Vol. XXV, p. 3600). He testified:

> "Personally, in my mind there's absolutely no doubt that they're old river beds, but to find any exhibits that says they are or any witnesses that says they are, they don't exist." (R. Vol. XXV, p. 3619).

If Mr. Jauron did not suggest an area that Iowa should claim, they did not consider it (Vol. XXIV, p. 3570-3571). If an area was submitted to the Attorney General's office for consideration and the attorney threw the area out, "that was it." (R. Vol. XXV, p. 3642).

From all of this evidence and the testimony of Iowa's Conservation Commission officials, Mr. Schwob and Mr.

Bailey, cited in the Exceptions of the State of Nebraska (Nebraska's Exceptions pp. 4-6) and other references to Iowa's conduct concerning these lands in said Exceptions and Brief, there is ample evidence to support the Master's findings that Iowa was not asserting her ownership claims along the river at the time of the Compact or prior thereto. Obviously, the Iowa State Conservation Commission and Attorney General's office would be in serious trouble with the Iowa citizenry if they actually claimed all of the Missouri River valley along the 190 mile boundary. By carefully selecting areas which she claims, Iowa can acquire them one by one, attacking titles of land owners claiming through Nebraska claims, but disclaiming as against any large Iowa landowners. Nebraska contends that any rule which allows Iowa to selectively pick and choose the areas which she now claims and to disregard others leaves the entire Missouri River valley subject to a rule of men and not of law.

Another incongruous result of Iowa's arguments is illustrated by the situation at Goose Island and Auldon Bar immediately to the south of the Nottleman Island land. The evidence concerning this area is discussed on pages 405 to 409 of PLAINTIFF'S RESUME' OF EVIDENCE BEFORE THE SPECIAL MASTER. It clearly establishes that there were originally two islands in the Missouri River and the Corps of Engineers dredged a canal through the southern part of Goose Island and through the northern part of the island immediately downstream. The southern part of Goose Island and the northern part of the downstream island presently appear as one island or one land mass described as Auldon Bar

which is "in Iowa" as a result of the Compact. The northern part of Goose Island is in Nebraska and the southern part of the downstream island is also in Nebraska as a result of the Compact. In determining Iowa's claim to Auldon Bar, Mr. Jauron made no attempt to determine where the main channel of the river was prior to the construction by the Corps of Engineers in that area (R. Vol. XXV, p. 3637). This points up the fact that it was the design of the Corps of Engineers determining which side of the river lands would be placed upon and then the adoption of the Compact which have ultimately determined which lands Iowa is claiming. Had the Corps reversed the channel and placed the islands above and below Nottleman Island on the east side of the river and Nottleman Island itself on the west side of the river, there would have been no attack upon Mr. Babbitt's title or that of the other owners of Nottleman Island, but the owners of those islands above and below would have been in jeopardy. The same would be true for the Schemmel land. This is such an unjust result that the position of the State of Iowa can hardly be tenable.

Not only did Iowa fail to make any claim prior to the Compact to abandoned channels to the west of the Missouri River which were ceded to Nebraska by the Compact, but following the Compact Iowa made no claim to these abandoned channels or islands placed to the west of the 1943 designed channel. Even if she had any such claim, a state which acquires land in another state can claim no sovereign immunity or privilege with respect to this land and holds such land as a subject and not as a sovereign. See *Georgia v. Chattanooga*, 264 U. S. 472; and

State v. City of Hudson, 231 Minn. 127, 42 N. W. 2d 546. Consequently, Iowa would have lost any rights which she had by her failure to assert claims to those lands to the west. The owners of the northern half of Goose Island and the southern half of the island to the south are free of burdensome claims by the State of Iowa whereas the owners of the portions of those islands which were placed in Iowa are subject to such burdens. This, again, appears to be unjust and unfair.

Iowa's complete disregard of the language of the Compact also becomes apparent when she continues to fall back upon the common law presumptions that the prior river movements have been gradual and imperceptible so as to constitute movements by accretion and not by avulsion. Iowa has again misstated the facts when she states at page 21 that as of July 12, 1943 the Missouri River was flowing in the designed channel along the entire length of the boundary. The testimony and evidence really showed that 2,000 feet of the river were not in the designed channel in 1943 (R. Vol. XII, p. 1658).

The maps upon which the Compact was based were all dated approximately three years prior to the Compact and show the designed channel north of Omaha going through islands, bar, and bank land at various places. In spite of this and in spite of the evidence concerning the fifteen canals dredged by the Corps and recognition of other areas having been cut-off by the Missouri River, Iowa still wants to rely upon the common law presumptions that all of the prior movements of the Missouri River were gradual and imperceptible. This presumption can only work to Iowa's benefit because of the passage of

time, loss of witnesses and destruction of records, if the burden is placed upon a landowner to determine that the river moved in some other manner. The unfairness of this approach is illustrated in the case of *State of Iowa v. Schemmel* where Iowa called only two witnesses, one a surveyor and the other Mr. Huber who also testified before the Special Master and whose testimony will be referred to later (R. Vol. XXIV, pp. 3581-3582). Iowa's counsel, in his opening statement to the District Court of Fremont County, Iowa, stated:

> "We expect the Court will be satisfied that there was no avulsion to cause the state boundary to be any place other than the thalweg in this particular area.
>
> "In the first instance, we are simply going to rely on a presumption concerning avulsions. Perhaps the Court is acquainted with the fact that one claiming an avulsion has the burden of proving; and therefore, we have no proof except incidental proof that there was no avulsion in the first instance, being our intention to rely on the presumption in the first instance, at least." (Ex. P-1658, R. Vol. XIII, p. 1864).

Yet, at the same time, Iowa had knowledge that the Corps of Engineers had dug a canal to place the river into the designed channel adjacent to Schemmel Island on the west. There are in evidence the following interrogatories to Defendant and Defendant, State of Iowa's answers:

> "Interrogatory 233, 'Was a canal dug by the United States Army Corps of Engineers in the year 1938 in the vicinity of Otoe Bend and the land involved in the case of Iowa versus Schemmel?'
>
> "'Answer. Yes.'

"Interrogatory 235, 'If the answer to Interrogatory No. 233 was 'Yes,' state in which state the canal was dug.

" 'Answer. Nebraska.' " (R. Vol. VII, p. 927)

The evidence clearly shows that the states recognized the fact that the boundary was not in the Missouri River at many places and such places were very difficult of determination, and this constituted a reason for the Boundary Compact. This agreement certainly destroyed, by contract, any presumption that the boundary was in the river. If Iowa can still rely upon such a presumption, by merely waiting until evidence has been lost, destroyed or disappeared, Iowa can assure that she will be successful in these law suits. Such a situation is completely unfair and inequitable and Nebraska contends could not possibly be the result of the Compact.

Nebraska submits that the Compact is clear and convincing that titles which were recognized as good in Nebraska were to be recognized as good in Iowa, and when considered in the context in which the Compact was adopted, requires that Iowa recognize all of these titles emanating from Nebraska without regard to the actual location of the pre-1943 boundary. The states could have decided to enter into an original action in this Court to determine the location of the boundary all along the 190 mile length but obviously this would have been time-consuming and expensive. Iowa's position would now require that these determinations be made, thus recreating the uncertainty which existed in 1943 but compounding the problems of the land owners because of the passage of an additional 20 to 30 years.

Iowa's reliance upon the presumption also is inconsistent with the recognition in Part 1 of the Missouri River Planning Report that:

> "The past violent fluctuations in river water levels have been so frequent that changes in channels, bank location, sand bars, etc., made it virtually impossible to describe the state boundary or to determine land ownership on the Iowa side . . ."

This Report constitutes the present policy of the State of Iowa (R. Vol. XI, p. 1593).

The Compact changed the boundary; it also had to change the presumptions and the common law. Iowa has asked the Court to hold that the parties now have to prove what they agreed they did not want to do or have to do in 1943. If the states did not want to take the time and expense of determining the boundary in 1943, why should they be able to require private landowners to prove this pre-1943 Boundary because of the change in Iowa's conduct?

REPLY TO EXCEPTION NO. III OF THE STATE OF IOWA

Iowa also excepted to that portion of the Master's proposed rule that:

> "In any proceeding between a private litigant and the State of Iowa involving a claim of title good under the law of Nebraska, alleged to have been ceded to Iowa under Sections 2 and 3 of the Compact and contiguous to the Missouri River on the Iowa side, the State of Iowa shall not invoke its common law doctrines either as a plaintiff or as a defendant." (Iowa's Exceptions, p. 25).

Here, again, Iowa is ignoring the agreement which she entered into in 1943. Her position seems to be that all that the two states did was draw a new line so that she could claim title because she thereafter had jurisdiction. Obviously, this was not the case, because Sections 3 and 4 were added as integral parts of the agreement and the Iowa Act, which was adopted first, insisted in Section 5 that the Nebraska Act must contain provisions identical with those contained in Sections 3 and 4 but applying to lands ceded to Nebraska. Today, Iowa would effectively ignore Sections 3 and 4.

The case of *U. S. v. Chaves,* 159 U. S. 452, involved claims to certain lands in New Mexico under a claimed Mexican land grant with the original grant papers having subsequently been lost. The United States denied that such a grant was ever made. The Court of Private Land Claims which had adjudged the title of the claim to be good and valid had been established by an Act which provided that all proceedings should be conducted as near as may be according to the practice of the courts of equity of the United States and that the Court was to settle and determine the question of the validity of title and boundaries of the grant or claim according to the law of nations, the stipulations of the treaty between the United States and Mexico, and the laws and ordinances of the government from which it is alleged to have been derived. Mr. Justice Shiras, in delivering the opinion of the Court, stated at page 457:

> "The first rule of decision thus laid down by Congress for our guidance is that we are to have regard to the law of nations, and as to this it is sufficient to say that it is the usage of the civilized nations of

the world, when territory is ceded, to stipulate for the property of its inhabitants. *Henderson v. Poindexter,* 12 Wheat. 530, 535; *United States v. Arredondo,* 6 Pet. 691, 712; *United States v. Ritchie,* 17 How. 525.

"We adopt the language of Chief Justice Marshall, in the case of *United States v. Percheman,* 7 Pet. 51, 86, as follows: 'It may not be unworthy of remark that it is very unusual, even in cases of conquest, for the conquerer to do more than to displace the sovereign and assume dominion over the country. The modern usage of nations, which has become law, would be violated; that sense of justice and of right which is acknowledged and felt by the whole civilized world would be outraged, if private property should be generally confiscated and private rights annulled. The people change their allegiance; their relation to their ancient sovereign is dissolved; but their relations to each other and their rights of property remain undisturbed. If this be the modern rule, even in cases of conquest, who can doubt its application to the case of an amicable cession of territory?'"

Sections 3 and 4 were included for a purpose which the Master properly found was to secure the people along the Missouri River in their rights and to give them protection from the states in whose jurisdictions the property would lie after the Compact insofar as claims emanating from such other state were concerned. The Compact was intended to leave the individuals secure in their property rights as recognized immediately prior to its adoption, at which time Iowa was not contesting these property rights (SMR 88).

Iowa's approach and her zeal to acquire lands without compensation is again illustrated at page 25 of her

Exceptions where she complains that such a rule would bar Iowa from "asserting that the sovereign State of Iowa cannot lose its title as a result of adverse possession by a private individual." If Iowa is correct, then there is no statute of limitations along the Missouri River and at some time in the future, Iowa can assert claims to lands in the entire Missouri River valley, which Iowa has admitted have been at one time or another the bed of the Missouri River.

Iowa also wants to now assert her ownership under a common law claim of title to beds and abandoned beds but the evidence has clearly shown that she has not done this consistently. It is the application of the law by Iowa's officials and the fact that individuals have been determining how it is to be applied which, in part, has created such unfairness and injustice in the Missouri River valley. Iowa has no excuse or justification for her failure to claim lands in certain abandoned channels along the Missouri River or for her disclaiming certain areas which were islands arising in the Missouri River. The areas which Iowa selected to claim were based upon judgment by individuals in the Conservation Commission and from the Attorney General's office. The evidence has shown how inadequately the Schemmel and Nottleman Island areas were researched and how Iowa did not investigate the county records or even talk to the landowner claimants before filing suit. Some of Mr. Jauron's investigation is described in more detail in PLAINTIFF'S RESUME' OF EVIDENCE BEFORE THE SPECIAL MASTER, pages 510-530.

With the admitted uncertain status of boundaries and land titles in the Missouri River valley, anyone can create a question concerning how land areas were formed. However, in most instances the statutes of limitation or equitable defenses will have decided the question as between private individuals because, as to those areas in existence in 1943, more than 27 years have passed since the Compact. However, if Iowa is to be immune from such defenses which are applicable against private individuals, as she has contended in her Exceptions, then by merely waiting until the evidence is destroyed or obscured by the passage of time and relying upon the common law presumptions, she can effectively deprive the landowner of his ability to defend his claim. However, at the same time, Iowa must rely upon the Compact boundary to establish her jurisdiction and, once she has established this jurisdiction, she uses the jurisdiction to create her claim of title. Nebraska submits that this is completely unfair, inequitable, and leads to such oppressive and unjust consequences, that the Compact should not be read to allow such a result.

Although Iowa has stated at page 16 of her Exceptions that:

> "His finding that Iowa was not asserting her ownership claims in 1943 and prior is clearly erroneous.",

she has apparently retreated from that position at page 28 where she states:

> "We can understand why the Special Master might feel that the State of Iowa was not doing enough in and prior to 1943 to assert, protect, de-

> fend and develop her state owned areas. But the record made before the Special Master clearly establishes that it was erroneous for him to find that Iowa was doing nothing."

The Master found with regard to Iowa's claims to abandoned beds and islands arising in the Missouri River under common law, that:

> "Any application of the principle by the State of Iowa at or prior to the Compact amounted to nothing more than lip service to a principal (sic) without any application to the specific factual situation which existed . . ." (SMR 64).

In addition, even though Iowa contends that she was following her common law doctrines, all the evidence indicates that she was not claiming any of the areas in the Planning Report south of Omaha which were in existence in 1943 so she was not applying her doctrine to these areas. Iowa's application of her common law doctrines based upon the judgment, whim or caprice of her officials has resulted in such tremendous injustice to the farmers along the boundary.

The Master examined all of the evidence and observed the witnesses, and Iowa is grasping for straws when she attempts to show that she was making claims at the time of the Compact or for more than a decade thereafter similar to those made in Part I of the Missouri River Planning Report. Nebraska submits that Sections 3 and 4 were included in the report to prevent Iowa from taking such a position and perpetrating such a great injustice against the former Nebraska landowners.

Iowa has attempted to justify her lack of action on the grounds ". . . that said lands and the river itself

were so unstable that protection and development were impossible" (Iowa's Exceptions, p. 29). However, it should be pointed out that the landowners did develop and occupy these lands. Nebraskans had lived upon and farmed Nottleman Island from 1929 up until the time of the Compact and the Schemmels had protected their ownership of the area and were doing so at the time of the Compact. The river was almost completely stabilized south of Omaha in 1943 and these areas were in existence but with no claim being made by Iowa. According to an article in 42 Iowa Law Review 58 (SMR 89) the Iowa Courts had made no determination that the State of Iowa would have a right to sandbars or new lands added to the territorial domain of Iowa through the process of avulsion or by stabilizing work done by the Corps of Engineers. The article indicated such claims may develop on account of the substantial amount of new land that would be added to Iowa by reason of such channel stabilization work and the determination of the state boundary along the center line of such stabilized channel. It was following this article that Iowa's activities and claims began (SMR 89-90). The evidence established that Iowa's claims were motivated by the fact that Iowa finally recognized that the lands were of substantial monetary value (SMR 101-102; R. Vol. XIII, pp. 1863-1864).

Nebraska would again point out that there were many obvious abandoned channels or ox-bow lakes several miles from the Missouri River and these areas were developed by private individuals prior to 1943 with no claim having been made by the State of Iowa. It simply is not

true that protection and development of many of these abandoned channels was impossible.

Nebraska does not dispute the fact that the areas were subject to flooding and the Missouri River was unstable prior to the construction work by the Corps, but this did not stop development of the Missouri River valley by individuals. Iowa's excuse for her inaction is flimsy and after the fact. Her conduct in 1943 and for approximately 18 years thereafter is more consistent with the fact that she had no claim to these specific areas.

Certainly if Iowa had been taking the position in 1943 that the areas which she claims in 1961 as described in the Planning Report were owned by Iowa because they were located in Iowa, it is obvious that Nebraska never would have agreed to a new boundary line which could result in Iowa's obtaining title to these areas as against the Nebraska claimants. In fact, the Master found that there was nothing in the history or negotiations leading up to the Compact indicating that Iowa ever intended to protect herself in the making of future claims of common law ownership to islands or abandoned beds of the Missouri River then in existence as against private title claimants (SMR 64).

Iowa has also attempted to justify her conduct by arguing that her "laws" must have equal application to all lands within her boundaries. However, she has overlooked entirely the fact that her boundary to the east, which is the middle of the main channel of the Mississippi River, is now entirely different from her boundary to the west, which was changed by the Compact. This

Compact is specific in requiring Iowa to recognize titles and in proscribing Iowa's conduct. There is no question but what Iowa can limit herself in the exercise of her powers. As was stated by Mr. Chief Justice Hughes in *U. S. v. Bekins*, 304 U. S. 27, at 51-52:

> "• • • It is of the essence of sovereignty to be able to make contracts and give consents bearing upon the exertion of governmental power. This is constantly illustrated in treaties and conventions in the international field by which governments yield their freedom of action in particular matters in order to gain the benefits which accrue from international accord. 1 Oppenheim, International Law, 5th ed. §§ 493, 494; 2 Hyde, International Law, § 489; *Perry v. United States*, 294 U. S. 330, 353; *Steward Mach. Co. v. Davis*, 301 U. S. 548, 597. The reservation to the States by the Tenth Amendment protected, and did not destroy, their right to make contracts and give consents where that action would not contravene the provisions of the Federal Constitution. The States with the consent of Congress may enter into compacts with each other and the provisions of such compacts may limit the agreeing States in the exercise of their respective powers. Const. Art. 1, § 10, subd. 3; Poole v. Fleeger, 11 Pet. 185, 209; Rhode Island v. Massachusetts, 12 Pet. 657, 725; Hinderlider v. La Plata River & C. C. Ditch Co., post 92. • • •"

Nebraska submits that the law of Iowa is what the Compact determines it to be, not what Iowa officials and Iowa Courts might declare it to be without regard to the Compact. Her commitment to Nebraska was contractual in nature and was binding not only upon her legislature but upon her executive and judicial branches as well.

There is nothing "implied" about the mandate to the State of Iowa in Sections 3 and 4 of the Compact. It is expressly stated and, when considered in the context in which adopted, the Compact had to supersede Iowa's common law and require that she recognize Nebraska titles to the bed of the Missouri River, and bars and islands arising in the bed as well as titles to those areas in existence which she was not claiming.

REPLY TO EXCEPTION NO. IV OF THE STATE OF IOWA

Iowa, in taking exception to that part of the Special Master's Report where he adjudges that the State of Iowa does not own Nottleman Island and recommends that Iowa be enjoined from claiming it, has suggested that Nebraska selected the two areas along the river as to which she would adduce detailed evidence to establish private ownership, where the evidence is the strongest (Iowa's Exceptions, p. 33). It must be pointed out that Iowa selected the areas which she was claiming and Iowa filed the quiet title actions in the Iowa state courts. The Schemmel trial commenced in the District Court of Fremont County, Iowa in July of 1964 just a few days after Nebraska filed her Complaint. It was Iowa which was pushing the case to trial and Nebraska had no control over Iowa's conduct.

Although Nebraska contends that the evidence has conclusively established in both the Nottleman Island and Schemmel Island areas that there were titles good in Nebraska at the time of the Compact which Iowa must

recognize, it took diligent effort by the Nebraska State Surveyor's office and Nebraska counsel extending over a period commencing in 1963, prior to the filing of the case in 1964, through trial of the case in 1969 in order to collect the evidence establishing the factual history in the Nottleman and Schemmel Island areas. The Master found that such a study is time consuming and expensive (SMR 118, 155). However, in the California Bend area (see PLAINTIFF'S RESUME' OF EVIDENCE BEFORE THE SPECIAL MASTER, pp. 396-405) and in the Winnebago Bend or Flowers Island area (see PLAINTIFF'S RESUME' OF EVIDENCE BEFORE THE SPECIAL MASTER, pp. 349-363), the evidence which is still available from the records of the Corps of Engineers and the public records are such that proof that the river was entirely in Nebraska at the time of the Compact and that Iowa is now claiming "ceded land" in those two areas can be established by much fewer documents than was required in the Schemmel and Babbitt cases. In addition, the dredging of canals entirely in Nebraska by the Corps of Engineers in both places and the fact that the case of *United States of America, Trustee and Guardian for the Winnebago Tribe of Indians, Plaintiff v. Wilbur Flower, et al.*, had been decided in the United States District Court, District of Nebraska, Omaha Division in 1937 (Ex. P-2661, R. Vol. XII, p. 1677) provided evidence of avulsions prior to the Compact leaving the river entirely in Nebraska without the necessity of the long historical study required in the Nottleman Island and Schemmel Island cases. Iowa was a party to the case of *U. S. v. Flower* for a time and she necessarily had to have been aware of the determination

in that case (Ex. P-2661, R. Vol. XII, p. 1677; see PLAINTIFF'S RESUME' OF EVIDENCE BEFORE THE SPECIAL MASTER, pp. 349-363). That case was appealed to the Circuit Court of Appeals, 8th Circuit, which entered an opinion captioned *United States v. Flower, et al.*, 108 F. 2d 298 (December 27, 1939). In 1938 at California Bend, the Corps condemned an easement in Nebraska in which to place the designed channel (Ex. P-2670, R. Vol. XII, p. 1724; see also PLAINTIFF'S RESUME', pp. 396-405). Iowa's statements concerning the selection of the Nottleman Island and Schemmel Island areas about which extensive evidence was offered are completely without foundation.

Nebraska will comment concerning Iowa's statements about the date of formation of Schemmel Island in the next section of this brief. Insofar as the date of formation of Nottleman Island, Iowa has overlooked the fact that there were trees found on Nottleman Island to the west of the 1890 thalweg according to the 1890 Missouri River Commission map (Ex. P-718, R. Vol. IV, p. 346) which commenced growth in 1900, 1919, and 1913 (see PLAINTIFF'S RESUME' OF EVIDENCE BEFORE THE SPECIAL MASTER, pp. 142-147; Ex. P-726, R. Vol. III, p. 361; SMR 136). The Master, commencing at page 134 of his Report, has summarized the history of the movement of the river in the Nottleman Island area and the record amply supports these findings.

At pages 33-34 of Iowa's Exceptions, Iowa referred to certain statements of the Special Master from the bench in an attempt to show lack of decision upon the part of the Master with regard to the amount of evidence adduced

to establish that Nottleman Island formed in Nebraska. Nebraska would point out that careful analysis of the statements referred to by Iowa in the Transcript of Oral Arguments are not in the nature of holdings at all but are in the nature of discussion and are designed to bring out argument and clarify positions and facts. In addition, all that Nebraska would have had to do was establish that the boundary was to the east or left bank side of Nottleman and Schemmel Islands in order to prove that the land formed in Nebraska. There would have been no necessity to locate the actual line as the location of the former line may be more complicated than the determination of which state the land formed in. It is the Master's findings which constitute his decision. It is unfair to him to attempt to impeach these findings by citing comment from the bench during argument which may well have been intended only to elicit discussion and the position of the parties.

No matter how the Master characterized the evidence, he found the facts establishing that Iowa violated the Compact in both the Nottleman Island and Schemmel Island areas and there is no equivocation in his adoption of these findings. In fact, at page 118 of his Report he mentioned that "There is in evidence a considerable volume of records substantiating these facts (Nebraska exercises of jurisdiction prior to the Compact) which again illustrates the tremendous amount of research, effort and expense in the collection of this type of data from old records in order to establish a factual situation which was well recognized between 30 and 40 years ago." (SMR 118). At page 133 he found that the evidence " . . . would seem to be conclusive that this was in Nebraska prior to the

Compact". (SMR 133). A similar statement was made with regard to the Schemmel land (SMR 155).

The Master's findings of fact concerning Nottleman and Schemmel Islands on pages 112 through 163 are unqualified if it is necessary for the Court to reach those findings.

Iowa has suggested at page 35 of her Exceptions that it is undisputed that the main channel was west of Nottleman Island in 1943. In and of itself, this statement is meaningless because the evidence shows that the reason the river was west of Nottleman Island at that date was because the Corps of Engineers stabilized the channel and placed the river there. The work of the Corps in moving the river from the east side to the west side of Nottleman's Island is described by the Master in his findings at pages 138 to 140 and the evidence and testimony is summarized in PLAINTIFF'S RESUME' OF EVIDENCE BEFORE THE SPECIAL MASTER at pages 134 to 142. Iowa would overlook completely that the Corps of Engineers transferred the channel of the Missouri River from the east side to the west side of Nottelman Island without washing away the island. This constituted an avulsion and the Iowa-Nebraska boundary immediately prior to the adoption of the Compact remained in the east abandoned channel of the Missouri River (SMR 139).

Nebraska submits that the precise location of that abandoned channel is not critical since the entire island was in Nebraska immediately prior to the adoption of the Compact. The only countering argument which Iowa has is the presumption favoring accretion as against avul-

sion. This presumption was clearly and conclusively rebutted by the mass of evidence and the Master further recognized that Iowa's witnesses had only a casual acquaintance with the situation and indicated a lack of familiarity with the Missouri River in the Rock Bluff vicinity (SMR 137).

Iowa is again in error at page 36 of her Exceptions when she has suggested that there is no evidence that Mr. Fitch, Cass County, Nebraska County Surveyor, surveyed the island in 1933 in his official capacity. Plaintiff would point out that this survey bears the legend "R. D. Fitch, Jr. Co. Surveyor" and the survey was filed of record in the Office of the Register of Deeds of Cass County, Nebraska (Ex. P-735, R. Vol. III, p. 409) and was also recorded in the County Surveyor's Office of Cass County, Nebraska (Ex. P-2345, Vol. IV, p. 431).

The land was separately taxed in Nebraska in 1934 following this survey, but this is not to say that it was not included as accretion to Nebraska bank lands at prior dates under the descriptions of those riparian sections. Iowa claims that the period of exercise of dominion by Nebraska was too brief and there was no evidence of knowledge on the part of the State of Iowa or its officials that Nebraska was exercising dominion in any manner. The critical facts are that, at and prior to the Compact, the Nottleman Island area had been occupied by Nebraskans; this occupancy was adequately documented of record in Nebraska; it was common knowledge in the Rock Bluff area and Plattsmouth vicinity that the residents of Nottleman Island were considered Nebraska citizens; none of the witnesses who testified concerning formation testified

that it was Iowa land or considered to be in the State of Iowa prior to the compact (SMR 118); and there were deeds of record in the Office of the Register of Deeds of Cass County, Nebraska (SMR 118-119). In addition, there was a quiet title action in the District Court of Cass County, Nebraska in 1940 quieting title to the north half of Nottleman Island (SMR 119; Ex. P-462, R. Vol. III, p. 415). The south half of the island was included within the Estate of John Nottleman and within the property probated in the County Court of Cass County, Nebraska and was sold at public sale pursuant to proceedings in the District Court of Cass County, Nebraska in 1941 (SMR 119-120; Ex. P-463, R. Vol. I, p. 50). THERE WERE TITLES TO NOTTLEMAN ISLAND WHICH WERE GOOD IN NEBRASKA AT THE TIME ADOPTION OF THE COMPACT. They were documented by the public records but Iowa apparently has ignored all of these public records.

Nebraska suggests it is highly significant that Iowa contracted in light of the existing situation concerning land titles when she entered into the Compact and she recognized and agreed to respect this situation. In addition, Iowa's officials were not taxing the land or asserting any exercises of jurisdiction over it (SMR 120-121) and there was testimony that the Iowa school officials would not let children living on the island go to school in Iowa (R. Vol. VI, p. 794; SMR 117). This was the type of situation which was in existence when the two states agreed to recognize titles good in Nebraska. As the Master found, had the states investigated the status of Nottleman Island at that time, they could have come to no other conclusion

than that it was considered to be a part of the State of Nebraska and was considered as being within the category of "ceded" lands transferred to Iowa by the Compact (SMR 121).

In addition, Iowa appropriately glosses over the fact that officials of her Conservation Commission specifically disclaimed any ownership of the island in 1951 (SMR 130; Gillilland Deposition Ex. 5, R. Vol. I, p. 127; Ex. B-3, R. Vol. I, p. 156). Iowa's Attorney General had notice of the situation at Nottleman Island in 1946 (R. Vol. II, pp. 255-257; Gillilland Deposition, Ex. 1, R. Vol. I, p. 121) and again in 1951 (R. Vol. 124, pp. 124-125). The owners successfully brought a lawsuit requiring that the land be placed on the tax rolls in Iowa in 1946 in an action against the county officials in the District Court of Fremont County, Iowa (Gillilland Deposition, Ex. 1, R. Vol. I, p. 121), and in 1961 Mr. Babbitt brought an action attempting to have his real estate taxes lowered and the District Court of Fremont County, Iowa, again found that Mr. Babbitt had title (Ex. P-171, R. Vol. I, p. 71).

All of the evidence following 1943 shows that the Iowa county officials as well as the Iowa State Tax Commission, in levying inheritance taxes upon owners of portions of Nottleman Island who died following the Compact, recognized the private ownership claims. The land was being taxed in Iowa at the time of the suit at the same time that the State of Iowa was attempting to take it away from the private owners. All the facts establish just plain recognition of the owners' titles by Iowa.

Iowa also has suggested that there were no valuable improvements placed upon Nottleman Island but Nebraska

would point out that the land had been cleared at considerable expense and made valuable farm land, and Mr. Babbitt built good lots and fences, loading chutes and made hog pastures upon it (R. Vol. I, p. 59). Babbitt also put an Inland Steel Bin on the island and mortgaged it to the Commodity Credit Corporation (Ex. P-486, R. Vol. I, p. 81). At one time, he had a cabin on the land (Ex. P-1850, R. Vol. II, p. 240). Mr. Babbitt testified that after what it had taken for living expenses: "I put every dollar I ever made in this farm to make a good farm of it." (R. Vol. I, p. 76).

Iowa suggests at page 39 that the issue of ownership as between the private owners and the State of Iowa is an issue properly triable in the state courts of Iowa, that being the state in which the island is located. This completely disregards Iowa's agreement in the Compact to recognize the ownership and the fact that the only reason that Iowa can take the position that the land is "in Iowa" is because the Compact placed it there. Obviously, Iowa wants to try these cases in her own courts by her own rules in total disregard of her contractual commitment. Iowa would overlook the fact that her courts are bound by the Compact just as much as her executive and legislative branches are bound.

REPLY TO EXCEPTION NO. V OF THE STATE OF IOWA

Defendant excepted to that part of the report wherein the Master adjudged that the State of Iowa does not own Schemmel Island and recommending that Iowa be

enjoined from claiming Schemmel Island (Iowa's Exceptions, p. 41). There are evidently printing errors in Iowa's statement of Nebraska's position on page 41 of Iowa's Exceptions and it does not accurately reflect that position. There is little doubt, as Iowa says, that the facts of the formation of Nottleman and Schemmel Islands are different. However, all of Iowa's discussion concerning the date of commencement of formation of Schemmel Island overlooks completely the fact that the river was entirely in Nebraska at all times following 1905. The Master found that the Missouri River had developed an easterly bend and by 1900, the river had moved easterly to a location later called the Iowa Chute by the area residents, approximately two miles east in some places of where the river was originally and where the designed channel is today (SMR 156). Between 1900 and 1905, the Missouri River cut through the bend or point bar, leaving Nebraska land on the left bank of the Missouri River located between the Iowa Chute and the 1905 location of the river. This movement constituted an avulsion, leaving the Iowa-Nebraska State boundary in the abandoned channel described as the Iowa Chute until 1943 (SMR 156). The Master found that there was physical evidence in support of this avulsion by the location of a tree which commenced growing in 1895 on the Nebraska or right bank (SMR 157). This tree survived the movement of the river to the west, thus providing physical evidence that the river had not moved back gradually or by accretion.

In the case of *McCafferty v. Young,* 144 Mont. 385, 397 P. 2d 96, 99-100, the Court considered the evidence of trees in determining an avulsion and said:

> "While it is true, as counsel for defendant contends, that it is presumed that changes in river banks are due to accretion rather than avulsion (Wyckoff v. Mayfield, 130 Ore. 687, 280 P. 340), that rule does not apply where there is evidence of avulsive change. We think the evidence showing the age of trees lying between the former channel and the new channel precludes any conclusion that the lateral migration of the river was slow and imperceptible. The witness Hamre, who was the Helena National Forest Supervisor, testified that the trees lying on the land between the two channels were 70 to 80 years in age and still growing. Had the lateral migration of the river been gradual the soil supporting the roots would have been eroded and the trees would have been washed out. Instead, this physical evidence demonstrates that those trees have remained strong since at least 1880 or 1890. The question is one of fact, and the trial judge found there had been an avulsive change. We feel there is ample and credible evidence to support that finding, and, therefore, it will not be disturbed. Rumsey v. Spratt, 79 Mont. 158, 255 P. 5."

In addition, the earlier movements of the Missouri River were analyzed and discussed by Nebraska's expert geologist, Dr. William Gilliland, who the Master described as "an eminent and well qualified expert in the field of geology" (SMR 157). Dr. Gilliland testified that the river could not have moved back from the east to the west in any manner other than by an avulsive change (R. Vol. XI, p. 1557). His explanation, as the Master properly found, is consistent with the theories utilized by the Corps of Engineers in their construction work along the river and is consistent with the basic geological data submitted (SMR 159). There was also eye witness testimony that in 1911 or 1912 the river made a

natural jump to the west in the Schemmel area, leaving an area three miles long and a mile wide (SMR 159, R. Vol. VIII, p. 1062). At all times from 1905 until the adoption of the Compact, the Missouri River was entirely within the State of Nebraska.

The Corps of Engineers dug a canal in the designed channel at Otoe Bend in 1938 which Iowa admitted was dug in the State of Nebraska. Photographs are in evidence showing the area and trees which were cut off by this canal, and the testimony by one of the surveyors who worked on the canal was that when it was staked out, they walked to the area from the Nebraska side and did not cross any water (SMR 161, R. Vol. IX, p. 1163). This tree area which was cut off from the right bank by the canal appears on the left bank of the designed channel on the Alluvial Plain maps referred to in the Compact (Ex. P-230, R. Vol. VII, p. 914). This canal bisected land acquired by Henry Schemmel and resulted in Mr. Schemmel's owning land on both sides of the Missouri River. The designed channel of the Missouri River is now located where the canal was dug (see PLAINTIFF'S RESUME' pp. 255-318). Even if the canal had been dredged within the low banks it would have constituted an avulsion (see *Uhlhorn v. U. S. Gypsum Company,* 366 F. 2d 211 (8th Cir., 1966), cert. den. 385 U. S. 1026). This canal, however, did not seem to deter Iowa from claiming title to Mr. Schemmel's land in reliance upon the presumption that the movement of the Missouri River into the designed channel in Otoe Bend had been gradual and imperceptible. It is incredible that this type of conduct could be sanctioned under the terms

of the Compact requiring Iowa to recognize titles *good* in Nebraska.

Iowa has attempted to infer that the evidence establishes that the Schemmel title was not "good" coming from Nebraska but Iowa completely ignored the fact that the Schemmels were parties to two quiet title actions involving their land in the District Court of Otoe County, Nebraska prior to the Compact which confirmed their title (Ex. P-190, R. Vol. IX, p. 1247 and Ex. P-189, R. Vol. IX, p. 1243). Mr. Schemmel filed one of these decrees in the Office of the County Recorder of Fremont County, Iowa on August 25, 1941 (Ex. P-194, R. Vol. IX, p. 1250). These facts are summarized and described on pages 318 to 341 of PLAINTIFF'S RESUME' OF EVIDENCE BEFORE THE SPECIAL MASTER. AT THE TIME OF ADOPTION OF THE COMPACT, THE SCHEMMELS HAD A TITLE WHICH WAS GOOD IN NEBRASKA AS RECOGNIZED BY THE NEBRASKA COURT DECREES AND NOTICE OF THIS WAS ON RECORD IN FREMONT COUNTY, IOWA. Plaintiff would point out that Mr. Schemmel holds title to land which is to the east of the area which Iowa is claiming, through the same deeds, quiet title actions, and indicia of ownership through which he claimed the land which remained to the west of the Missouri River following the digging of the Otoe Canal. Iowa has never made any claim to this land to the east and adjacent to Schemmel Island. The fact that Mr. Schemmel had a title "good in Nebraska" is also established by Iowa's evidence (Ex. D-708, R. Vol. XVII, p. 2541), which is a Court decree in a quiet title action in Nebraska after

the Compact regarding land on the west side of the Missouri River which Mr. Schemmel had sold and to which he had reserved hunting rights. The Court in that decree recognized Mr. Schemmel's reservation of hunting rights. It is submitted that, just as in the Babbitt or Nottleman Island case, the Schemmels had as good a title as anyone had in the Missouri River valley at the time of the Compact emanating from Nebraska.

Iowa placed the Schemmel land on the tax rolls in 1949, tax deeds were issued by the County Treasurer's office of Fremont County, Iowa in 1954 pursuant to the Iowa statutory provisions regarding such sales, and the taxes just on the real estate in the year 1968 payable in 1969 were $1,183.06 (Ex. P-2643, R. Vol. IX, p. 1240). At the time that Iowa's local officials were taxing the property, the State of Iowa was attempting to take it away without compensation. As the Master found, it is unjust and inequitable to allow Iowa to accept taxes on the land for such a period of time and then claim that the land always belonged to the State of Iowa in this type of situation (see *United States Gypsum Co. v. Grief Bros. Cooperage Corp.*, 389 F. 2d 253 8th Cir., 1968, SMR 151-152). In addition, the Schemmel's exercised exclusive possession of the land and cleared it at considerable expense, thus making it valuable farm land. The cost of such clearing today would approximate $200 per acre (R. Vol. XIII, pp. 1125-1137).

Iowa also has ignored the fact that the Ward deeds to the Schemmels conveyed land on both sides of the Missouri River in 1938 and the Schemmels thereafter owned both banks and the entire bed under Nebraska law. The

fact that Iowa has made no claim to the Schemmel land adjacent to and east of Schemmel Island which the Schemmels have owned and exclusively possessed from 1938 up until the present date further substantiates the validity of the Ward deeds.

Plaintiff would also point out that Iowa had made no investigation of the Schemmel title before filing of suit and her officials had not even talked to the Schemmels concerning their claims. Although Iowa may say that she recognizes good Nebraska titles, the facts are that she never investigated to determine whether any Nebraska titles existed.

Iowa has further misdescribed the evidence concerning the exercises of jurisdiction over the area prior to the Compact. Iowa's statement that there was ". . . clear evidence that all local officials and all local residents considered that the boundary was not in the Iowa Chute after the river moved westward from the Iowa Chute prior to 1905" simply is not true. The evidence is clear that all local officials and local residents considered that the Iowa Chute *was* the abandoned bed of the Missouri River. This chute is approximately one mile and three-quarters to the east of the present Missouri River and is marked upon the map of the area found at Appendix B on the last page of PLAINTIFF'S RESUME' OF EVIDENCE BEFORE THE SPECIAL MASTER.

The early Iowa records indicating eastward movement of the Missouri River and the abandoned channel in the Iowa Chute are referred to and summarized on pages 242 to 251 of PLAINTIFF'S RESUME' OF EVI-

DENCE BEFORE THE SPECIAL MASTER and show numerous entries in the records of the County Courthouse of Fremont County, Iowa, documenting the eastward movement of the river to the Iowa Chute and that the river was in the Iowa Chute in 1900. This was further corroborated by Nebraska's witnesses, Frank Duncan (R. Vol. VIII, p. 1025) and Cliff Cockerham (R. Vol. VIII, p. 1031). Following the avulsion which occurred between 1900 and 1905, the Iowa maps and records had continued to recognize that the east bank of the Missouri River was along the Iowa Chute and constituted the abandoned Missouri River bank (see pages 247-251, PLAINTIFF'S RESUME' OF EVIDENCE BEFORE THE SPECIAL MASTER); Resolution Establishing the Knox Drainage District dated June 11, 1909 (Ex. P-196, R. Vol. VII, p. 893); Iowa State Highway Commission Official Map of Fremont County, Iowa filed February 14, 1914 (Ex. P-1707, R. Vol. XIV, p. 1944); Plat entitled Knox Drainage Ditch Outline of District and Location of Ditch, filed September 2, 1920 (Ex. P-1765, R. Vol. VII, p. 895); Engineers' Report dated November 14, 1922 entitled KNOX-PLUM DRAINAGE DISTRICT (Ex. P-198, R. Vol. VII, p. 896); proceedings of the Missouri Valley Drainage District No. 1, Election District No. 3, November 24, 1922 (Ex. P-1767, R. Vol. VII, p. 898); Map of Missouri Valley Drainage District No. 1 filed February 5, 1923 (Ex. P-1766, R. Vol. VII, p. 898); Ditch Record Book No. 5 showing resolution of the Missouri Valley Drainage District No. 1, Election District No. 3 passed on May 4, 1931 (Ex. P-1768, R. Vol. VII, p. 900). All of these aforementioned documents were of record in the Fremont County, Iowa Courthouse, and reflected conduct of state or county

subdivisions or agencies recognizing the Iowa Chute as the boundary. Each of these maps or records shows the Iowa Chute as the western boundary of Iowa.

Iowa's taxing officials, after having taken the land off the tax rolls as the river moved east up until 1900, did not tax the Schemmel land from that time up until 1949, when the Schemmel land was placed upon the tax rolls by the Fremont County, Iowa Auditor and Treasurer following the Compact. The history of this taxation by Iowa is found at pages 341-344 of PLAINTIFF'S RESUME' OF EVIDENCE BEFORE THE SPECIAL MASTER. Although the testimony of the Fremont County Treasurer indicated that many of the tax records had been destroyed, they were not all destroyed as was suggested by Iowa in her Exceptions. Iowa's categorization of the tax evidence and that they were all lost or destroyed is simply not accurate and is disproved by the evidence. There were records showing the Iowa land being taken off the tax rolls as the river moved eastward.

All of the testimony recognized that the Iowa Chute was the abandoned channel of the Missouri River and there is no testimony to the contrary. Iowa's own witness, Mr. Hinze, so testified (R. Vol. XXI, pp. 3104-3106 quoted at page 241, PLAINTIFF'S RESUME' OF EVIDENCE BEFORE THE SPECIAL MASTER). Iowa's witness, Mr. Givens, when asked about the Iowa Chute stated:

> "If it involves the Iowa Chute, it would be the old river bed" (R. Vol. XXII, p. 3161).

Yet, Iowa has never made any claim to this old river bed in the Iowa Chute (see also R. Vol. XXI, p. 3078).

The Master correctly found that:

> "It was generally recognized by the residents in the vicinity that the Iowa Chute marked the abandoned main thread of the Missouri River" (SMR 146).

He further found that at the time of the Compact in 1943, the State of Iowa, its subdivisions and instrumentalities, were exercising no incidents of jurisdiction over Schemmel Island and the State of Iowa was making no ownership claims to Schemmel Island and was exercising no incidents of possession (SMR 146). There was absolutely no testimony by any Iowa residents or officials that the land west of the Iowa Chute was considered as being in Iowa prior to the Compact. Mr. Propp did not testify that he paid taxes on the land in Iowa and Mr. Givens made no reference to the payment of taxes in Iowa prior to 1943. Iowa's other witnesses, Oscar Hayes (R. Vol. XXII, pp. 3170-3186), Frank Starr (R. Vol. XXII, pp. 3186-3195), and Lon Baker (R. Vol. XXII, pp. 3195-3205), did not testify that the land was being taxed in Iowa or was in Iowa.

At the same time, Nebraska placed the lands on the tax rolls in 1895 and 1896 and it was taxed in Nebraska continuously up until the time of the Iowa-Nebraska Boundary Compact (Ex. P-1 to P-125, R. Vol. VII, p. 888). There were quiet title actions in Nebraska to the lands and again the Master found that Nebraska was exercising jurisdiction over this land up until the time of the Compact. This evidence is summarized at pages 251 to 254 of PLAINTIFF'S RESUME' OF EVIDENCE BEFORE THE SPECIAL MASTER.

There is some evidence that some of the land to the east of the Schemmel land but to the west of the Iowa Chute was on the tax rolls of both states for a brief period prior to the Compact, but this was only a portion of that land, did not involve Schemmel Island, and Iowa's evidence shows that some of this area was on the tax rolls in Iowa only in the years 1934, 1935 and 1936 (R. Vol. XVIII, pp. 2572-2573), with no records from 1937 through 1942.

Iowa's maps prepared by Mr. Bartleman which are attached to her tax records were admittedly in error and were completely discredited (R. Vol. XVIII, pp. 2602-2603).

Iowa is wrong in her statement that all maps from 1905 to date designate all of the land east of the river at Otoe Bend as being in "Iowa". This statement disregards the Iowa records and 1914 Iowa Highway map previously referred to. The 1929 Shannon map (Ex. D-272, R. Vol. XXII, p. 3207) was not officially filed of record in either Nebraska or Iowa. The 1905 U. S. Geological Survey map did show a line in the Missouri River purportedly designated as the state line (Ex. P-219, R. Vol. VII, p. 884), but there was also a 1922 soil survey map showing the boundary line in the Missouri River which would have placed Nottleman Island in Nebraska (Ex. P-719, R. Vol. III, p. 349) which Iowa has failed to mention. Iowa attempts to utilize such map designations when they are consistent with her position but ignore them when it may suit her purposes. Plaintiff's evidence established that the state lines placed upon U. S. Geological Survey maps are often in error (R. Vol.

XII, p. 1663) and only constitute the conclusion of some map maker. The maps which Iowa has referred to are only isolated instances and it is the mass of evidence establishing that Schemmel Island formed entirely in Nebraska and was so recognized by both states, which is persuasive.

Nebraska submits that the evidence clearly establishes that Nebraska was exercising jurisdiction over the Schemmel Island area prior to the Compact and Iowa was not exercising any jurisdiction or any claim of ownership to the area.

Iowa's discussion of some of the evidence even results in the impeachment by Iowa of her own witnesses. Dr. Ruhe, called by Iowa as an expert witness, predicated his entire testimony upon the fact that the Missouri River had reached its easternmost location prior to 1890 and had started to recede to the west by 1890. He testified that a bank position shown on the 1890 map and the Iowa Chute were in the same position and that if he was mistaken in that assumption, everything else which he had said would also be in error (R. Vol. XIX, p. 2804 quoted in PLAINTIFF'S RESUME' OF EVIDENCE BEFORE THE SPECIAL MASTER, p. 492). The evidence shows that he was mistaken and the Iowa Chute was to the east of that 1890 bank position. Iowa has now admitted in her Exceptions that the Missouri River was in the Iowa Chute in 1895 (Iowa's Exceptions, p. 44). At pages 41-42 of her Exceptions, Iowa has again impeached Dr. Ruhe by stating her evidence tends to fix the year 1936 as the year in which formation of Schemmel Island commenced, but Dr. Ruhe testified that there

were four areas of Schemmel Island shown on the 1930 aerial photograph (R. Vol. XIX, pp. 2794-2795).

Other discrepancies between the testimony of Dr. Ruhe and Dr. Fenton and the facts are discussed in PLAINTIFF'S RESUME' OF EVIDENCE BEFORE THE SPECIAL MASTER at pages 49 through 502. These include a 3,200 foot error in one of their traverses (Ex. D-1221, R. Vol. XX, pp. 2894-2895). Dr. Ruhe described a chute identified as Chute No. 7 as having been formed by the Missouri River (R. Vol. XIX, pp. 2820-2821) but Plaintiff established in rebuttal through Mr. Hiley J. Barrett, Jr., that this had been a borrow area from which he had taken dirt in order to construct an agricultural levy in 1948 (see 1960 Agricultural aerial photograph, Ex. P-256, and Mr. Barrett's testimony, R. Vol. XXVI, pp. 3673-3679). Dr. Ruhe identified a scarp east of the Schemmel land identified as Red 10 (Ex. D-1221, R. Vol. XX, p. 2840) but the Nebraska State Surveyor ran a profile across that location (Ex. P-2704, R. Vol. XXVI, p. 3688; R. Vol. XXVI, p. 3683) which clearly established that there was no such scarp. Dr. Ruhe further testified that all scarps he found faced to the west and if any scarps were to be found facing east it might change his conclusions (R. Vol. XIX, pp. 2819-2820). The Nebraska State Surveyor on his profile found a scarp which did face to the east (Ex. P-2705, R. Vol. XXVII, p. 3688; R. Vol. XXVI, p. 3685). This evidence is discussed in PLAINTIFF'S RESUME', pp. 489-502.

Iowa has referred to the testimony of Dr. Brush, who Iowa called as an expert witness (Iowa's Exceptions, p. 45). His entire testimony was based upon the

premise that the Missouri River at Otoe Bend was not a "typical meandering stream" and that the character of the Missouri River south of the entrance of the Platte River was different from other areas. However, Dr. Brush admitted during the course of his testimony that it was based upon the Ruhe-Fenton Report. This is the same report which was discredited completely by the evidence. He admitted that the Missouri River had a sinuousity ratio in the easterly bend containing the Schemmel area in 1895 in excess of the minimum required for the definition of a meandering stream (see PLAINTIFF'S RESUME' OF EVIDENCE BEFORE THE SPECIAL MASTER, pp. 502-503, for discussion of Dr. Brush's testimony), and that there had been cutoffs in the easterly bends above and below the easterly bend containing the Schemmel area (R. Vol. XX, p. 2956). He agreed with the statement from the Report to the Committee on Rivers and Harbors of February 5, 1934:

> "Cutoffs in the Missouri River are most frequent in the broad sections of the alluvial valley while in the narrow sections the changes consist of the bodily downstream movements of series of bends with less frequent cutoffs. Cutoffs therefore have been very common in the middle river from Sioux City, Iowa, to Kansas City, Missouri. Numerous horseshoe lakes in this part of the river valley are the remains of old river beds" (R. Vol. XX, pp. 2947-2948).

Iowa has attempted to argue that the Iowa case of *Payne v. Hall,* 192 Iowa 780, 185 N. W. 912, is authority for what happened factually in the Schemmel area

(Ex. D-747, R. Vol. XIX, p. 2731). However, Nebraska would point out that the land involved in the *Payne v. Hall* case appeared in part as an island on the left bank to the north of the main channel of the river according to the 1890 Missouri River Commission Map (Ex. P-211, R. Vol. VII, p. 860) and formed consistent with the development of the easterly bend in the Schemmel area which was downstream.

Iowa has suggested that the evidence taken in its most favorable light for Nebraska establishes that Schemmel Island commenced forming in 1932 although she states that her evidence tends to fix 1936 as the year in which formation began. This statement would again seem to impeach Iowa's own witnesses. Albert Propp testified that it began to form as an island in the early '20's (R. Vol. XXI, p. 3059) and:

> "The first people that I knew of that was on the island was a couple of fellows built a shack over there. It was back in about 1918 or along in there. There was John Hilger and Walt Williams . . ." (R. Vol. XXI, p. 3062).

Iowa's witness, James Givens, testified that there were some pretty good sized trees on the island in 1936 (R. Vol. XXII, p. 3148), and Iowa's witness, Otto Hinze, testified that "Anywhere from 1915 on up to present date, that island has been there until the Government cut the chute off" (R. Vol. XXI, p. 3088). Of course, the evidence shows that the river was entirely in Nebraska when these events were taking place but Plaintiff only makes these references to indicate the inconsistencies between some of the evidence which Iowa offered and her present position.

Plaintiff would also point out the unreliability of the placement of Nottleman and Schemmel Islands on various Corps documents by Iowa's witness, Mr. Bartleman. This is illustrated by a comparison of Exhibit D-1036-A at Nottleman-16 of Iowa's Appendix where the upstream part of Nottleman Island is found on Mile 630 and the lower part of the island is far above King Hill or Calumet Point, which is not shown on the exhibit, with Exhibit D-605-A at Nottleman-6 of Iowa's Appendix, which shows the lower part of Bartleman's Nottleman Island extending downstream below the northern part of Calumet Point. The upper portion of the island on Exhibit D-605-A is well below Mile 630. All of Bartleman's exhibits were impeached as unreliable and he admitted that his placement on maps of the areas being taxed in Iowa prior to 1943 were not accurate (R. Vol. XVIII, pp. 2602-2603).

The injustice of a reading of the Compact so that Iowa can require a landowner to prove the factual history and prior movements of the Missouri River is pointed out by Iowa's use of Mr. Raymond L. Huber who had worked with the Corps of Engineers from 1926 until 1963 when he retired. Iowa used him as a principal witness in each of the cases which Iowa tried (*State of Iowa v. Raymond,* 254 Iowa 828, 119 N. W. 2d 135, 138; *Dartmouth College v. Rose,* 257 Iowa 533, 133 N. W. 2d 687, 691; *Tyson v. Iowa,* 283 F. 2d 802, 810; R. Vol. XXIV, pp. 3520-3521, 3581; R. Vol. XXIV, pp. 3414-3415). This witness also testified in the Schemmel case in the District Court of Fremont County, Iowa in 1964 (R. Vol. XXIV, p. 3581, p. 3415) and the variances be-

tween his testimony in 1964 and 1969 are summarized in PLAINTIFF'S RESUME' OF EVIDENCE BEFORE THE SPECIAL MASTER, pages 468 through 482. After first indicating in response to a question from the Special Master that there was no navigable channel of the Missouri River in 1931, Mr. Huber later had no hesitancy in drawing in the navigable channel on maps or aerial photographs. He supposedly placed the deepest thread of the stream in the Otoe Bend area on a July 16 to July 23, 1931 hydrographic survey (Ex. D-291-A, R. Vol. XVIII, p. 2586) but he placed this so called "thalweg" in a different place on the same hydrographic survey in the Schemmel case in 1964 (R. Vol. XVIII, pp. 3372-3374). This exhibit shows the "thalweg" he drew in 1964 1,100 feet from that same "thalweg" which he drew in 1969. He drew the thalweg in different places on aerial photographs taken in 1930 in the two trials (Ex. D-1092, R. Vol. XXII, p. 3214). He also was clearly shown to be in error in placing his "deepest thread of the Missouri River" on an 1890 Missouri River Commission map (Ex. D-605-A, R. Vol. XVIII, p. 2551; R. Vol. XXIV, pp. 3408-3410). This is described in PLAINTIFF'S RESUME' OF EVIDENCE.

He testified before the Special Master in 1969 that the entrance of the Platte River into the Missouri River influenced the stream downstream as far as the Schemmel area, but in 1964 he testified that the Platte River outlet into the Missouri had no significance in the Schemmel case (R. Vol. XXIV, pp. 3413-3414, quoted at pp. 481-482, PLAINTIFF'S RESUME' OF EVIDENCE BEFORE THE SPECIAL MASTER).

The Special Master said of Mr. Huber:

> "Mr. Huber has been a witness for Iowa and for practically all of Iowa's litigation in the courts of both states and in the federal courts. Before me he appeared to favor Iowa's interest, and his views as to the mid-channel boundary line are suspect" (SMR 197).

The Master viewed all of the witnesses and observed their demeanor and his findings concerning the credibility of these witnesses should be given great weight. However, Mr. Huber's ability to change his testimony as to the same facts illustrates the great injustice done to a private landowner when the State of Iowa can place the burden upon him to prove the location of the Missouri River at any time in the past and how certain lands may have formed. No state should take advantage of an individual in a situation such as this and the Compact should not be interpreted in such a manner as to allow such an unjust result. No person's title along the Missouri River should be subject to determination by this type of testimony of such a transitory nature, yet this is exactly what Iowa is attempting to accomplish.

CONCLUSION

Nebraska would reiterate that Iowa completely disregards the history of the Compact, its purpose, and her conduct at and prior to the Compact. She further would disregard her conduct following the Compact.

The Compact necessarily changed the rights of the states which might have existed under their common law

and Iowa should now be bound by her agreement that not only was a new boundary created, but all private titles would be recognized without the necessity of determining where the state boundary had been previously. There is no rational consistency in any of Iowa's conduct as she argues evidence and fact to meet her fancy in individual situations to achieve only one result which is a declaration of ownership in the State of Iowa with no requirement for compensation to the landowners. If Iowa is correct, then the Compact settled nothing except to place areas within Iowa's jurisdiction so that Iowa could then claim them using her so-called "common law". A few officials can continue to pick and choose the various areas which the state claims without regard to the factual history of their formation and without inquiry into prior Nebraska records. Iowa can at any time in the future assert claims to other areas along the Missouri River which she has never laid claim to before, even though these areas may have been claimed by individuals for many years. Rights would be created in the State of Iowa in areas along the river at a time more than twenty years following the adoption of the Compact whereas, at the time of the Compact, in 1943, Iowa made no claim to these specific individual lands, did not have them of record in her General Land Office as required by her statutes, and had not marked the boundaries as also required by her statutes. Iowa can litigate the title to a small area of land in a situation such that the cost

of the landowners' attorneys' fees would exceed the value of the land in order to obtain a principal which would assist her in acquiring title to other areas along the river. Iowa can disregard the fact that there had been many natural avulsions and canals dug along the Missouri River. She can claim lands in her own courts even though those lands are being taxed by the Iowa County officials, and she can disclaim lands which are not being taxed by her County officials. She can survey lines without using any basis in fact for such boundaries, and she can unilaterally establish where the state line is, using inconsistent methods which would give different locations if applied to the same area. Titles to all lands in the Missouri River would be clouded by the fact that Iowa might at some later date claim title based upon her sovereign right to beds or abandoned beds of the Missouri River and based upon her position that no equitable defense is applicable against her. The Compact would have the effect of divesting the former Nebraska landowners of vested ownership rights without compensation and farmers all along the Missouri River who have cleared, cultivated, fertilized and developed the land and paid taxes upon it in Iowa will lose their farms without payment. Plaintiff submits that the Compact should not be construed in such a manner as to result in such injustice.

Plaintiff further submits that the evidence is clear and convincing that Nottleman Island and Schemmel Is-

land formed in Nebraska prior to the Compact and Iowa is obligated to recognize the titles to those areas by the Compact.

Nebraska respectfully renews her request for a determination that Iowa should be restrained and enjoined from making claims of title to lands along the Missouri River under any claim of common law sovereign ownership of the beds or abandoned beds of the Missouri River and for such other relief as is requested in Plaintiff's Exceptions to the Report of Special Master.

Respectfully submitted,

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PROOF OF SERVICE

I, Howard H. Moldenhauer, Special Assistant Attorney General of the State of Nebraska, and a member of the Bar of the Supreme Court of the United States, hereby certify that on January 19, 1972, I served a copy of the foregoing REPLY BRIEF OF PLAINTIFF, STATE OF NEBRASKA, TO IOWA'S EXCEPTIONS TO SPECIAL MASTER'S REPORT by depositing same in a United States Post Office, with first class postage prepaid, addressed to:

RICHARD C. TURNER
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Logan, Iowa 51546

such being their post office addresses, and that all parties required to be served have been served.

HOWARD H. MOLDENHAUER
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[redacted]

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In The

Supreme Court of the United States

October Term, 1964

No. 17, Original

STATE OF NEBRASKA, PLAINTIFF,

vs.

STATE OF IOWA, DEFENDANT.

SUPPLEMENTAL BRIEF OF PLAINTIFF, STATE OF NEBRASKA IN ANSWER TO NEW POSITION TAKEN BY IOWA IN HER REPLY

INTRODUCTORY STATEMENT

Plaintiff, the State of Nebraska, files this Supplemental Brief in answer to propositions submitted by the State of Iowa in Iowa's Reply to Nebraska's Exceptions to Special Master's Report in which Iowa has taken a completely new and unexpected position from the position which she has taken consistently throughout this case. This brief is restricted to this new matter and change of position by the State of Iowa.

IOWA'S NEW POSITION

In DIVISION II of Iowa's Reply, Iowa has stated at pages 15-16:

"It is the position of Iowa that from the foregoing, it is apparent that the common law of the State of Nebraska did not in fact give the Nebraska riparian owners along the Missouri River title or ownership of the bed of the navigable channel of the river, and they acquired no property right to such bed until it was abandoned by the river. In the event this Court believes Iowa counsel has misinterpreted the doctrine set out in the *Kinkead* and *Ecklund* cases, supra, then Iowa submits the Nebraska court had no jurisdiction over the bed of the navigable waters of the Missouri River as title to some had never passed from the United States, as set out in *Yates v. Milwaukee,* supra."

For the first time, in her argument and analysis of the common law of Nebraska, Iowa has taken the position that statements by the Nebraska courts concerning ownership of a riparian owner to the thread of navigable streams are dicta and the riparian owner acquired no property right to such bed until it was abandoned by the river. Iowa has then gone further and submitted alternatively that the Nebraska Court had no jurisdiction over the bed of the Missouri River as title had never passed from the United States.

The above propositions represent a complete change of position by the State of Iowa which is at variance with the pleadings and completely inconsistent with Iowa's position taken throughout this case.

IOWA'S PREVIOUS POSITION

In the Complaint, Plaintiff, State of Nebraska, alleged in Paragraph X at page 11:

> ". . . The Supreme Court of the State of Nebraska, beginning with the case of *Kinkead v. Turgeon*, 74 Neb. 580, 109 N. W. 744 (1906) reversing 74 Neb. 573, 104 N. W. 1061 (1905) has followed the doctrine that the riparian owner owns to the thread of the channel of navigable streams in Nebraska subject to the public easement of navigation. . . ."

This averment was admitted by the State of Iowa in her Amended Answer and Counterclaim of Defendant, State of Iowa, to Complaint of Plaintiff, State of Nebraska, Paragraph X at page 2. The allegations of the Complaint and Iowa's Answer were read into evidence and are found in the Record at Vol. XIII, pp. 1838-1840.

The Special Master found at page 89 of his Report:

> "Under Nebraska law, title to the beds of navigable streams is in the riparian owner subject to the public easement of navigation, each owner owning to the thread of the stream. The leading case is *Kinkead v. Turgeon*, 74 Neb. 580, 109 N. W. 744 (1906), reversing 74 Neb. 573, 104 N. W. 1061 (1905). The Nebraska rule is based upon the equitable principles that, where a person is subject to having his property added to by gradual movement of the river, he also suffers the possible loss which might result. Under Nebraska law the Nebraska owner's right extends to islands, bar areas or beds which are on his side of the thread of the stream. However, the Nebraska owner's title to the bed is subject to the public easement of navigation."

Iowa did not take exception to this finding.

In his Report, the Special Master set forth Iowa's statement concerning jurisdiction which included the following proposed findings submitted by the State of Iowa:

". . . Ownership of lands, river beds and abandoned river beds which were in the State of Nebraska prior to 1943 was determinable by the law of Nebraska. Likewise, ownership of tracts which were in Iowa prior to 1943 was determinable by the law of Iowa. In many cases, the answer as to ownership would be different because of difference between the state laws of the two states. . . ." (SMR 51).

• • •

"The laws of the two states regarding ownership of accretion lands, river beds and abandoned channels are similar but there are two important differences: (1) In 1856, approximately 20 years before Nebraska was admitted to statehood, it was determined in Iowa that private land titles to riparian lands along navigable streams would extend only to the ordinary high water mark and the beds of the navigable streams in Iowa were state-owned. *McManus v. Carmichael,* 3 Iowa 1. In 1906, 50 years later, it was determined that private land titles to riparian lands in Nebraska would extend to the thread of the contiguous stream. *Kinkead v. Turgeon,* 74 Neb. 573, 104 N. W. 1061. . . ." (SMR 52).

• • •

"From the general statements hereinabove made concerning the internal title laws of the two states it will be seen that, if accretion land formed along the Missouri River, or a former channel became an abandoned channel, or an island arose from the river bed west of the thalweg and in the State of Nebraska its ownership was determinable by the law of Nebraska. There has been much litigation in the state courts of Nebraska down through the years, both before and since 1943, wherein ownership of these lands has been the issue. Generally, the courts of Nebraska have held that accretion lands which formed contiguous to the shoreline of a riparian owner became property of such riparian owner, and

when a channel became an abandoned channel, the riparian owner became the owner to the former thread of the stream, and when an island arose from a stream the riparian owner became the owner of such island, depending on which side of the thread of the stream it arose. The salient fact at this point is that the State of Nebraska has never been found to be the owner of any such lands because by her law, she elected to make all such lands and river beds, islands and abandoned beds privately owned. . . ." (SMR 54).

The Special Master did not adopt Iowa's statement but Iowa did set forth her position recognizing private ownership to the river beds under Nebraska law.

In Part 1 of the Missouri River Planning Report (Ex. P-2609, R. Vol. I, pp. 87-88) the following statement is made at page 4 under the heading "LAND AND WATER OWNERSHIP":

"Two basic problems of land and water ownership effect the development of the Missouri River for recreational use. One is the difference in state laws in Iowa and Nebraska effecting public ownership and, two, in Iowa, the matter of quieting title to lands believed to be state-owned.

IN NEBRASKA

"Nebraska law provides that the riparian owners have title to the bed of the river to the center of the channel or to the described boundary line, whichever the case may be. Thus, all lands in a proposed project area lying west of the Iowa boundary but east of the new channel are in Nebraska and owned by private owners and must be purchased if needed for project development. The question arises — can the state of Iowa own lands in another state?"

With regard to this Report, the State of Iowa was asked by interrogatory:

> "Interrogatory No. 20: Does Part I of the Missouri River Planning Report of the State Conservation Commission of January 1961 represent the present policy of the State of Iowa or any branch thereof concerning acquisition of or proof of interest in lands referred to in such report?" (R. Vol. XI, p. 1593).

The answer by Iowa was:

> "Yes. We believe that a fair and reasonable construction and interpretation of Part I of the Missouri River Planning Report constitutes a fair statement of Iowa's present policy, but this is not to say that the construction and interpretation placed thereon by Nebraska constitutes any fair statement of Iowa's present policy. Nebraska construes and interprets the document as a statement that Iowa intends to acquire all sites mentioned therein by court action which it construes to be in the nature of 'land grabs', but Iowa points out that this is no fair construction or interpretation of the document because in truth and in fact Iowa proposes in the document to acquire many of the sites mentioned therein by purchase or exchange" (R. Vol. XI, p. 1593).

In addition, throughout the argument before the Special Master, Iowa's counsel recognized the fact that the Nebraska riparian owner owned to the thread of the stream. As was stated by Mr. Walker at page 498, Volume II, of the Transcript of Oral Arguments Made Before Hon. Joseph P. Willson, Special Master:

> "You see, the thalweg was the boundary before, and the Nebraska riparian owner owned out to the thalweg, and Iowa owned from the thalweg to the high shore line . . ."

Mr. Murray stated at page 488 of the Oral Argument:

> "But once again, basically we feel the Court's decision is to say that Iowa did remain the owner of its river bed in Iowa; Nebraskans did remain the owners of their river bed in Nebraska, and so be it."

In Iowa's Exceptions to Special Master's Report, the statement is made at page 3:

> "Nebraska is among the states which elected to have for her common law that private titles to riparian lands would run to the thread of the contiguous stream. *Kinkead v. Turgeon,* 74 Neb. 580, 104 N. W. 106 (1906)."

THE NEBRASKA LAW

Immediately prior to the adoption of the Iowa-Nebraska Boundary Compact of 1943 the law of Nebraska was, and remains, that title to the beds of navigable streams is in the riparian owners subject to the public easement of navigation, each owner owning to the thread of the stream. This right includes ownership of the bed, islands or bar areas arising in that bed, and abandoned bed. The leading case is *Kinkead v. Turgeon,* 74 Neb. 580, 109 N. W. 744, reversing 74 Neb. 573, 104 N. W. 1061. This was an ejectment action and involved abandoned channel of the Missouri River. However, in the decision by the Commissioner, 74 Neb. 573, 104 N. W. 1061 (1905), the Commissioner recognized that:

> ". . . Plaintiff's claim to the land rests solely on the doctrine that the riparian owner of lands bordering on the Missouri river takes to the middle thread of the stream, notwithstanding the fact of its navigability. . . . "

The Commissioner's decision was vacated by the Supreme Court of Nebraska at 74 Neb. 580, 109 N. W. 744 and the Court stated at 109 N. W. 746-747:

> ". . . In passing upon the applicability of the common law to our conditions in the first place it is well to observe that for upwards of half a century the people of the territory of Nebraska and the state of Nebraska have been in occupancy of the west bank of the Missouri River. The first settlement of the territory was along the Missouri River and its fertile valley has been the home of thrifty farmers ever since. It is a matter of public knowledge of which the court will take judicial notice that that great river in this locality takes its course through a wide valley composed in the main of loose, sandy, and friable soil of great fertility; that it is subject to annual floods, sometimes of great extent and volume; that its course is erratic and tortuous; that sometimes, during flood periods, its current will strike or impinge upon its banks at such an angle and with such effect, as, even in a single day, to undermine the same and cause large masses of soil to fall into the stream and be disintegrated and thus whole farms are swallowed up with almost inconceivable rapidity, while in other localities hundreds of acres are often added to its banks by the process of accretion. It is further a matter of common knowledge that at a number of points along the northern and western boundary of the state the river has, as in this case, cut across the neck of a peninsula, entirely abandoned its old bed and left the former peninsula with the abandoned bed entirely across the river upon the eastern or northern bank and thus physically dissevered from the state of Nebraska and conjoined to Dakota, Iowa, or Missouri. See Nebraska v. Iowa, 143 U. S. 359, 12 Sup. Ct. 396, 36 L. Ed. 186; Missouri v. Nebraska, 196 U. S. 23, 25 Sup. Ct. 155, 49 L. Ed. 372. These processes have been going on for 50 years.

> During the whole period of time the state of Nebraska has existed it has never asserted any title or dominion over the abandoned river bed but has left the riparian owner in full possession and control of the same to the thread of the stream, and many fertile farms now occupy the place where the waters once flowed. When the river abandoned the bed the riparian owner occupied it, claiming title thereto and, as fast as it became subject to useful purposes, reclaimed it for agriculture. For so long a period, therefore, it has been considered by the authorities of the state of Nebraska that the common law is applicable to the conditions along the Missouri River and the fact of this administrative construction of the law by the state authorities, extending over so many years, is entitled to great, if not controlling, weight upon this question. . . ."

The Court said that at some points on the boundary of Nebraska, the then present channel of the river was removed to a distance of more than a mile from where it was thirty years previously. It also noted a number of "cut-off lakes" occupying abandoned river beds along the Missouri River and that the public right attaches to the waters of the new channel to the same extent as it did while it flowed in the former bed. The public has lost nothing by the change of channel. The Court then stated at 109 N. W. 747-748:

> ". . . As was said long ago by Ulpian: 'In like manner, if a river leaves its bed and begins to flow elsewhere, whatever is done in the old bed is not subject to the interdict, because not done in a public river, as the bed belongs to the neighbors on each side, or else the bed belongs to the occupant if he has fields marked off thereon. Certainly the bed ceases to be public. Also the new channel which the river has made, although it was private, begins, neverthe-

less, to be public, because it is impossible that the channel of a public river should not be public. (D.3. 12. l. 7)" Ware's Roman Water Law, 34 § 22. To hold otherwise in case of a stream of the characteristics of the Missouri River might well lead, by way of repeated changes of the river's channel, to additions to the public domain at the expense of adjoining proprietors. For example, if in this case we should hold that the bed of the abandoned stream belonged to the state of Nebraska, by the same reasoning the bed of the new channel belongs to the state, and if the river should again change its channel nearby by another avulsion, thus leaving the new bed dry, the state then would be the owner of the land in two abandoned river beds and also of the bed of the new channel. The property in the second and third bed then would be wrested without compensation from the property of private individuals. A doctrine which might work such an injustice as this ought never to be adopted by a court if any other view is reasonable. The interest of the public in the waters and bed of a navigable river is analogous to that of the public in a public road. It has the right of passage over the stream as it had over the road. The owner of the land abutting upon a public road can do nothing in any way to interfere with the rights of the public in the same, nor can the riparian owner on the banks of a navigable stream exercise any dominion over its waters or over the bed thereof in any manner inconsistent with, or opposed to, the public easement. When the public entirely abandons a public road either by virtue of nonuser or by its vacation through proper proceedings, it does not retain the title to the land over which the easement of travel existed, but it reverts to the adjoining owners to the middle of the road. And so with a navigable river of this class. When, by reason of natural changes, the stream abandons the bed over which, through the instrumentality of its waters, the public

> has the right to pass, the right of passage is as effectually abandoned at that point as when a road is vacated and a new one opened to take its place. The right of the public is to travel in the new road and its right and privilege to pass over the old reverts to the abutting owners, and so with the river, the public right of navigation attaches to the new channel of the stream by virtue of the change of its waters, over which alone the right of navigation can exist, and the abandoned bed, which is of no avail for public use as a means of travel, reverts to the riparian owners to the thread of the channel where the waters flowed."

The Nebraska rule is based upon the equitable principles that, where a person is subject to having his property added to by gradual movement of the river, he also suffers the possible loss which might result.

Kinkead v. Turgeon has been cited numerous times in Nebraska and constitutes the law of Nebraska.

Many of the Nebraska decisions do involve nonnavigable streams such as *Thies v. Platte Valley Public Power & Irrigation Dist.*, 137 Neb. 344, 289 N. W. 386, 387 (1939), involving an action for damages including damage to accretion lands in the old riverbed along the North Platte River wherein the court stated:

> "Defendant contends that plaintiff was in no event entitled to recover for the damages to that portion of his leasehold that consisted of accretion lands in the old riverbed, for the reason that all property interests in such lands must be held to be subservient to the use of the bed of the river for public purposes. The state does not hold title to the riverbeds in Nebraska. *Kinkead v. Turgeon*, 74 Neb. 573, 580, 104 N. W. 1061, 109 N. W. 744, 748. Such riverbeds are

as effectually the subject of private ownership as other property except that, in the case of navigable streams, there is an easement for public navigation. . . . ."

The court went on to cite language from *Kinkead v. Turgeon* and then continued at page 388:

"The title of an abutting owner to the accretions to such land is similarly absolute. *Conkey v. Knudsen,* 135 Neb. 890, 284 N. W. 737. It follows that under section 21, article I of our Constitution, an interest in accretion lands, like other property, cannot be taken or damaged for public use without just compensation."

In 1964 in the case of *Krumwiede v. Rose,* 177 Neb. 570, 129 N. W. 2d 491, a case involving claims to ownership of an island formed by accretion between the eastern and western "high banks" of the Missouri River, the Supreme Court of Nebraska said:

"It makes no difference whether the land began as a sandbar island in a main stream or whether it was all formed by accretion to the mainland or by both processes joining. If, as in Burket v. Krimlofski supra, there is another owner of the island, then the ownership is split to the thread of the chute in which the accretion is taking place to both the island and the mainland. Who owned Omi Island at the time of its origin? In Nebraska the rule as to ownership on the bottom of the river including islands formed by accretion to the thread of the channel is the same, whether the stream is navigable or nonnavigable. The only difference is that in case of a navigable stream, such as the Missouri River, it is subject to the superior easement of navigation. This basic decision was reached in Kinkead v. Turgeon, on rehearing, 74 Neb. 580, 109 N. W. 744, 7 L. R. A.,

N. S., 316, 13 Ann. Cas. 43, 121 Am. St. Rep. 740. The exact application to the case at bar is the holding in Independent Stock Farm v. Stevens, 128 Neb. 619, 259 N. W. 647, where it is said: 'All states do not agree as to the ownership of land along navigable streams like the Missouri River. In Nebraska this court, after the rehearing in the case of Kinkead v. Turgeon, 74 Neb. 573, 580, 104 N. W. 1061, 109 N. W. 744, 1 L. R. A. (N. S.) 762, 7 L. R. A. (N. S.) 316, 13 Anr. Cas. 43, *held that riparian owners are entitled to the possession and ownership of the soil formerly under the waters of such a stream as far as the thread of the stream, while in other states the title to the bed of the navigable river is in the state, and the grantee of land along the line of such stream owns only to the shore line,* Haight v City of Keokuk (1856), 4 Iowa, 199; Payne v. Hall, 192 Iowa 780, 185 N. W. 912. So that if an island occurs in the Missouri River on the Iowa side of the thread of the stream, *it is an accretion to the soil in the bed of the river, and not to the land of the riparian owner.'* (Emphasis supplied.)

"An owner of land on shore, in the absence of restrictions on his grant, owns to the thread of the stream, and his riparian rights extend to existing and subsequently formed islands. Ohm v. Clear Creek Drainage Dist., 153 Neb. 428, 45 N. W. 2d 117; Haney v. Hewitt, 105 Neb. 746, 181 N. W. 861; Higgins v. Adelson, 131 Neb. 820, 270 N. W. 502; Briard v. Hashberger, 107 Neb. 199, 185 N. W. 430; Burket v. Krimlofski, supra." (Emphasis by the Court.)

The Nebraska cases either stating or reaffirming these propositions are so numerous that further citation would merely burden the record. Although Iowa has taken the position that these statements are dicta, the fact is that there is no question under the law of Nebraska

but that the riparian owner "owns" to the thread of the stream and such riverbeds, islands, or bar areas are as effectively the subject of private ownership as other property, except that, in the case of navigable streams, there is an easement for public navigation. The Nebraska courts have never waivered from this position since *Kinkead v. Turgeon*, supra.

Consequently, cases involving beds or islands in the beds of nonnavigable streams in Nebraska are also applicable to navigable streams insofar as the ownership is concerned, except that there is merely the added qualification that there is an easement for public navigation on the navigable streams.

IOWA'S ALTERNATIVE PROPOSITION

Nebraska submits that Iowa's alternative proposition that title to the bed of the Missouri River had not passed to the states constitutes another last minute change of position by Iowa and has no basis. The result of this argument by Iowa leads to the inescapable conclusion that Iowa would have no claims whatsoever to the bed of the Missouri River. Further comment is not deemed necessary.

CONCLUSION

This change of position by the State of Iowa in her Reply is typical of her ability to argue to meet the expediencies of the moment without regard to the conse

quences or effect of her argument. Nebraska submits that Iowa has now misstated the Nebraska law concerning ownership of the bed of navigable streams. In addition, if Iowa's alternative proposition that title to the bed of the waters of the Missouri River "had never passed from the United States" then the result of this argument is that Iowa does not have any claim to the bed of the Missouri River either. If Iowa's argument depends upon either of the two propositions which she has submitted at pages 15-16 of her Reply, then Nebraska must necessarily prevail.

Respectfully submitted,

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PROOF OF SERVICE

I, Howard H. Moldenhauer, Special Assistant Attorney General of the State of Nebraska, and a member of the Bar of the Supreme Court of the United States, hereby certify that on January 28, 1972, I served a copy of the foregoing SUPPLEMENTAL BRIEF OF PLAINTIFF, STATE OF NEBRASKA IN ANSWER TO NEW POSITION TAKEN BY IOWA IN HER REPLY by depositing same in a United States Post Office, with first class postage prepaid, addressed to:

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such being their post office addresses, and that all parties required to be served have been served.

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Supreme Court, U. S.
FILED
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IN THE

Supreme Court of the United States

October Term, 1964

NO. 17 ORIGINAL

STATE OF NEBRASKA, Plaintiff

v.

STATE OF IOWA, Defendant

RECOMMENDED DECREE BY SPECIAL MASTER

JOSEPH P. WILLSON
Senior District Judge
Special Master

SMITH BROS., LAW PRINTERS, 620 SECOND AVENUE, PITTSBURGH, PA. 15219

IN THE

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October Term, 1964

NO. 17 ORIGINAL

STATE OF NEBRASKA, Plaintiff

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STATE OF IOWA, Defendant

RECOMMENDED DECREE BY SPECIAL MASTER

PRELIMINARY STATEMENT

The opinion of the Court was announced April 24, 1972, 406 U. S. 117.

Mr. Justice Brennan in the opinion invited the States to submit a proposed decree. The last sentence of the opinion reads:

> "If the States cannot agree, the Special Master is requested, after appropriate hearing, to prepare and submit a recommended decree."

The States cannot agree on a proposed decree. A hearing has been held. Counsel for each State have been heard. The following decree is recommended:

IT IS ORDERED, ADJUDGED AND DECREED THAT:

1. The Missouri River was the boundary between the States of Iowa and Nebraska which was subject to the general rules of accretion and avulsion until 1943 when the states determined to agree by compact upon a permanent location of the boundary line.

Preliminary Statement.

2. By 1943 the shifts of the Missouri River channel had been so numerous and intricate, both in its natural state and as a result of the work of the Corps of Engineers, that it was practically impossible to locate the original boundary line between the states.

3. The Compact between the states effective July 12, 1943 provides in Section 3 as adopted by Iowa:

> "Titles, mortgages and other liens good in Nebraska shall be good in Iowa as to any lands Nebraska may cede to Iowa and any pending suits or actions concerning said lands may be prosecuted to final judgment in Nebraska and such judgment shall be accorded full force and effect in Iowa."

4. Under Section 2 of the Compact, each state "cedes" to the other state "and relinquishes jurisdiction over" all such lands then located within the compact boundary of the other.

The word "cedes" in Section 2 was meant by the states to describe all areas formed before July 12, 1943, regardless of their location with reference to the original boundary, whose "titles, mortgages and other liens" were, at the date of the Compact, "good in" the ceding state. Under Section 3, the state is bound to recognize such "titles, mortgages and other liens" to be "good in" its state, and not to claim ownership in itself.

5. Sections 2 and 3 are not to be construed as relating only to areas formed before July 12, 1943 that can be proved by clear, satisfactory, and convincing evidence to have been on the Nebraska side of the *original* boundary before the Compact fixed the permanent boundary. Such a construction would require the

claimant who proves title "good in Nebraska" also to shoulder the burden of proving the location of the *original* boundary before 1943, as well as proving that the lands were on the Nebraska side of that boundary which would be placing a burden upon the land owner which the states themselves refused to undertake in 1943 and agreed would not be necessary.

6. The State of Iowa does not own Nottleman Island and Schemmel Island. The proofs sufficed to establish title "good in Nebraska" to Nottleman Island which was the land involved in the case of *State of Iowa, Plaintiff, v. Darwin Merritt Babbitt, et al.,* Equity No. 17433 in the District Court for Mills County, Iowa, and to Schemmel Island which was the land involved in the case of *State of Iowa, Plaintiff, v. Henry E. Schemmel, et al., Defendants,* Equity No. 19765 filed in the District Court of Fremont County, Iowa, on March 26, 1963, and that Nottleman Island and Schemmel Island formed before July 12, 1943.

7. Under Section 3 of the Compact, titles "good in Nebraska" include private titles to riparian lands that under Nebraska law, differing from Iowa law, run to the thread of the contiguous stream.

8. Titles "good in Nebraska" are found to include and embrace titles obtained by ten years' open, notorious and adverse possession under claim of right without any requirement of a record title or of "color of title."

9. As to areas formed before July 12, 1943, Sections 2 and 3 of the Compact limit the State of Iowa to contesting with private litigants in State or Federal Courts the question whether the private claimants can prove title "good in Nebraska" and when private liti-

gants prove such title, Iowa cannot interpose Iowa's doctrine of state ownership as defeating such title.

10. In the presently pending cases of *State of Iowa, Plaintiff v. Darwin Merritt Babbitt, et al.*, Equity No. 17433, (District Court of Mills County, Iowa), and *State of Iowa, Plaintiff v. Henry E. Schemmel, et al.*, Equity No. 19765, (District Court of Fremont County, Iowa), it having been proved that there are titles "good in Nebraska" as to those islands, there is no reason for an injunction against Iowa, its officers, agents and servants, at this stage, unless it be shown that the State of Iowa will not abide by this determination of the issues as embodied in our opinion of April 24, 1972.

11. As to areas which have formed since the Compact date, July 12, 1943, claimants of title to these areas as against Iowa may also have the opportunity to show title "good in Nebraska" on the Compact date.

12. Whether a Nebraska riparian owner has title to accretions that cross the boundary into Iowa is determined by Iowa law.

13. The counterclaim of Iowa is dismissed.

14. The parties having paid their own costs and having contributed equally to a fund for expenses of the Special Master, any amounts remaining in said fund after deduction of all expenses by the Special Master shall be divided equally and returned to each state by the Special Master.

Respectfully submitted,

JOSEPH P. WILLSON
Senior District Judge
Special Master

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 17, ORIGINAL

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

STATE OF NEBRASKA,
Plaintiff,

vs.

STATE OF IOWA,
Defendant.

IOWA'S EXCEPTIONS TO DECREE RECOMMENDED BY SPECIAL MASTER

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No. 17, ORIGINAL

STATE OF NEBRASKA,
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vs.

STATE OF IOWA,
Defendant.

IOWA'S EXCEPTIONS TO DECREE RECOMMENDED BY SPECIAL MASTER

PRELIMINARY STATEMENT

Stated in general terms, Iowa's exceptions to the Recommended Decree by the Special Master filed herein by the Special Master on or about November 9, 1972, are:

(1) That said Decree fails to determine all questions raised by the case, and

(2) That a portion thereof is unclear and subject to possible misinterpretation

The numerous legal definitions of a "Decree" all embody the thought that a "Decree" should always determine *all* questions raised by the case, dispose of the *whole* litigation, and leave *nothing* that would give rise to further litigation.

Sawyer v. *White*, 125 Me. 206, 132 A. 421, 422.

Draper Corp. v. *Stafford Co.*, C. C. A. Mass., 255 F. 554, 557.

Burgin v. *Sugg*, 210 Ala. 142, 97 So. 216, 217.

Pomeroy's Equity Jurisprudence, 5th Ed., Vol. I, Sec. 115.

It is Iowa's belief that the Recommended Decree submitted by the Special Master would fail to accomplish these logical and proper purposes which the Decree in this case should accomplish.

The issues tendered to the Court for determination in this case were several conflicting contentions as to proper interpretation and construction of the Iowa-Nebraska Boundary Compact of 1943. In his "Report of Special Master" filed herein in 1971, the Special Master proposed decisions for each and all of these issues. Some of his proposed decisions upheld the contentions of Nebraska and several of them upheld the contentions of Iowa.

Both states excepted to the Special Master's Report and Recommendations, and the submission to the Court was upon these exceptions. The Court's decision (expressed at Page 5 of Mr. Justice Brennan's Opinion dated April 24, 1972) was:

"We overrule all exceptions, save two of Nebraska addressed to printing errors in the Report, save as we sustain, *infra*, Iowa's Exceptions IV and V insofar as the Special Master recommended that an injunction issue, and save as mentioned in N. 8, *infra*."

The net effect of the above statement in the Opinion was that each and all of the Special Master's proposed interpretations and constructions of the Compact were approved and adopted by the Court. The only parts of the Report which were not approved were two paragraphs where there were obvious printing errors, and the Special Master's recommendation for injunctive relief was not approved.

Therefore, Iowa asserts in these Exceptions that the Decree should be made to contain a statement as to each and all of these interpretations and constructions of the Compact. That this should be done without regard to whether a particular construction was as contended for by the Plaintiff, Nebraska, or by the Defendant, Iowa. That this should be done without regard for whether or not Mr. Justice Brennan elected to discuss a particular construction in his own words in the Opinion.

IOWA'S SPECIFIC EXCEPTIONS

Exception I

Iowa proposes that a paragraph should be added to the Decree in substantially the following language, to-wit:

> OWNERSHIP OF AREAS WHICH HAVE FORMED SINCE JULY 12, 1943, SHALL BE DETERMINED BY THE LAW OF THE STATE IN WHICH THEY FORMED, THE BOUNDARY FIXED BY THE IOWA-NEBRASKA BOUNDARY COMPACT OF 1943 BEING THE LINE WHICH SHALL DETERMINE IN WHICH STATE THEY FORMED.

The statement above is a direct quotation from the Special Master's Report at the top of page 193. Nebraska excepted to this statement in her Exception (6) com-

mencing on page 19 of her Exceptions. Her exception was overruled at page 5 of the Opinion where Mr. Justice Brennan, speaking for the Court, said "We overrule all exceptions, save two of Nebraska addressed to printing errors. . . ."

Furthermore, the statement above is one of the rules to be derived from the Circuit Court's decision in *Tyson* v. *State of Iowa,* 283 F. 2d 802 (1960), which this Court specifically approved at page 10 of the Opinion.

The rule above stated is the Compact construction which the Special Master and this Court have said shall apply to determine ownership of areas which have formed since 1943. As the Special Master found and Mr. Justice Brennan noted at page 4 of the Opinion, it is the rule which shall determine ownership of 21 areas and part of a 22nd. Iowa submits that any decree entered in this case would be deficient and incomplete unless it contains this construction of the Compact.

At page 8 of the Opinion, Mr. Justice Brennan said that "Nebraska's basic Exception is to the Findings and Conclusions of the Special Master that ownership of areas that have formed since July 12, 1943, should be determined under the law of the State in which they formed, the boundary fixed by the Compact being the line that determines in which State they formed. . . ." Previously in the Opinion at page 5, he had overruled Nebraska's said Exception. There was no need to overrule it again at page 8.

Failure to include this construction of the Compact in the Decree would enable future lawyers to argue that said issue was not decided in this case, and thus, the Decree would give rise to further litigation of the issue. The Decree should lay at rest the issue as to how ownership of areas which have formed since 1943 shall be determined.

Exception II

Iowa proposes that a paragraph should be added to the Decree in substantially the following language, to-wit:

> SINCE JULY 12, 1943, THE EFFECTIVE DATE OF THE IOWA-NEBRASKA BOUNDARY COMPACT, OWNERSHIP OF THE BED OF THE MISSOURI RIVER IS AND HAS BEEN DETERMINED BY IOWA LAW ON THE IOWA SIDE OF THE NEW BOUNDARY (CENTER LINE OF THE DESIGNED CHANNEL) AND OWNERSHIP OF THE RIVER BED ON THE NEBRASKA SIDE OF THE NEW BOUNDARY IS AND HAS BEEN DETERMINABLE BY NEBRASKA LAW.

This construction of the Compact was recommended by the Special Master at page 183 of his Report in almost the same language set forth above.

Nebraska considered that this was an issue being decided in the Report when she excepted to it in her Exception No. (4) at page 16 of her Exceptions as follows:

> ". . ., Nebraska further takes specific exception to the conclusion (stated in Iowa's words) that . . . after 1943, ownership of the river bed would be determined by Iowa law on the Iowa side of the new boundary (center line of the designed channel) and ownership of the river bed on the Nebraska side of the new boundary would be determined by Nebraska law . . . (SMR 183)."

Nebraska's Exception No. (4) was overruled (along with others) at page 5 of Mr. Justice Brennan's Opinion dated April 24, 1972.

Iowa's counsel understand and believe that the Special Master excluded this statement concerning ownership of the river bed in his Recommended Decree because Mr. Justice Brennan elected not to discuss the subject in his own words in his Opinion dated April 24, 1972. During the "appropriate hearing" held by the Special Master pursuant to the last sentence of Mr. Justice Brennan's Opinion, it was urged by Nebraska that nothing should or could be included in the Decree unless it could be found in and quoted from the Opinion. A reading of the Recommended Decree indicates that the Special Master accepted this argument.

Iowa submits that the Decree should not be limited to a series of direct quotations from the Opinion. If the Decree were to be thus limited, it would serve no purpose. It would not serve the purpose of determining all questions raised by the case, disposing of the whole litigation, leaving nothing that would give rise to further litigation.

We believe it was this Court's intention, clearly expressed in Mr. Justice Brennan's Opinion of April 24, 1972, to decide each and every issue tendered to the Court for decision in this case. Nebraska argued to the Special Master that Mr. Justice Brennan's failure to discuss Nebraska's Exception No. (4) in his own words constitutes an indication that this Court was declining to decide the issue to which Exception No. (4) was addressed. This is certainly a misinterpretation of the Opinion. At page 5 of the Opinion, it is stated unequivocally that Nebraska's Exception No. (4), among others, is overruled. Nebraska should not be allowed a second chance to relitigate this issue as to ownership of the river bed by making any such argument in later litigation. It should be made clear in the Decree that said issue was decided.

Exception III

This exception is addressed to a portion of Paragraph 6 of the Special Master's Recommended Decree.

As stated hereinabove in our Exception II, the construction placed on the Compact by the Special Master in his Report and approved by this Court when it overruled Nebraska's Exception No. (4), was that since 1943, ownership of the bed of the Missouri River has been determinable by Iowa law on the Iowa side of the Compact boundary. That is to say, that portion of the river bed which lies easterly from the fixed Compact boundary is and has been since 1943 owned by the State of Iowa in accordance with its common law doctrine of state ownership.

The difficulty with Paragraph 6 is that, as written by the Special Master, it would be subject to interpretation as saying that the private individuals who own Nottleman and Schemmel Islands also own the bed of the Missouri River contiguous to the islands, said bed being in Iowa because it is easterly from the Compact boundary. This is because the traverses around the islands from which the legal descriptions of the land involved in *State of Iowa, Plaintiff* v. *Darwin Merritt Babbitt, et al.,* Equity No. 17433 in the District Court of Mills County, Iowa, and in *State of Iowa, Plaintiff* v. *Henry E. Schemmel, et al., Defendants,* Equity No. 19765 in the District Court of Mills County, Iowa, were made up do not stop at the shorelines of the islands, but extend westerly to the Compact state boundary approximately in the middle of the Missouri River. See Exhibits D-1044-A and D-427, both reprinted at pages Nottleman-24 and Otoe-18 respectively, in APPENDIX TO DEFENDANT'S BRIEF AND ARGUMENT BEFORE THE SPECIAL MASTER.

Iowa believes that this exception is serious and substantial because numerous persons, firms and corporations such as bridge builders, pipeline companies, dock and wharf builders and the like, are often needing to know who owns the river bed. The common law of Iowa has always provided a clear answer as regards the beds of navigable waters within her borders. We do not understand that the Special Master or this Court in the case at bar has any intent to bar or impair Iowa's right to have and apply this common law doctrine to the bed of the navigable Missouri River insofar as the bed of that river is within Iowa's boundaries.

There are several possible ways by which Paragraph 6 could be amended so that it would not have the bad effect hereinabove pointed out. One way might be to simply add a sentence at the end of the paragraph as follows:

> HOWEVER, NOTHING IN THIS DECREE SHALL BE CONSTRUED AS SAYING THAT ANY OF THE BED OF THE MISSOURI RIVER WHICH LIES EASTERLY FROM THE IOWA-NEBRASKA BOUNDARY FIXED BY COMPACT IN 1943 IS PRIVATELY OWNED.

Exception IV

This exception is addressed to Paragraph 11 of the Special Master's Recommended Decree. Iowa excepts to said paragraph as written for the basic reason that it is inaccurate, misleading and subject to misinterpretation. If left as is, it would invite further litigation.

At page 192 of his Report, the Special Master was discussing the areas north of Omaha, most but not all of which have been formed since July 12, 1943. The general rule to

be applied for determining ownership of these areas is stated at the top of page 193. Iowa has, in EXCEPTION I hereinbefore stated, asked for a statement of that general rule to be included in the Decree.

At page 192 of his Report, the Special Master said:

> "It is conceivable, of course, that a private person may contend that he has a title supportable under Nebraska law on land existing north of Omaha on the Compact date, July 12, 1943. If so, his title is to be afforded the same recognition as given to Nottleman and Schemmel Islands with no requirement that the land be pinpointed as having formed in Nebraska."

In other words, if a private claimant of land north of Omaha can prove that the land in question formed before 1943 and that he has title supportable under Nebraska law as of 1943, then Iowa does not own it, she having signed away her right to claim it by entering into the 1943 Boundary Compact.

Mr. Justice Brennan deals with the subject in the first paragraph commencing on page 8 and in the first sentence of the second paragraph commencing on the same page of the Opinion. There, Mr. Justice Brennan clearly refers back to the Report and approves what the Special Master had said in the Report by the following words, to-wit: "Although the Special Master recommended, and we agree, . . .".

Paragraph 11 is an unsuccessful attempt to telescope into one sentence the content of several paragraphs of the Report and Opinion, and the result, as we have said before, is an inaccurate and misleading statement. The fallacious inference which may be drawn from Paragraph 11 as written is that a private claimant of an area which has formed since 1943, may, somehow, be able to show title "good in Nebraska" to such area as of the Compact date in 1943.

In truth and in fact, there is no way that a private claimant of any area can show title "good in Nebraska" as of 1943 if the area did not exist in 1943. The only way the private claimant can show title "good in Nebraska" is by showing that the area in question existed in 1943. The only way a private claimant can show entitlement to the protection of the Nottleman-Schemmel rule is by showing that the area in question, like Nottleman Island and Schemmel Island, existed in and prior to 1943.

The above proposition is true because of the common law of both Nebraska and Iowa which is to the effect that when riparian land is washed away and destroyed by action of the water, the title of the former owner is divested. When new land reforms in the same place, the new land belongs to the owner of the land to whom the new land accretes. This is one of the rules derived from *Tyson* v. *State of Iowa*, 283 F. 2d 802 (1960), whereby the Circuit Court disallowed the Harrop claims. See also *Wallin* v. *Clinkenbeard*, 214 Iowa 343, 242 N.W. 86 (1932), and *Yearsley* v. *Gipple*, 104 Neb. 88, 175 N.W. 641 (1919).

There are several ways in which Paragraph 11 could be redrafted so that it would clearly state the proposition. One way would be to simply quote, in the Decree, the paragraph from page 192 of the Special Master's Report which is quoted hereinabove in this Exception.

Another way might be to paraphrase from Mr. Justice Brennan's Opinion substantially as follows:

> "PERTAINING TO THE 21 AREAS AND PART OF A 22ND THAT LIE NORTH OF OMAHA, CLAIMANTS OF TITLE TO THESE AREAS AS AGAINST IOWA MAY ALSO HAVE THE OPPORTUNITY TO SHOW TITLE 'GOOD IN NEBRASKA' ON THE COMPACT DATE, JULY 12, 1943."

Iowa believes that perhaps the best way to clearly and unequivocally express the proposition set forth at pages 192-193 of the Special Master's Report and approved at page 8 of the Opinion would be to redraft Paragraph 11 as follows:

> ALTHOUGH THE GENERAL RULE FOR DETERMINING OWNERSHIP OF THE AREAS WHICH HAVE FORMED SINCE THE COMPACT DATE, JULY 12, 1943, SHALL BE AS STATED IN PARAGRAPH ..... OF THIS DECREE, PRIVATE CLAIMANTS OF TITLE TO ALL AREAS AS AGAINST IOWA SHALL HAVE THE OPPORTUNITY TO SHOW TITLE "GOOD IN NEBRASKA" AS OF JULY 12, 1943, BY SHOWING THAT THE DISPUTED AREA EXISTED IN 1943, THAT THEY HOLD A TITLE "GOOD IN NEBRASKA" AS OF 1943, AND THUS BRINGING THE DISPUTED AREA WITHIN THE RULES SET FORTH IN PARAGRAPHS 4, 5, 7, 8 AND 9 OF THIS DECREE.

Exception V

Iowa respectfully excepts to Paragraph 12 of the Recommended Decree as written, and proposes that said paragraph be enlarged as follows:

> 12. THE NEBRASKA LAW OF ACCRETION DOES NOT OPERATE TO CREATE RIPARIAN RIGHTS WITHIN THE TERRITORIAL LIMITS OF IOWA, AND WHETHER A NEBRASKA RIPARIAN OWNER HAS TITLE TO ACCRETIONS THAT CROSS THE BOUNDARY INTO IOWA IS DETERMINED BY IOWA LAW.

The foregoing is almost a direct quotation from Mr. Justice Brennan's Opinion at the bottom of page 9. Pur-

suant to this Court's direction that the Decree be in accord with the Opinion, Iowa believes that the language of the Opinion be employed in the Decree as accurately and fully as possible. Isolating and quoting phrases from the Opinion is a dangerous game at best, the danger being that the meaning, out of context, may be changed or subject to misinterpretation.

The Special Master's recommended Paragraph 12, would, by its very words, be applicable only "to accretions that cross the boundary into Iowa." Thus, the possible applications of Paragraph 12 would be very limited. It could even be argued that Paragraph 12 has no application at all because it is a basic tenet in the common law concerning accretions that there is no such thing as moving accretions.

Paragraph 12 as proposed by Iowa above is no more or less than a restatement of one of the rules derived from *Tyson* v. *State of Iowa*, 283 F. 2d 802 (1960). The added portion of Iowa's Paragraph 12 is a direct quotation from the *Tyson* case, which was quoted with approval by this Court at the bottom of page 9 of the Opinion. Brevity may be a virtue in some circumstances, but not here, where brevity would result in inaccuracy and uncertainty.

CONCLUSION

Iowa's understanding of Mr. Justice Brennan's Opinion dated April 24, 1972, is that all of the three broad general issues tendered to the Court for decision were in fact decided. These issues were:

(1) What effect did the 1943 Iowa-Nebraska Boundary Compact have on ownership of areas along

the boundary which were in existence in and prior to July 12, 1943, the effective date of the Compact?

(2) What effect did the Compact have on ownership of areas along the boundary which have formed since July 12, 1943?

(3) What effect did the Compact have on ownership of the bed of the Missouri River?

Iowa believes that since this Court decided all three of these issues in the Opinion of April 24, 1972, and since the Decree is to be entered "in accord with this Opinion", the Decree would be lacking and deficient if it does not set forth each and all of the Court's decisions as to these issues.

The Court's decision as to issue No. (1) stated above is fully set forth in the Special Master's Recommended Decree. This is the Court's decision which was in accordance with Nebraska's contentions and against Iowa's. Nevertheless, Iowa does not except to its inclusion in the Decree in some five paragraphs. (Paragraphs 4, 5, 7, 8 and 9.)

The Court's decision as to issue No. (2) is not set forth in the Recommended Decree unless one considers that Paragraph 12 covers the subject, but Paragraph 12 does not cover the subject, as we have attempted to point out in EXCEPTION I hereinabove.

The Court's decision as to issue No. (3) is not even touched upon in the Recommended Decree.

Iowa submits that future readers of the Opinion and Decree in this case, lawyers and judges, should be able to ascertain what this Court's decisions were without the necessity of going back of the Opinion and Decree to the Special Master's Report and to Nebraska's exceptions thereto. The Report and the exceptions will not be readily

available to future readers. The Opinion and Decree will be readily available by publication. The sentence on page 5 wherein it is said "We overrule all exceptions, . . ." is meaningless to future lawyers and judges unless its meaning be spelled out in the Decree.

WHEREFORE, the Defendant State of Iowa respectfully prays that her exceptions hereinabove stated be sustained, and that the Decree in this case be entered in accordance therewith

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1964

o

No. 17, Original

o

STATE OF NEBRASKA, PLAINTIFF,

vs.

STATE OF IOWA, DEFENDANT.

o

NEBRASKA'S REPLY TO IOWA'S EXCEPTIONS TO DECREE RECOMMENDED BY SPECIAL MASTER

o

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In The

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STATE OF NEBRASKA, PLAINTIFF,

VS.

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—o—

NEBRASKA'S REPLY TO IOWA'S EXCEPTIONS TO DECREE RECOMMENDED BY SPECIAL MASTER

—o—

INTRODUCTORY STATEMENT

Nebraska opposes Iowa's Exceptions to the Decree Recommended by the Special Master and respectfully submits that the Decree is in accord with the Opinion delivered by the Court herein on April 24, 1972.

Iowa did not take exception to the Opinion of the Court and Iowa did not file a Petition for Rehearing. She should not now be able to circumvent that Opinion by the Decree nor should she be allowed to circumvent Rule 58 of the Rules of the Supreme Court of the United States regarding rehearings. The *entire* Report of Special Master was considered by this Court and Iowa should not now be able to select certain sentences from the Report of Special Master in isolation and thereby change the meaning of the Opinion.

The Special Master recommended the proposed Decree after hearing and oral argument. Iowa's proposed Exceptions would change the opinion of the Court and in some instances would be completely contradictory to that opinion.

The Decree is, as nearly as possible, in the language of the Supreme Court. Attached hereto as Exhibit A is a copy of the Opinion delivered in this case on April 24, 1972 with references in the margin to the paragraphs of the Recommended Decree by the Special Master and with the supporting language underlined. References to the Opinion in this Reply shall be to the page of the Exhibit such as E-1.

Iowa apparently refuses to accept the language of this Court and particularly the determination that under Nebraska law the riparian owner along the Missouri River owned title to the bed on that owner's side of the main channel. Iowa's argument to the contrary was considered "frivolous" (See f. n. 3, E-7). The Court further clearly stated that a title "good in Nebraska" includes private titles to riparian lands that run to the thread of the contiguous stream (E-6 and E-7), and that under Section 3 of the Iowa-Nebraska Boundary Compact of 1943, Iowa was bound to recognize such titles which were "good in Nebraska" to be "good in" Iowa, and not to claim ownership in herself (E-5). These statements by the Court have been embodied in the Recommended Decree submitted by the Special Master. Iowa's Exceptions would change these principles and operate to deprive the Nebraska riparian owner of his title which had been good in Nebraska in direct contravention of the

Opinion and Section 3 of the Iowa-Nebraska Boundary Compact of 1943. It is clear from the Opinion that titles good in Nebraska shall be good in Iowa. The Compact recognized these titles. It did not take them away from the owner or divest the owner of them and transfer them to the State of Iowa.

Iowa's present position is typical of her conduct throughout these proceedings. First, Iowa refused to accept the Court's decision that it had jurisdiction in 1965, 379 U. S. 996, and she continued to argue that point for the next seven years. Then she refused to accept the clear legal principle that in Nebraska the riparian owner owns the bed of navigable streams and engaged in an argument which this Court found to be frivolous (f. n. 9, E-7). Now she has refused to accept the clear and unambiguous Opinion of this Court delivered on April 24, 1972.

Nebraska submits that the Decree should be entered as recommended by the Special Master. It is clear and unambiguous and decides the issues in the case. It may not decide them in the manner which either Nebraska or Iowa completely prefer, but it does set the issues to rest as decided by this Court.

———o———

REPLY TO EXCEPTION I OF THE STATE OF IOWA

It is difficult to reply to Iowa's Exceptions without rearguing the entire case since Iowa's Exceptions would change the holding of the Court. When exceptions were

argued to the Report of Special Master, in some instances the exceptions were worded in different language from that of the Master and in others were to be taken in the total context. To take certain sentences or paragraphs out of the Master's Report now could be misleading in result. The opinion of the Court constituted a complete overview of the entire case and settled the issues in totality.

Iowa has stated that its Exception I is ". . . a direct quotation from the Special Master's Report at the top of page 193." However, Iowa failed to mention that this statement was qualified by language at the bottom of page 192 of the Report of Special Master to generally refer to "north of Omaha". Without this qualification, Iowa's statement is taken out of context. Nebraska would point out that there is no basis for a distinction between principles to be applied north and south of Omaha but the same principles must be applied along the entire river. This, the Opinion made very clear.

Paragraph 11 of the Recommended Decree by the Special Master reiterates language found at page E-8 of the Opinion that claimants of title to areas formed since July 12, 1943 may also have the opportunity to show title "good in Nebraska" on the Compact date. This title includes the Nebraska riparian owner's title to the bed which was a title "good in Nebraska". Iowa still refuses to accept that principle and by subtle changes to the Decree, such as her proposed language in her Exception I, would nullify it.

In addition, Iowa's suggestion that her proposed statement is one of the rules to be derived from the case of *Tyson v. State of Iowa*, 283 F. 2d 802 (1960) could be misleading. The *Tyson* case will be discussed at a later point in this Reply.

—o—

REPLY TO EXCEPTION II OF THE STATE OF IOWA

Iowa's proposed Exception II would completely change the effect of the Opinion. Iowa has suggested that ownership of the bed of the Missouri River after the Boundary Compact "is and has been" determined by Iowa law on the Iowa side of the new boundary. This is not, as Iowa has inferred, the language of the Special Master found at page 183 of his Report. The subtle addition of the words "is and has been" would lend retroactivity to any determination about the formation of lands and would operate to displace the Nebraska riparian owner's title which had been "good in Nebraska" and which, under Section 3 of the Compact, Iowa had agreed to respect.

Iowa's proposed language is inconsistent with other holdings in the Opinion and would create ambiguities leading to further litigation. It would nullify the plain holding of the Court that titles good in Nebraska shall be good in Iowa as to lands "ceded" as defined in the Opinion.

At page 6 of Iowa's Exceptions, she apparently has attempted to cast some doubt upon the nature of the

hearing held by the Special Master and his reasoning in preparing the Recommended Decree. Nebraska would point out that a full and fair hearing was held and the Recommended Decree is that of the Special Master. As such, and particularly considering that it is completely consistent with the Opinion of the Court, his recommendation should be given great weight.

Nebraska must also point out that it is not Nebraska which is attempting to relitigate any issues, but it is Iowa which is making this attempt. Iowa has refused to accept the clear language of the Court found in the Opinion at pages E-6 to E-7 and embodied in paragraph 7 of the Recommended Decree that titles "good in Nebraska" include private titles to riparian lands that under Nebraska law, differing from Iowa law, run to the thread of the contiguous stream. She continues to cling to her "frivolous" argument to the contrary (see Footnote 9, page E-7). The language of the Court could hardly be clearer. If such plain and clear language constitutes ambiguity in her eyes, then Iowa's motives would seem to become suspect.

REPLY TO EXCEPTION III OF THE STATE OF IOWA

Iowa's Exception III has objected to paragraph 6 of the Recommended Decree. Nebraska would first point out that paragraph 6 is accurately reflective of the holding in the Opinion (see E-6 and f. n. 4 and f. n. 5 at E-4).

In addition, Iowa recommended the following paragraph to the Master:

> "8. The State of Iowa does not own Nottleman Island and Schemmel Island. The proofs sufficed to establish title 'good in Nebraska' as of July 12, 1943, to Nottleman Island which was the land involved in the case of *State of Iowa, Plaintiff, v. Darwin Merritt Babbitt, et al.*, Equity No. 17433 in the District Court for Mills County, Iowa, and to Schemmel Island which was the land involved in the case of *State of Iowa, Plaintiff v. Henry E. Schemmel, et al., Defendants,* Equity No. 19765 filed in the District Court of Fremont County, Iowa, on March 26, 1963, and that Nottleman Island and Schemmel Island formed before July 12, 1943."

The above language is identical to paragraph 6 of the Recommended Decree except Iowa had suggested the phrase "as of July 12, 1943" be inserted. Iowa should not now be entitled to question what was substantially her own recommendation.

In addition, Iowa is again suggesting that the Court ignore its statement at E-6 and E-7 that titles "good in Nebraska" include private titles to riparian lands that under Nebraska law, differing from Iowa law, run to the thread of the contiguous stream. Iowa has apparently refused to accept this clear statement by the Court.

There is nothing in the Opinion which states that a Nebraska riparian owner's ownership of river bed before the Compact, to which there was a title good in Nebraska, floated out from under that landowner and into the State of Iowa, without compensation, thus depriving the landowner of his property, by the fact that the area was placed in Iowa by the Iowa-Nebraska Compact of 1943.

Nebraska would further mention that Exhibits D-1044-A and D-427 referred to by Iowa were discredited by the evidence, but Nebraska does not feel it should be necessary to have to go back into the original issues argued in the case.

—o—

REPLY TO EXCEPTION IV OF THE STATE OF IOWA

Iowa has stated that paragraph 11 of the Recommended Decree is "inaccurate, misleading and subject to misinterpretation." However, paragraph 11 represents what the Court said in its Opinion (E-8). Again, it appears that Iowa is arguing with the holding of the Court and is attempting to change that holding by the Decree.

At page 9 of her Exceptions, Iowa is apparently again attempting to interject a requirement that a private claimant of land must prove when and how the land formed, and this is a requirement which clearly was negated by the Court in other parts of the Opinion when the Court held that it was not necessary to prove the location of the *original* boundary (E-6).

There are many complicated factual situations existing along the Missouri River and this, in large part, was one of the major reasons for the adoption of the Compact. The difficulty in tracing the factual history of areas was clearly illustrated by the mass of evidence in this case directed toward the formation of the Nottleman and Schemmel Island areas. The Court found that all of this was not necessary and the Compact did not place this burden upon the landowner (E-6).

In her statements on page 10 of Iowa's Exceptions, Iowa has again ignored the fact that the riparian owner in Nebraska owned the bed and this includes island and bar areas arising in that bed. This was a part of his title which Iowa agreed would be good under Section 3 of the Compact. Iowa is attempting to provide a requirement that an area "existed" and this definitional problem is fraught with litigious possibilities. When the area was in Nebraska, it was immaterial whether it was bar, island or bed since it all belonged to the riparian owner. Iowa's suggested rule would lead to further controversy, litigation, and possible injustice. There are thousands of acres of land along the approximately 190 mile border which could be affected by this holding and Iowa's language would allow her to obtain large areas to which she otherwise has no right and over which she has not exercised any incidents of ownership, in direct violation of her solemn agreement in the Compact that such titles would be good in Iowa.

REPLY TO EXCEPTION V OF THE STATE OF IOWA

Iowa has also objected to Paragraph 12 of the Recommended Decree even though that language is almost identical to that in the Opinion (E-9).

Iowa apparently would like to go back into the *Tyson* case and extract certain language from it. The evidence in this case is clear that Iowa has previously relied upon the *Tyson v. Iowa* case as holding that a Nebraska riparian owner could not accrete across the state line into

Iowa (See pp. 382-389 of Plaintiff's Resume' of Evidence Before the Special Master, Honorable Joseph P. Willson and p. 34 of the Missouri River Planning Report (Ex. P-2609, R. Vol. I, pp. 87-88) quoted at p. 69 of Plaintiff's Resume'). The holding of the Court in this case is certainly clear that a Nebraska riparian owner may have accretions to his land which cross the boundary into Iowa if they are formations which, under Iowa law, meet the tests of accretion. The *Tyson* case did not involve any question of a claim of a title good in Nebraska to land ceded to Iowa and should not be extended beyond what it properly held. The Decree should make it clear that Iowa cannot continue to miscite the *Tyson* case for a principle which is not accurately reflective of the holding as Iowa has done in the *Riley Williams* case at Middle Decatur Bend. (See Plaintiff's Resume' of Evidence Before the Special Master, pp. 382-389).

Iowa's statement on page 12 of her Exceptions that "it could even be argued that Paragraph 12 has no application at all because it is a basic tenet in the common law concerning accretions that there is no such thing as moving accretions" is completely incomprehensible and again raises some question as to Iowa's willingness to abide by the Opinion. The proposition in Paragraph 12 of the Proposed Decree as recommended by the Special Master is very clear, and it is difficult to conceive of any *bona fide* questions as to its applicability or meaning.

CONCLUSION

Nebraska submits that all of the issues in this case have been clearly decided by the Opinion and are accurately reflected in the Recommended Decree by the Special Master. The Decree is in accord with the Opinion, but it would not be if Iowa's proposed Exceptions were adopted. Iowa has just refused to accept what the Court decided. Iowa should not be allowed to change the effect of the Opinion by a selectively drafted Decree which does not reflect the holding of that Opinion. This is particularly pertinent since Iowa failed to file any Motion for Rehearing following delivery of the Opinion.

If Iowa is allowed to extract language from the Report of Special Master, in all fairness Nebraska should also have the opportunity of going behind the Opinion to recommend other more restrictive language in the Report such as that Iowa has violated the Compact of 1943 by claiming Nottleman and Schemmel Islands; that the states relinquished by the Compact the right to question any title, lien or mortgage on the grounds that the land to which it applied was not within the jurisdiction of the state through which said title, lien or mortgage arose; that there was no record of land ceded by the Compact; that the land within the bed of the Missouri River was ceded along the entire boundary; that it is almost impossible to locate the boundary throughout from the A. P. maps; that some of Iowa's traverses are arbitrary and have no basis in fact; that when a litigant shows a title supportable under Nebraska law, Iowa should not be able to defend on the ground that no person can claim adversely against the sovereign State

of Iowa, and the presumption that accretion is favored over avulsion should not have application in such situation; that the credibility of Iowa's principal witnesses may have been influenced or may be suspect; that the states made no attempt to determine what private title claims existed along the Missouri River, but intended to recognize all private claims as against the states without further investigation; and other such statements which might be found in the Report of Special Master. Nebraska submits that this is not proper procedure and that such statements are not a proper part of the Decree any more than are the suggested changes set forth by Iowa in her Exceptions.

This case has been fully argued and decided and should not be reopened at this stage of the proceedings. Nebraska respectfully submits that the Recommended Decree of Special Master should be entered herein.

Respectfully submitted,

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PROOF OF SERVICE

I, Howard H. Moldenhauer, Special Assistant Attorney General of the State of Nebraska, and a member of the Bar of the Supreme Court of the United States, hereby certify that on December 11, 1972, I served a copy of NEBRASKA'S REPLY TO IOWA'S EXCEPTIONS TO DECREE RECOMMENDED BY SPECIAL MASTER by depositing same in a United States Post Office, with first class postage prepaid, addressed to:

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such being their post office addresses, and that all parties required to be served have been served.

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EXHIBIT A

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 17, Orig.

State of Nebraska, Plaintiff,
v.
State of Iowa.
} On Exceptions to Report of Special Master.

[April 24, 1972]

MR. JUSTICE BRENNAN delivered the opinion of the Court.

Both Iowa and Nebraska filed Exceptions to the Report submitted by the Special Master in this original action brought by Nebraska against Iowa for construction and enforcement of the Iowa-Nebraska Boundary Compact of 1943.[1]

The Missouri River is the boundary between the two States. In 1892, in another suit brought by Nebraska against Iowa, this Court held that the boundary line in

Decree
Par. 1

[1] Iowa Code Ann. Vol. I, p. 85; Iowa Acts 1943 (50 G. A.), c. 306; Nebraska Laws 1943, c. 130; Act July 12, 1943, 57 Stat. 494.

Leave to file the action was granted in 1965. 379 U. S. 876 (1964); 379 U. S. 996 (1965). There have been successive Special Masters. See 380 U. S. 968 (1965); 392 U. S. 918 (1968); 393 U. S. 910 (1968). Senior Judge Joseph P. Willson completed the case after extensive hearings and filed his Report on November 9, 1971. 404 U. S. 933 (1971). The Exceptions of the States were orally argued before this Court on March 29, 1972.

Iowa's Exception I renews the objection to the Court's jurisdiction that was overruled when leave to file was granted. We overrule the Exception. "Just as this Court has power to settle disputes between states where there is no compact, it must have final power to pass upon the meaning and validity of compacts." *West Virginia ex rel. Dyer* v. *Sims*, 341 U. S. 22, 28 (1951); Constitution Art. III, § 2; 28 U. S. C. § 1251.

Decree, Par. 1

the river at Carter Lake, Iowa, was to be located according to the principle that the boundary "is a varying line" so far as affected by "changes of diminution and accretion in the mere washing of the waters of the stream," but not where the river is shifted by avulsion: "By this selection of a new channel the boundary was not changed, and it remained as it was prior to avulsion, the centre line of the old channel; . . . unless the waters of the river returned to their former bed, [such centre line] became a fixed and invarying boundary, no matter what might be the changes of the river in this new channel." *Nebraska* v. *Iowa*, 143 U. S. 359, 370 (1892); the decree is at 145 U. S. 519 (1892). The Compact adopts this line at Carter Lake, and for the rest of the boundary fixes the line in "the middle of the main channel of the Missouri River," defined as the "center line of the proposed stabilized channel of the Missouri river as established by the United States engineers' office, Omaha, Nebraska, and shown on the alluvial plan maps of the Missouri river from Sioux City, Iowa to Rulo, Nebraska and identified by file numbers AP–1 to 4 inclusive, dated January 30, 1940, and file numbers AP–5 to 10 inclusive, dated March 29, 1940, which maps are now on file in the United States engineers' office at Omaha, Nebraska, and copies of which maps are now on file with the Secretary of State of the State of Iowa and with the Secretary of State of the State of Nebraska." The "proposed stabilized channel" refers to a project begun in the early 1930's by the United States Army Corps of Engineers to tame the river along its entire length by containing it within a designed channel. The work was partially completed by 1943, but had been suspended when World War II intervened. When work resumed in 1948, the channel was partly redesigned, and by 1959 the river had been confined in the new designed channel.

The States determined in 1943 to agree by compact upon a permanent location of the boundary line when experience showed that ". . . the fickle Missouri River . . . refused to be bound by the Supreme Court decree [of 1892]. In the past thirty-five years the river has changed its course so often that it has proved impossible to apply the Court decision in all cases, since it is difficult to determine whether the channel of the river has changed by 'the law of accretion' or 'the law of avulsion.'" Erickson, 25 Iowa J. of Hist. and Pol. 233, 235 (1927). The Special Master found, on ample evidence, and we adopt his findings, that by 1943 the shifts of the river channel had been so numerous and intricate, both in its natural state and as a result of the work of the Corps of Engineers, that it would be practically impossible to locate the original boundary line.[2] Decree, Par. 1 Decree, Par. 2

The fixing of the permanent boundary by Compact resulted in some riparian lands in each State being located within the other State. This created the problem of the effect to be given by the new State to titles, mortgages, and other liens that had arisen under the laws of the other State. Sections 2 and 3 of the Compact were designed to solve this problem.[3] Under § 2 each State "cedes" to the other State "and relinquishes jurisdiction over" all Decree, Par. 4

[2] Report, pp. 63, 65, 67, 68, 80.

[3] Each State Legislature adopted a statute to evidence its agreement to the Compact. Sections 2 and 3 of each statute create obligations reciprocated by the other State in §§ 2 and 3 of its statute. In the Iowa statute the sections are:

"Sec. 2. The State of Iowa hereby cedes to the State of Nebraska and relinquishes jurisdiction over all lands now in Iowa but lying westerly of said boundary line and contiguous to lands in Nebraska.

"Sec. 3. Titles, mortgages and other liens good in Nebraska shall be good in Iowa as to any lands Nebraska may cede to Iowa and any pending suits or actions concerning said lands may be prosecuted to final judgment in Nebraska and such judgments shall be accorded full force and effect in Iowa." Decree, Par. 3

Decree, Par. 4

such lands now located within the Compact boundary of the other. Under § 3, "titles, mortgages and other liens" affecting such lands "good in" the ceding State "shall be good in" the other State.

The instant dispute between the States arose when Iowa in 1963 claimed state ownership of some 30 separate areas of land, water, marsh, or mixture of the three wholly on the Iowa side of the Compact boundary. Eight and part of a ninth such areas were formed before 1943. Twenty-one and part of a 22d were formed after 1943.[4] Iowa's claim was based on Iowa common law that private titles to riparian lands run only to the ordinary high water mark on navigable streams and that the State is the owner of the beds of all navigable streams within the State and is also the owner of any islands that may form therein. *McManus* v. *Carmichael*, 3 Iowa 1 (1856); *Holman* v. *Hodges*, 112 Iowa 714, 84 N. W. 950 (1901). The areas formed before 1943 lie south of Omaha and those formed after 1943 lie north of Omaha. Two of the pre-1943 areas are Nottleman Island and Schemmel Island. Each is the subject of an action to quiet title brought by Iowa in Iowa courts.[5] The defense in each case is that there

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Decree, Par. 6

[4] The areas formed before 1943 are Nottleman Island, Schemmel Island, St. Mary's Bend, Auldon Bar, Copeland Bend, State Line Island, Wilson Island, Deer Island, and a portion of Winnebago Bend. Report, pp. 106, 165.

The areas formed since 1943 are Dakota Bend, Omadi Bend, Between Omadi and Browers Bends, Snyder Bend, Glover's Point Bend, Rabbit Island, Upper Monoria Bend, Monoria Bend, Blackherd Bend, Tieville Bend, Upper Decatur Bend, Middle Decatur Bend, Lower Decatur Bend, Louisville Bend, Blencoe Bend, Little Sioux Bend, Bullard Bend, Soldier Bend, Sandy Point Bend, Tyson Bend, and California Bend. Report, p. 107.

[5] On March 18, 1963, Iowa filed in the District Court for Mills County *"State of Iowa, Plaintiff* v. *Darwin Merrit Babbit et al.*, Equity No. 17433" to quiet title to Nottleman Island. On March 26,

exist "titles . . . good in Nebraska" to the islands that, under § 3 of the Compact, Iowa obligated itself to recognize to be "good in Iowa" as against any claim of Iowa under its doctrine of state ownership.

Thus, the controversy between the States in this case centers around the proper construction of their Compact. The Special Master's Findings and Conclusions generally favor Nebraska's position on the merits of the controversy over the areas that formed before July 12, 1943, and Iowa's exceptions are addressed to them. On the other hand, the Findings and Conclusions favor Iowa's position on the merits of the controversy over the areas that formed after July 12, 1943, and Nebraska's exceptions are primarily addressed to them. We overrule all exceptions, save two of Nebraska addressed to printing errors in the Report,[6] save as we sustain, *infra*, Iowa's Exceptions IV and V insofar as the Special Master recommended that an injunction issue, and save as mentioned in n. 8, *infra*.

The Special Master construed the word "cedes" in § 2 as meant by the States to describe all areas formed before July 12, 1943, regardless of their location with reference to the original boundary, whose "titles, mortgages and other liens" were, at the date of the Compact, "good in" the ceding State, and ruled that, under § 3, the other State is bound to recognize such "titles, mortgages and other liens" to be "good in" its State, and not to claim ownership in itself. Iowa urges, in its Exceptions

Decree, Par. 4

1963, Iowa filed in the District Court of Fremont County *"State of Iowa, Plaintiff* v. *Henry E. Schemmel, et al., Defendants,* Equity No. 19765" to quiet title to Schemmel Island. Proceedings in the actions have been suspended pending our decision.

[6] Exceptions of the State of Nebraska, No. 6, p. 8, and No. 12, p. 11. Iowa concedes that the Exceptions are well taken. Iowa Reply, pp. 5, 7. The errors will be deemed corrected as suggested by the Exceptions.

II and III, that this construction is erroneous and that §§ 2 and 3 should be construed as relating only to areas formed before July 12, 1943, that can be proved by clear, satisfactory, and convincing evidence to have been on the Nebraska side of the *original* boundary before the Compact fixed the permanent boundary. We overrule Iowa's Exceptions. Iowa's construction would require the claimant who proves title "good in Nebraska" also to shoulder the burden of proving the location of the *original* boundary before 1943, as well as proving that the lands were on the Nebraska side of that boundary. That, said the Special Master, and we agree, ". . . would be placing a burden upon the land owner which the States themselves refused to undertake in 1943 and agreed would not be necessary. The states would in effect be saying to the land owner 'we could not prove where the boundary was in 1943 but now, after we have waited 27 years, we are going to make you prove where it was at your expense even though we know it is impossible.' "[7]

Decree, Par. 5

Iowa's Exceptions IV and V concern the Special Master's findings that the State of Iowa does not own Nottleman Island and Schemmel Island. The Special Master found that the proofs sufficed to establish title "good in Nebraska" to Nottleman Island and Schemmel Island, but did not suffice to prove title "good in Nebraska" to the other areas claimed by Iowa that were formed before 1943.[8] He found, and we agree, that titles "good in Nebraska" include private titles to riparian lands that under Nebraska law, differing from

Decree, Par. 6

Decree, Par. 7

[7] Report, pp. 88–89.

[8] Report, p. 174. The Special Master found, alternatively, that if his construction of §§ 2 and 3 was not accepted, nevertheless the landowners met the burden of proving that Nottleman and Schemmel Islands were actually on the Nebraska side of the original boundary. Since we agree with the Special Master's construction, we consider no exceptions addressed to those findings.

Iowa law, run to the thread of the contiguous stream. *Kirkead* v. *Turgeon*, 74 Neb. 580, 104 N. W. 1061 (1906).[9] He found further that titles "good in Nebraska" embrace titles obtained by 10 years' open, notorious, and adverse possession under claim of right without any requirement of a record title; under Iowa law, a claim must be under "color of title," requiring some type of record title to commence the period of adverse possession.[10] Decree, Par. 7 Decree, Par. 8

The Special Master recommended that as to areas formed before July 12, 1943, §§ 2 and 3 should be construed as limiting the State of Iowa to contesting with private litigants in state or federal courts the question whether the private claimants can prove title "good in Nebraska," and when private litigants prove such title, as obliging Iowa not to interpose Iowa's doctrine of state ownership as defeating such title.[11] We agree and to that extent overrule Iowa's Exceptions IV and V. As to Nottleman Island and Schemmel Island, however, the Special Master recommended that, in addition to a judgment that titles "good in Nebraska" have been proved as to those islands, so that Iowa is precluded from claiming title thereto under its doctrine of state ownership, this Court should enjoin the State of Iowa, its Decree, Par. 9 Decree, Par. 10

[9] In Iowa's Reply, filed January 19, 1972, Iowa for the first time in this protracted litigation retracts her concession, made often and throughout the proceedings, that *Kirkead* established this principle of Nebraska law. In her Reply, pp. 15–16, Iowa contends that "the common law of the State of Nebraska did not in fact give the Nebraska riparian owners along the Missouri River title or ownership of the bed of the navigable channel of the river, and they acquired no property to such bed until it was abandoned by the river." Our reading of the Nebraska cases satisfies us that the argument is frivolous.

[10] Report, pp. 68–69. Claimants to titles to areas of Nottleman Island rested at least in part on the Nebraska law of adverse possession. Report 121–126.

[11] Report, pp. 174–175.

officers, agents, and servants from further prosecution of the cases now pending in the Iowa courts.[12] We see no reason for an injunction at this stage. We are confident that the State of Iowa will abide by our adoption of the Special Master's conclusion that in any proceeding between a private litigant and the State of Iowa in which a claim of title good under the law of Nebraska is proved, the State of Iowa shall not invoke its common law doctrine of state ownership as defeating such title. Iowa's Exceptions IV and V are therefore sustained insofar as the Special Master recommended that an injunction issue.

Decree, Par. 10

Nebraska's basic Exception is to the Findings and Conclusion of the Special Master that ownership of areas that have formed since July 12, 1943, should be determined under the law of the State in which they formed, the boundary fixed by the Compact being the line that determines in which State they formed.[13] This pertains to the 21 areas and part of a 22d that lie north of Omaha. See n. 4, *supra*.

Although the Special Master recommended, and we agree, that claimants of title to these areas as against Iowa may also have the opportunity to show title "good in Nebraska" on the Compact date, July 12, 1943,[14] Nebraska offered no proofs to support such a claim as to any of the areas. Nebraska does contend, however, that any accretions to Nebraska riparian lands that cross the Compact boundary line into Iowa, caused when the river moves gradually and imperceptibly, should be declared to accrue to the Nebraska riparian owner under Nebraska law, since under Nebraska law the boundary of the Nebraska owner moves with the thalweg or main navigable channel, regardless of which State the move-

Decree, Par. 11

[12] Report, p. 201; see n. 5, *supra*.

[13] Report, p. 193.

[14] Report, p. 192.

ment is in. The Special Master rejected that contention. We agree that the contention is without merit for the reasons stated in *Tyson* v. *State of Iowa*, 283 F. 2d 802 (1960). That was a condemnation action by the United States in which the question was the ownership of an island at Tyson Bend, one of the areas north of Omaha to which Iowa claims ownership. See n. 4, *supra*. The island had formed between the designed channel and a main channel created when the river escaped from the designed channel between 1943 and 1948. The island had then become connected to the Nebraska shore when the designed channel filled with sediment after a 1952 flood. The Corps of Engineers determined to dredge a canal in the designed channel to place the river back in the designed channel. Condemnation of an easement on the island was necessary to carry the project forward, and the question of ownership of the island had to be settled to determine who was entitled to compensation. The Tyson claimants claimed the land as an accretion to Nebraska land or river beds belonging to them. The State of Iowa claimed it as an island formed over the state-owned river bed in Iowa under the Iowa doctrine of state ownership. The Court of Appeals for the Eighth Circuit held that the ownership of the island should be determined by the law of the State in which the land was situated, that is, by the law of Iowa, since the island was on the Iowa side of the Compact boundary. The Court of Appeals expressly rejected the same contention urged upon us by Nebraska, holding, in agreement with the District Court in the case, that "the Nebraska law of accretion did not operate to create riparian rights within the territorial limits of Iowa." 283 F. 2d, at 811. Hence, whether the Nebraska riparian owner has title to the accretions that cross the boundary into Iowa is determined by Iowa law. Nebraska argues that *Tyson* was

Decree, Par. 12

wrongly decided. We do not agree. *Tyson* is consistent with what the Court said in *Arkansas* v. *Tennessee*, 246 U. S. 158, 175 (1918):

> "How the land that emerges on either side of an interstate boundary stream shall be disposed of as between public and private ownership is a matter to be determined according to the law of each State, under the familiar doctrine that it is for the States to establish for themselves such rule of property as they deem expedient with respect to the navigable waters within their borders and the riparian lands adjacent to them. . . . *But these dispositions are in each case limited by the interstate boundary, and cannot be permitted to press back the boundary from where otherwise it should be located.*" (Emphasis added.)

The States may submit a proposed decree in accord with this opinion. If the States cannot agree, the Special Master is requested, after appropriate hearing, to prepare and submit a recommended decree.

It is so ordered.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 17, ORIGINAL

STATE OF NEBRASKA,
Plaintiff,

vs.

STATE OF IOWA,
Defendant.

TRANSCRIPT OF ORAL ARGUMENTS MADE BEFORE HON. JOSEPH P. WILLSON, SPECIAL MASTER

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ORAL ARGUMENT BY MR. HOWARD H. MOLDENHAUER FOR THE PLAINTIFF, STATE OF NEBRASKA

9:30 O'Clock A.M.,
September 29, 1970

THE COURT: Good morning everyone. I said hello to the counsel in my chambers a few minutes ago, and this is the time fixed for the oral arguments of counsel. I suggest that Nebraska proceed, take the time that they think necessary and proper, and afterwards we will hear from Iowa.

MR. MOLDENHAUER: May it please the Court, we plan to present this argument in the following order. We plan to start out with the history leading up to the Compact and review it fairly briefly in light of the extensive briefing that has been done.

We will begin with the Compact, then we plan to explain to the Court what we think it did, how we think it solved our problems, and discuss what our contentions are as to the Compact right at that time.

Then we plan to go into the Babbitt and Nottleman Island area more specifically and some of the documents and review to the Court those documents that, just exactly what the history was in that area, both as to how it formed and how the states treated the property.

And then we plan to go down to the Schemmel area and cover it. And then hit the other areas along the river, such as Winnebago Bend, the Flowers Island case and California Bend and Auldon Bar to show what Iowa's conduct has been pursuant to the Missouri River Planning Report in this last

decade and illustrate what we contend are the violations of the Compact by the State of Iowa.

Then we plan to take up in a little more detail at the very end the Court's questions which they raised in their Order, but we realize that some of those questions will probably come up during the argument as we get to them. But I think that once we discuss the facts it's a little easier to talk about the application of those facts, but whenever the Court has a question in connection with the question submitted it will be perfectly --

THE COURT: I think we'll get along better if I try to remain silent.

MR. MOLDENHAUER: Since there is such a mass of evidence concerning background of the Compact we just wanted to pick out a few selected illustrations which indicate, I take it, it's all right to walk around.

THE COURT: Oh, sure, sure.

MR. MOLDENHAUER: (continuing) which indicate that the situation along the Missouri River ever since the time that the States were admitted into the Union was tremendously uncertain, and that the movements of the river became a thing of common knowledgeto both states and the people of all states.

In the first case which Nebraska and Iowa had filed back in 1890, between Nebraska and Iowa with regard to Carter Lake, there were allegations about the channels of the river, and Iowa itself alleged how the river frequently cuts through the necks of the bends foresaking its former channel and taking a new channel, and their own allegations indicated that this is typical of the entire river.

So way back in 1890 we have the first real recognition by both states formally and officially, at least, that there was this great uncertainty which existed.

And starting in 1901 in Nebraska, the Nebraska Legislature started adopting resolutions creating boundary commissions to settle the boundary, and in and about 1902 and thereafter, in Iowa there were many resolutions offered into the Legislature of Iowa and there were many resolutions adopted creating Boundary Commissions. During all this period we had discussions between the states.

Now there may be some contention that Carter Lake was the primary problem between the states at this time, but I'd like to point out that in 1913, for instance, the Iowa General Assembly adopted, or, a bill was introduced which referred to the fact that the Missouri River flowed through, bordered counties and flowed through some others, and it mentioned the great flood of 1881 which Carter Lake was cut off. But it also mentioned land in Pottawattamie County which was cut off and

bordering Douglas and Sarpy Counties. Now Douglas County and Pottawattamie County and Carter Lake, now Sarpy County is just south of here and in all probability this was Lake Manawa.

THE COURT: What you are reading, is there an exhibit number?

MR. MOLDENHAUER: This is the Exhibit P-1793 which is the 1913 from the Journal of the Senate.

THE COURT: I think as we go along if you'll mention those numbers, that that will help.

MR. MOLDENHAUER: Thank you. I'm just selecting these.

THE COURT: I know, that's all right.

MR. MOLDENHAUER: And in 1923 there was another bill which we have in Exhibit P-1796, in which the Boundary Commission or the bill was to enact and establish a Boundary Commission, to report drafts and compacts and agreements.

And I want to point out that there was a specific sentence in that bill that in presenting such compacts the Boundary Commission of the State of Iowa shall preserve the boundary line as it now exists between the states of Iowa and Nebraska,

between Council Bluffs and Omaha at Carter Lake. So here in '23, what we're trying to find out is the fact that they weren't just talking about Carter Lake, and here they are talking about the entire remainder of the river in making the middle of the channel the boundary, but excepting Carter Lake because they know where the boundary is there, as it was determined by the Court in 1890.

Then in 1937 a bill was presented, Exhibit P-1805, to the Senate, it was not adopted but the bill in its "Whereas" clauses recognizes that it would be expensive and practically impossible in view of the conditions as they now exist to locate the original boundary between the state of Iowa and the state of Nebraska, recognizes that said lands remained unplatted and are not subject to taxation in either state, that there was a Boundary Commission in '35, and that the river was apparently and in all probability would be fixed and stabilized.

So again, it was proposed to put it in the middle of the river. But in that offered bill there was again recognition of all this uncertainty that existed along the river.

Back in 1923 in the Iowa Journal of History and Politics in Exhibit P-2696, which is published by the Iowa Historical Society, the statement was made the Missouri River has always been notorious for its meandering. There are tracts of land which are first on one side of the river and then on the other. The people who live there are sometimes

uncertain whether they are inhabitants of Iowa or Nebraska, and so are the tax assessors.

Another, in the Iowa Journal of History and Politics, Exhibit P-2691, the statement was made in 1927 that in the past thirty-five years since Iowa-Nebraska the river has changed its course so often it's proved impossible to apply the Court's decision in all cases, since it's difficult to determine whether the channel of the river has been changed by the law of accretion or the law of avulsion.

And then we have many newspaper articles over the years. P-2500 is an article in the Des Moines Register in 1925 entitled "War on Nebraska" which recognizes the fact that there are areas up and down the river which are left on each side, and it mentions a two thousand acre tract of Iowa which was in a part of Dakota County, Nebraska, it mentioned East Omaha, and it mentions the difficulties that have been caused by this change of channel between two states.

The same thing, an article in the March 4, 1935 Marshalltown paper, and these are Iowa newspapers, in which they discuss land which has been cut off, they mention Flowers Island and the problems there, areas up and down the river which have been cut off by the action of the river, and some of the problems which have followed.

In 1940 there was an article in the Omaha World-Herald about action on the boundary which

refers to negotiations between the two states for a boundary Compact, and it says in an editorial "all up and down the river there are tracts of land on one side which belong to the other, tax problems, school problems and law enforcement problems result, and all could be solved by the simple expedient of fixing the boundary where it ought to be, in the center of the stabilized channel," and that's Exhibit P-1535.

Another article on November 20, 1940, which is three years prior to the Compact, Exhibit P-1534 which says "But between Nebraska and Iowa the boundary line is vague and irrational. Originally that line followed the Missouri River. The river changed its course but the line stayed where it used to be. Now all up and down the river chunks of Iowa lie westward of it and pieces of Nebraska to the east."

So in this situation that we come up to 1943 at the time that the Iowa-Nebraska Boundary Compact had been adopted. Now we also have in evidence many, many extracts from the reports of the Corps of Engineers, which are quite voluminous, but mention is made all through these reports of natural cutoff of the Missouri River. They don't always identify where they are, but back in the 1880's and '90's there is one mentioned between Omaha and Plattsmouth, there were, I think it was, three cutoffs in the last two or three years, without locating them.

So the point of all this is that it was generally known that the river had moved many times by avulsion and it cut across necks and found new channels. This can also be found in some of our reported cases. In our original case about 1907 of Kinkead versus Turgeon, which really established our water law, our Court said that this is general knowledge about how the Missouri River has moved around, and they cited language very similar to what the State of Iowa alleged in the case of Nebraska versus Iowa.

Then on top of this situation we had the Corps of Engineers in about 1934 coming in and designing a new channel which was superimposed upon this great history and movement of the river. And when the Corps came in they had dredged by 1943 approximately fifteen canals in which they cut areas off, they moved the river by dikes and revetments, they moved it in the practical and in the most economic and fastest manner they could to put it where they wanted it. In the testimony of both General Loper and Mr. Huber was, they put it there as fast and as economically as they could. They went around the area without washing it away, that's what they tried to do, they didn't set out to wash everything away as they moved the river. If they could put it into a chute which was over on the other side they channeled over that chute, if it met their plan.

But what the Corps did was superimpose this

design, starting out in bluffs and hard points and put the river in a series of curves so that they could control it and scour out a channel, a navigable channel, on the outside, and in doing this they decided where the river was going to go and then they set out and placed it there; so we had that situation which existed.

Now it further illustrates just some of the problems. We have Exhibits P-2173, in which Mr. Brown superimposed the 1943 designed channel on the original Nebraska government survey of about 1857, in those years, and this does not show where the river moved between those times as such, because the river could have moved all over the place. It just showed where the Nebraska right bank was at the time of the original survey and where the '43 channel is.

But the significant thing here is on this first sheet, for instance, the designed channel is about two miles over to the east of where it is in some of these places, and this runs for at least two miles north and south. Now during the years the river has moved across in here and in order to determine or trace the title to that property it could be described as accretion to the Nebraska Section 1, which is right here, all the way over, and if it got over here and moved back it could be accretion to Section 4, if it moved back here it could be called accretion to Section 5 or accretion to Section 6, or accretion to any of those half

sections or quarter-sections in between. So the descriptions may change.

Then if the river moved here, the officials might re-survey it, put it back on the tax records and give it a tax lot designation, which is entirely different than the original government section number. Or they might restore, as they call it, a government section, and they might extend a different section over here, if this section is twelve, well, this is another, they might go over to thirteen, so there is a confusing situation which exists in all these areas along the river.

And in here we show a movement of at least two miles east and west and two miles north and south, and who knows how that land is described without a tremendous search of the tax records. This same situation exists down here, there are some areas where the river has moved completely and just left a lot of land on one state or the other, perhaps it washed it away, perhaps it cut around it, but the point we'd like to make here is at the time of the Compact there was always uncertainty which was in existence as to how these titles were to be described and as to what the situation was with regard to them.

Again, merely to illustrate the situation that existed and the problems that existed, and so on, what the states had to face when they came to the Compact.

And one other point we have made right here

is that from the navigation charts which are, I think we put one page in evidence, we have a whole book here, P-2685, they also established that once the Corps designed the channel what it did was it followed the usual hydrological principles and followed the outside of the curve until it came down to the bottom of the curve and crossed over to the other side, followed the outside bend in that curve and then crossed over to the other. So they had the river in the design for practically its entire length with the channel on the outside of most of the bends.

Then in 1943 the states entered into the Iowa-Nebraska Boundary Compact, and what we contend they did were two things, three things really. First, they said "We don't know where the river is, we don't have any, we don't know what the boundary is, we don't have any idea where it's been in the past, and this is generally recognized in common knowledge, so let's draw a new line." And what they did was they said the river is stablized and it's, and it should be in its designed channel, and, of course, here's the, here's where according to the navigation charts roughly the navigable channel would be, or the so-called thalweg, but they said "We're going to put a line right down the middle of it, and we're going to make that our boundary so "we know where it is and we're going to use the alluvial plain maps to do it."

Now the maps that they selected were really now surveys, they weren't precise, they were just like road maps, and even then some of them were dated back in 1940; and on these maps the Corps had superimposed their designed channel but it wasn't necessarily even where the river was at that time, it shows it going through what was, through bank area or islands or bar areas, even on some of these maps which the Corps used, and it also shows certain cutoff. . Here's an area where they obviously cut through and there's an area right here, this is Peterson Bend and this is California Bend, where they obviously cut through.

So the maps that they used recognized a superimposed channel by the Corps which covered both shores, covered bar area, and wasn't necessarily right where the river was before they started the work.

Then too, these maps didn't have any calls, they didn't have anything which would enable a surveyor to lay out a line on the ground, and they had a notation that the area covered was compiled from aerial photographs taken by the U.S. Army Air Corps and field surveys made in 1939, the area landward from the river was controlled by uncontrolled, or, was compiled from uncontrolled mosaics of aerial photographs taken by the U.S. Department of Agriculture in 1936, '37 and '38, and that's Exhibit P-1770.

But the fact here is that the states didn't go

to a lot of effort to try and determine where the line was before and they didn't go to a lot of effort in taking the time, effort or money to survey a line, they said "We're going to do it the easiest way we can, we'll just put it out there in the middle of the river."

Now when they did that if the navigable channel was the boundary, they had to transfer land on both sides of the river and all along the line, because there was no place practically that this line which they established using the AP maps midway between the two banks coincided with what was the previous navigable channel, so they changed everything and all principles when they established that fixed line from what they have done before, and we say they did it in a convenient easy manner.

Now all the testimony is that, and Mr. Huber's testimony was that the Corps used it to find their way to various projects on the river, so these were more like a road map that they showed a few more roads than just a general map. That was the first thing that they did, but they didn't stop there.

Then the question came up, well, what do we do with properties which are going to end up in another state, and this is in the context of where they don't know where everything is, and they recognized that they don't know. So they said "We're going to cede -- Nebraska is going to cede everything on the east side of that line and Iowa cedes everything on the west side of that line to

Nebraska." But then to protect the private owners, and the private owners are not a party, this is the state's contract, and although their contract is going to be binding on the private owners with regard to this jurisdictional line, we say that they can t take away a private owner's title because they deprive them of their due process of law, and so the states between themselves say "What about so and so's title down along the river?" And the answer is, "Well, we'll recognize those titles." So they put in a clause in Section 3 that titles, mortgages and liens good in Nebraska shall be good in Iowa as to any lands that Nebraska may cede to Iowa and any pending suits or actions concerning the said lands may be prosecuted to final judgment in Nebraska, and such judgments will be accorded full force and effect in Iowa.

Now they didn't ever identify specifically what was ceded, they just accepted the fact that "We're drawing a new line and we don't want to go back and make this determination." They could have done as the states of Missouri and Kansas did in the 1940's whereby they had an original action in the Supreme Court in '42 to '46, in that period, and they determined where the line was, and then they entered into an interstate boundary compact and they actually ceded the land which they determined.

But here they said they know it's a mess, "We

recognize the mess, it's always been, everybody recognizes that it's practically impossible to make these determinations, so we're going to recognize the private titles." And that includes pending lawsuits.

Now certaintly if they were going to recognize pending lawsuits concerning titles of land then it would have to be implied that they would recognize lawsuits which had been decided concerning title of lands, and we have a couple of those. We have those in both the Schemmel and Nottleman situations.

Now they went ahead and said "All right, now what are the states doing?" Well, at that time we contend as we go through the evidence it will show that Iowa was not making any proprietary claims to areas along the river. The record shows that the river was in the designed channel south of Omaha in 1943 and prior, and it was, I forget the exact figure, seventy-five percent, or something in the channel north of Omaha. But all the areas south of Omaha were in existence because the river was confined to the designed channel. Iowa had never made any claim whatsoever to any of these, and we contend as we go through the evidence, of course, this will become obvious.

The Iowa Conservation officials themselves testified, Mr. Schwob, who was Director from about '41 to '46, said that they weren't interested in the river at that time, and the head of their

Land Acqusition Section, Mr. Bailey, testified that they weren't interested at that time, and listed the activities to determine what lands they might own didn't commence until About 1958.

So at this time when they entered the Compact there were no claims of title by the State of Iowa. Now there may be a general principle of law, but nothing has been applied to identify these areas, there are statutes in the State of Iowa which provide that the Secretary of State is the State Land Office and shall keep separately indexed all of the lands which Iowa owns, there is no record of any of these areas.

The Conservation Commission had a statute which provided that, although there was a little discretion there, that they should establish the boundary line between their state-owned land and private property; no boundary lines, no fences or no signs, no indication that they have made any claim whatsoever. The literature that we have referred to and some of the newspaper articles talk about tax problems, talks about private title problems, talks about school problems, but there is no indication that there are problems as a result of the State of Iowa coming in and claiming that it owns any of these areas under a sovereign claim.

And this is a part of, a part of their agreement; so they come to the next question "We have taken care of where the line is, we have taken care of the private titles, what do we do about the state's rights?" And so they added Section 4,

in which they said "Taxes for the current year can be levied and collected by Nebraska or its authorized governmental subdivisions and agencies on lands ceded to Iowa, and any liens or rights accrued or otherwise accruing, including the right of collection, shall be fully recognized and the County Treasurers of the counties affected shall act as agents in carrying out the provisions of that section."

And then they added another limitation on the states which said "provided that all liens or other rights accrued or accruing as aforesaid shall be claimed or asserted within five years after the act becomes effective or be forever barred."

So what they did in that section we contend was protect those who had purchased the tax title in the state which was ceded and clarified what the local officials should do in regard to taxation of that land and then put a limitation on it, a limitation on themselves, that these claims have to be made under these rights within the five years or they are barred.

So we contend that there's three provisions; one draws a line, one requires the states to recognize these titles, and the other satisfies the state's claims or the tax claims which might have been asserted through the state officers and tells the treasurers that they are agents in carrying out that provision.

Now we contend that the Compact did all three

of these things and we just can't read the one and draw a new line and say all it did was establish a jurisdiction, because we feel that if there was inquiry to be made as to where the line had been previously that was the time that the states would have had to have made it, and when they determined to settle their boundary problems and avoid the necessity of making this determination, that they settled the boundary and laid all their problems to rest, and they thereby precluded themselves from taking a position with regard to any of these titles or with regard to any of these areas which would require the other state or any private property owner to come back in at some later date and determine where the boundary was in that area in the past.

In other words, we could have settled down and we could have decided where it was and then compacted, but we decided otherwise; and the Supreme Court has several times said that there are two ways for states to settle their problems; one, they have an original action, or, two, they do it by agreement, and when they do it by agreement it supersedes the situation and becomes the controlling law. And we think that the Compact is the law in this case and everything that flows after that has to hinge on the Compact as to what it authorized and what it didn't authorize.

Now following the Compact, and, we therefore, we don't feel that we should have to come in

and prove where the line was before the Compact, and we don't think that we should have to come in and show, had we had a lawsuit back in 1943, what the result would have been because we agreed to avoid that situation. And if that burden is placed upon us the Compact is completely nullified, and it didn't do anything that we intended it to.

Now another aspect of this is that we contend that the State of Iowa was the contracting party in this Compact, it agreed to recognize titles, liens and mortgages on land ceded without ever worrying about what that was applied to, and we don't think that they can come back and attack these titles at this late date, they didn't do it at the time, they didn't make any claim at the time, we don't think that their Attorney General or their Conservation Commission or their Governor or their administrative department can attack the titles and then use the excuse, "Well, our Courts will decide," because the Courts were bound by that Compact and the meaning of that Compact in Iowa just as the legislative and judicial branches were bound. This was very solemnly entered into by the legislatures and approved by Congress and it was and should be binding on these states.

So we don't think there's any answer to say "Well, our Courts will decide it," because the state here is a party, and not private individuals. We recognize that there may be private claims along that river, and that these private individuals after the Compact had a forum in which to litigate

their rights, but in those cases the state isn't taking an advocate's position, they are sitting there as an arbitrator and the determiner of disputes, and the parties in those cases can put in their own evidence and they are on an equal footing, because each party has the statutes of limitations, they have adverse possession, they have laches, they have estoppel, they have all the equitable defenses, and quiet title actions are equitable defenses. And when the State of Iowa comes in and says "We are the sovereign, we are not bound by any of the previous acts of our officials, because if we don't agree with them today they are unauthorized or illegal, we are not bound by taxation of the land even though we are taxing them today when we are quieting the title, we're not bound by anything that was done before the Compact as to recognition of these titles and we are not bound by anything after the Compact, even though perhaps our Conservation Commission has recognized that they didn't have "any claim to the land or though our Attorney General knew about it and didn't assert any claim." And then they come in and say "There are no laches, no estoppel, no equitable doctrines that run against us because we are the sovereign," they have put an impossible burden on that landowner, and in effect they have confiscated his land.

And they don't stop there, because when the land owner says "I have been paying taxes," and

asks them in interrogatories "Who is paying taxes?" and then they say "We don't have to go into that, you're trying to put an unauthorized burden on us," when he is asked "Have you looked at any Nebraska titles before the Compact?" They say "We don't have to look into that." And then when the titles are presented they say they're spurious of fictitious. When they find that there's somebody occupying an area that they think they now claim they say he's a squatter, he's a trespasser, and that's automatic, no hearing or no anything, whenever he comes up with a defense they knock it down with something that's unanswerable, "We are the sovereign, we can do no wrong."

And we can't feel that when we entered into the Compact, we can't believe that we placed our landowners in that situation.

They carry it another step, and we will discuss this later, they say that the presumptions are the river moved gradually. Well, if the presumption is that the channel of the river at any time is the boundary, if that's the presumption then the Compact didn't have to be adopted because the states obviously in light of all this history accepted the fact that there wasn't any presumption that the river was in the channel, they recognized that it had moved so many places, that they didn't know all the places where it had moved, they recognized we've got to do something else and draw a new boundary. They negated any presump-

tion to that effect that they would have as states at the time they entered into the Compact. But what they do is they do as in the Schemmel case, they say "We're going to start with a map which may show this area in the river. We own the bed, it's been in the river since this date that we start, the presumption is that the river was there gradually, and so it was always in Iowa, and we win. Now, landowners, you prove otherwise," and they can do this with two witnesses, as they did in the Schemmel case, one the man who ran the survey and the other, Mr. Huber, who testified in this case.

So then the landowner is left there, he's bewildered with this. What does he do because he's got all this history, years back, to have to try and negate what Iowa is relying on. And if he does it properly he's got to go back and determine if there were any avulsions in the past which left that boundary in a fixed placed rather than the river, it's a tremendous burden because it may depend on witnesses long dead, and it may depend on records which are long lost; and the record is replete with examples of records here which have been lost or destroyed, and he's just about, because he has to come in and defend his title, is deprived of it, and we don't think that's fair.

Another incidence of this is that as soon as Iowa attacks that title that farmer can't borrow on his land, and we have records in the Babbitt

case where he tried to get loans and he couldn't. He has to find a lawyer and maybe he can't find the money to pay that lawyer, and if he does maybe he's going to give him a share of the land and he's going to lose half his land even if he wins the lawsuit, because the time and effort that goes into trying one of these cases is tremednous.

We don't think that we imposed that burden on the landowners. And under Iowa's present policy they can come in and justify it by saying "Well, this is trust land." Well, the record shows that it's never been considered trust land, the record shows that when these areas were in existence they didn't pay any attention to it, the record will show, and we'll go through the evidence where they are buying land in abandoned channels of the Missouri River which would be their own trust land, if they're correct, and the record shows that they are going into cases, situations where there's an abandoned channel and they are disclaiming title, it happened against certain landowners.

THE COURT: If I may interrupt a moment, I think, as I recall it, that Iowa's position is that the word "cede" is so important here, that in order for one piece of land to be ceded from one state to the other. Iowa contends as I understand it that you have to show it was formed on one side and then it went to the other under the Compact, isn't that right?

MR. MOLDENHAUER: Yes, sir, I think that, I understand that's their position.

THE COURT: You have a different interpretation of the word "ceded" than Iowa.

MR. MOLDENHAUER: Absolutely, because we think that the authorities say that these agreements should not be construed to lead to hardship, depression and unjust and absurd consequences, and that's what their construction does. We could have determined where it was, but we avoided it, and now we don't think that it's fair for them to say that "We're not going to determine today where that line is because it's too much expense, it's too uncertain; we're going to wait twenty years 'till nobody else can prove otherwise, and then we're going to take the position that that was it all the time."

And no land was ceded, and under their position they can go up and down the river and select areas they want and neglect areas they don't want; and the Court theoretically and hypothetically could determine one by one, that they own the entire river and no land is ceded. Now we finally, I think, convinced them where there were a few areas where there were avulsions, but they had gone beyond that and they are claiming land in those area.

Now which brings to another point, that they

have said that "Because we're a sovereign," and obviously we think that they're disregarding everything in the Compact except the line, they say "When the river moved over, and when we moved the line over here in the middle of the river, even though this might have been Nebraska,"because the riparian owner's land title to the land would be in the thalweg as far as the limits of his title and the limits of the Iowa title, they say "As soon as the Compact is adopted, we, the State, pick it up here in the middle, because we're sovereign and because the State owns the beds. And then when the river, after the Compact, as it has done in the Tyson case, and as we think it has done in the Riley-Williams case in the Decatur Bend that we'll get to, moves out this way, they say "You're stopped right here, friend because this is the state line, you can't accrete across a state line, and we pick up all this."

And at the same time they argue that these doctrines of riparian rights are equitable, and what the riparian owner stands to lose on the one hand, he stands to gain on the other by the movement. But they are saying that "you're cut off right here at the state line so you're limited to 350 feet, but if the river goes this way and cuts then that's riparian and there's no chance to use their land title." They're applying their prior doctrines without paying any attention to the Compact, and this is the bad part about it, it looks so easy when

the Court says, "Well, the land's in Iowa," ignoring why it's in Iowa, because of the line "The law of Iowa is the state owns the bed, this formed in Iowa, therefore, Iowa owns it;" but it ignores, and that's what the Court said in the Tyson case, but it ignores the fact that the only reason that's the line is because they agreed to it.

THE COURT: Well, this Court doesn't have to decide, or does it, as between private property owners, whether or not you can accrete across a line or not, does it?

MR. MOLDENHAUER: Not between private property owners, no.

THE COURT: That's what I'm talking about.

MR. MOLDENHAUER: No, sir, but what we contend is, we contend that when we adopted the boundary all we did was draw a new line, and we couldn't take away those rights because that would have been an unconstitutional enactment. We do think that the Court should decide in this instance what the rights of the State of Iowa are as a result thereof.

THE COURT: Yes.

MR. MOLDENHAUER: And that's all we care

about in any of these, and in the areas that we have gone into, we don't care if Schemmel owns it or Babbitt owns it, or Mrs. Simmons owns it or anybody, or the indians own it, all we care about is that Iowa has to respect these titles and also that Iowa doesn't have any claim to them, and that's the whole reason we are here.

Then following the Compact, Your Honor, we'd like to point out that generally there were no claims again made by any of these, made by Iowa in any of these specific areas until the late '50's. One of the first cases that they got into was the Tyson case, in '58 or '59, in there sometime, and their own Planning Report says this case will help determine what areas are state-owned, so they gave a little precedent there for their argument.

Let me repeat one more point. In 1943, putting ourselves back at that time, if there was a question as to where the state line was we were in the situation that came up in this Durfee-Duke case decided in 1963 in the U.S. Supreme Court, where the Nebraska Court held that land bordering on the Missouri, but on the Missouri side of the river, this piece of land over here, this being Missouri and this being Nebraska, they quieted title in Nebraska and got the parties before the Court, so they had personal jurisdiction, and the Nebraska Court says that formed in Nebraska.

Then the Missouri claimants came into the Missouri Court, and was transferred to the Federal

Court, and the Missouri Court says that "We find as a matter of fact that the land formed in Missouri."

Well, it went up to the U.S. Supreme Court, and the Supreme Court said "Since the parties are all before the Court, it's res adjudicata, but if the Missouri claimants had not entered into the Nebraska Courts and they had gotten quiet title, and if the Nebraska claimants hadn't entered into the Missouri Courts and they'd gotten quiet title, on the grounds that we would have been left in this unsettled situation, and as the Court suggested in that case the only way that you could solve your problem would be by original action and by compact, because those private cases weren't binding on the states. But that would have been the situation all the way up and down the river.

What we did when we drew this new line was we gave the individuals a forum to try their cases, but giving them that forum shouldn't deprive them of their title, and it shouldn't take it away, it shouldn't allow the state to take it away by applying what the state, what was contended was the state doctrine.

Now there is one other factor in this, we not only contend the facts are very clear that they hadn't claimed any of this, and we think that the evidence that they put in only shows one area that they really claimed which was Noble's Lake in one of the Court decrees which they offered, which was

a meandered lake, and as we mentioned in our reply brief this lake was cut off from the Missouri River about seven or eight years before Nebraska came into the Union, and was a meandered lake and Iowa has had some separate provisions with regard to meandered lakes. There weren't any of these other areas that they listed in their Planning Report that we are aware of that they had claimed.

Now possibly Wilson Island, which was the only other possible island, also they show in their minutes of their Conservation Commission had a deed from some people called the Petersons who they had been dealing with all up and down the river. So they may have had some other claim on Wilson Island besides their sovereign claim, we don't know, but the records clearly shows that none of these areas south of Omaha were being claimed and most of them north of Omaha.

And we have also shown, I don't know if this is proof, or it's just a fact, in 1956 this Law Review article came out in Iowa, in the Law Review which discussed bars and island formations in the Missouri River, and it said "In the past our Courts have been holding these accretions to the bank. And if the Court would ever decide that this is an island arising in the bed of the stream, the Conservation Commission might have a claim to it," and that Law Review article I believe said that prior to that time they hadn't been holding these areas created by the Corps work as accretions to the bed, but to the

bank. So somebody along the way got the idea that here's a theory whereby the state can acquire title to land, to quiet title to land, and this, after the Tyson case and during this period they made their investigation which wasn't until about 1958 of areas up and down the river.

And we contend that this was a very loose, pretty sloppy investigation, they took the Corps maps and they took the present river and they looked to see where an island was and said "Well, this one we'll go after," some they didn't go after. But they didn't go back as they should have if they were going to be consistent to when the states first came into the Union and they disregarded the numerous Ox Bow lakes that exist all along the river, and a look at our aerial photographs, in this whole list of aerial photographs we have offered show these areas which are obviously scourings, cut off lakes, and they exist all over the Missouri River valley.

They didn't go into these, and Mr. Jauron's testimony indicates that if an area was too far from the river they ignored it, they just picked specific areas and said "Now these are state-owned lands," and that's a conclusion on their part, and we contend that they didn't ever own it and that they never did have any claim to it.

And then they adopted or came out with, in January of '61 their Planning Report which is really the first really public indication of what they were

going to do, and we have cited this fairly extensively in our brief, and I only want to mention particularly one paragraph where they said "The past violent fluctuations in river water levels have been so frequent that changes in channels, bank locations, and bars, et cetera, made it virtually impossible to describe the state boundary or to determine land ownership on the Iowa side. It hasn't been necessary to tie down the line between state and private ownership because development for recreation was not considered feasible because of constant change."

Here they are recognizing themselves that it's practically impossible. Now when they do that, when they say that, and when they recognize that it was this way back in '43, we don't think that it's fair for them to now make somebody prove what they recognized as impossible, particularly faced with all the burdens and presumptions which they're going to apply against that landowner.

Then through the Planning Report, there are all kinds of comments about "if the state gains title to this area," there is all kinds of recognition that even by them, that it may be uncertain. And not only that, but, although the Planning Report implies that these areas are sand, water and marsh, all the areas south of Omaha, except possibly State Line Island, have been cleared, and there are hundreds, and in some cases a few thousand acres of cleared farm land which they have included or

claimed to in the Planning Report. And we say that some of these claims, of course, are movements by the river after the Compact, and they are claiming those because the river after the Compact was in Iowa and they are not applying laws which would have been applicable if we hadn't had the Compact.

This came out in '61, and this started all the controversy, because the Planning Report also recognizes that in almost every single area, except I believe Rand Bar, and I'm not sure about Wilson Island, and not with regard to the access areas, to get to these areas, but it recognizes in all these areas claimed that they have to have a quiet title action; so it indicates that somebody is in there claiming the land and somebody has got to be in there other than the state or they wouldn't need to quiet the title.

What we say is what this report did was immediately cloud every title in the Missouri Valley, and it particularly recognizing how much the river moved around, and Iowa in its answers to interrogatories has said that they believe that the entire area from bluff to bluff on the Missouri was at one time a bed of the Missouri River.

So when the state comes in and says nothing runs against us, and no statute of limitations, that we can claim any beds or abandoned beds, and the whole area is an abandoned bed, they have opened up that whole valley to the claim by the State of

Iowa. Now just because today they don't select a certain area doesn't mean that they might not do it tomorrow, even when we have been in this case they have added a few areas to this list and they have admitted that in a few areas there were cutoffs , and they are claiming in this cutoff area.

Now we think that what this report does really is recognize a valuable economic asset that the State of Iowa can acquire without compensating the owners, and we think that was in part what motivated this program. If I can find it here, the Governor wrote a letter to the -- the Attorney General wrote a letter to the Governor of Iowa right after this case was filed, and in this he implied that these lands were now of great value and in some cases had recreational value. Yes, he said, in 1964, in a letter from the Attorney General to the Governor, and it was right after we filed this lawsuit "For many years of Iowa's history the State did not zealously protect its ownership of these islands," assuming ownership but indicating that they didn't protect it, "particularly islands forming in the Missouri River, because for many years islands in the Missouri River were considered transitory in nature, subject to excessive flooding and of little value."

We contend that they didn't contest them because they didn't have any claim to them, they didn't know about any claim to them.

Then he mentions in recent years they stabilized

the channel, and then says that these areas now have substantial value to the people of Iowa, both monetary, and in some cases recreational. That's Exhibit, or, that's in the record, was read into the record of Volume 13, pages 1863 to 1864.

But here again we contend this is a recognition of some monetary value that they can get at without having to condemn as they would normally have to do. And since that time, of course, the record shows considerable negotiation between the states as to a new boundary, because the river has been moved by the Corps and they have cut about, if I recall correctly, a dozen canals since the Compact, so there are many areas where the river is not in that old designed channel. But even here, this is an indication, we contend, that the states feel that it's important that they get their boundary settled, and that this is their continuing problem.

THE COURT: What is the progress of that now, any progress since I was here a year ago?

MR. MOLDENHAUER: There is absolutely no progress, Your Honor, because of this lawsuit.

THE COURT: Well, I hope you're not going to blame that on me, are you?

MR. MOLDENHAUER: No, I think that I can speak from Nebraska's standpoint, on this question

of what happens if the lands are ceded and what protections they can build into those lands as against the State of Iowa is critical because there's no reason for Nebraska ever to enter into a new compact if the land that's put on the other side of the river is going to change that person's title, it just doesn't make sense at all.

And so this has to be clarified, and Iowa's own Governor's Advisory Boundary Committee recommended this back in 1964, that there be a lawsuit in this Court, friendly lawsuit, they called it, to decide some of these title problems. And the Governor of Iowa in his message back in 1965 recommended that this committee report be adopted in order to settle the problems and open up the Missouri River to development -- I'm paraphrasing that, I'm not quoting it, but that's in this material in P-2319.

So some of Iowa's officials, at least, although not their Conservation Commission or Attorney General's office, recognize the importance of this thing.

Now let me retrace one more point and then we'll get to Nottleman Island. We had one other witness and some other testimony, the County Surveyor of Sarpy County, Mr. Peterson, and we put in Document No. 1057, which involved correspondence between Mills County and Sarpy County back in 1941, again prior to the Compact, and Peterson in his correspondence with the County Attorney of Mills County discussed how it was al-

most impossible to lay out the boundary and how expensive it is, if they had to lay it out, and he testified as to what a tremendous effort it was, so there again a recognized area where everybody realized that it just wasn't practical to spend the money and the time and the effort trying to find where the boundary was.

Now from that, Your Honor, we'd like to go to some of these specific areas because we think in all these facts it points up several things. It points up the burden that is placed on that landowner --

THE COURT: We'll take fifteen minutes, the Court is recessed for fifteen minutes.

(Short recess at 10:45 o'clock a.m.)

THE COURT: Mr. Moldenhauer.

MR. MOLDENHAUER: An example, Your Honor, of what Iowa can do if their construction of the Compact is correct and what they think the Compact does is correct, is illustrated by the Nottleman situation or the case of the State of Iowa versus Babbitt, et al. This is referred to in the Planning Report, which is Exhibit P-2609 on page 42. And I point out first that there's a photograph on page 43 of Nottleman Island, it's obvious that there's a great area which is cleared here and which

is under cultivation, and subject to private claim.

In their recommended action they say "It's believed that this island as well as the others from here on south are state-owned, and therefore the title to these islands must be quieted in the courts in the name of the State of Iowa. In the event that the title is quieted in the name of the state, parks could be used for recreation purposes."

And then they say that they should plan once title is quieted, and they show the area as 1,550 acres. It's a very substantial area, and what the record shows is that Iowa filed the case of Iowa versus Babbitt in 1963 in the Iowa Courts, and all they did was allege that they had title and the land belonged to Iowa and they didn't give the landowner any other indications of what their claim might be.

They did add an allegation that they requested the right to view, inspect and survey the subject real estate because they had been informed that such agents and employees would be physically and violently stopped and prevented in so doing unless they had a Court order authorizing them to survey it. It is obvious that somebody else is in possession of Nottleman Island at the time that they filed the suit.

Then when the landowners filed interrogatories finding out what Iowa's claim was based upon, they said "It isn't based on any happening or instrument, we own title to all beds the river has ever occupied in Iowa, and this was part of the bed, and so there-

fore we own it." And then they were asked whether they were in possession, and they said, "Well, we haven't made any investigation concerning exactly who is in possession because adverse possession can't run against the state." This although at the same time in their brief they made several statements that they were so diligent about protecting their claims.

Then they said that these people can't have any claim of adverse possession against them because they don't have color of title under Iowa law, and they say the burden of pleading and proving adverse possession rests with the defendants is an improper attempt to shift the burden on to the plaintiffs.

I want to make it very clear that we are not trying their adverse possession as such, we are not arguing adverse possession as against the state in this case, what we are pointing out is that these people had title, they'd exercised all the incidents that flow from title, and there isn't anybody else, a private person, subject to the defenses, and equitable defenses, among private people, who had any chance of taking that title away from them, they just had title. And all these acts and incidents show not only that Iowa never made any claim to this area, and didn't ever assert any claim to it, but also that nobody else did either. These people had a good recognized title.

Again, in their interrogatories, when they ask whether they have any deed or abstract or instru-

ment corroborating or confirming Iowa's title, they say, no we're just relying on their sovereign rights, in effect.

There was nothing recorded showing this title, and as soon as the Iowa people raised their deeds, Iowa says "Well, these are spurious and fictitious and have no force or effect against us because the land was never in the state of Iowa."

So they are here again where all they have to do is, just about start with the '47 map, and this is after the Corps work, and show an area out here, a little channel of water on both sides, and the main channel on one side and the little channel on the other side, and say "That's an island, it's in the bed, the land's in Iowa, we own it, and now you establish all the evidence and you prove otherwise because all the burdens are on you."

When they were asked if they had collected taxes, they say "It's irrelevant and immaterial," and the defendants have to plead an affirmative defense, and this is again an attempt to shift the burden, we don't have any duty to look into that.

And when they were asked if they had looked into the Nebraska titles, they say, "no", and when they were asked what witnesses they have to establish how this island formed, they list Mr. Huber, they list Mr. Jauron, they list the surveyor who surveyed the island, Mr. Windenberg, and that's it. They don't have anybody else, or they talk about if there are any other eye witnesses "There may be

some, we haven't gone into it," or "if their eye witnesses' testimony differs with any documents we have, why then obviously it isn't entitled to any significance or to any weight."

They were asked if the State of Iowa had ever disclaimed any ownership interest in this area, and they said, they mentioned the lawsuits in the District Courts of Mills County, but they said they didn't have any notice or any knowledge of them, although the evidence will show that their Attorney General did have knowledge of that lawsuit.

So here they are again, and they also, under the testimony admit that they didn't even talk to the landowners, all the landowners said nobody came to them from the Iowa Conservation Commission and the State of Iowa, and said "We'd like to go into how you claim your title." They just got sued, and there they are. Now this is entirely different from how landowners were treated in other places, where Iowa came in and settled with them and even bought their land without also looking into the past history.

Now we plan to go into these documents which really show how Nottleman Island formed and show how the states treated it. Again we would like to make it clear that we don't think that we should be, under the Compact, forced to meet this burden how it formed; but if the Compact means what Iowa says it does, and you do have to come back now

twenty years later or thirty years later and show how it formed, we think the evidence establishes that it was in Nebraska and it was actually physically transferred to Iowa.

But we think in having to do it today, we've been deprived of what we thought we agreed to back in 1943. And my colleague, Mr. Moore, informed me that I misspoke, that I really meant to say that there's no reason for Nebraska to enter into a Compact rather than the State of Iowa.

Now starting out, Your Honor, and I hope to go through these about as quickly as I can pointing out the highlights. The Nottleman Island's traverse, which, I don't know where the best place is to do this, I can do it here on your bench.

THE COURT: That's all right.

MR. MOLDENHAUER: The traverse is P-1691, and the original Government survey which was the 1852 bank line for Iowa and the 1856 bank line for Nebraska, if you place them together, shows the river really along the very west side of where the Nottleman Island area is located.

Another thing that this original Government survey as is tied together shows is that the section numbers on the Iowa and Nebraska sides are different and that the section lines don't coincide, so if you extend them over you run into problems and this, as the evidence shows, creates real

problems.

That's the very first map that we have, and that's the official Government survey. Then we go to 1879 when there was a Corps of Engineers survey, Exhibit P-716, and when we place the Nottleman traverse on this we see that that river has started to cut over and develop a little bend at the northwestern part, and move over into the State of Nebraska, or, into the State of Iowa. And we see an accretionary area building up on the Nebraska side and originally called Tobacco Island, which is building down, it's almost down Rock Bluff, and it's building down in into the area, which was later occupied by Nottleman Island.

The next survey by the Corps of Engineers was in 1890 by the Missouri River Commission, and here we see quite an accretionary mass. The river's moved a little bit, but not a lot, over towards the Iowa side.

This Tobacco Island accetionary mass is built up and extends even way down below Rock Bluff Point, almost to Calumet Point, and we see the river again moving over towards into Iowa.

Now there's a little island right here that we'd like to point out, because Mr. Huber, when he drew his thalweg, he went around this side of the island, and we'll see later the Corps of Engineers thalweg which was measured in 1890 goes around that side of the island. That's the 1890 situation with this accretionary mass starting to build up and building

up on the Nebraska side.

The next survey we found was in 1895 by Seth Dean, the County Surveyor of Mills County, and Dean was instructed to survey this by the County Commissioners; and his survey shows the original Iowa government survey and it shows the river having cut over into just a little bit, quite a ways into Section 19 and 18 and 30, and here is his line where the, which Willis Brown prepared from the field notes from the Seth Dean map showing his survey as of 1895.

Now Mr. Brown is going to get the instructions which are a part of the record which instructed Mr. Dean to make that survey, and there's a comment there I want to make, but I guess I can just point out that he was instructed to determine whether there were any islands in the Missouri River subject to taxation, and he found no such islands, so we got the river moving over that way.

Now at this point -- at that point, Your Honor, I'd like to jump to the 1926 map, because it shows the Corps of Engineers thalweg which Mr. Huber testified was actually sounded as it exists on the Missouri River, and it's this line right here. Now we go to P-726, and this is the first map where we found this Corps thalweg presented, the '23 map shows the bank line, the '26 map shows the thalweg. And I'd like to call your particular attention to Tree No. 259, which is, the "X" is right below the "t" in the tree on 726, which our tree man, Mr. Weakly,

says commenced to grow in 1900.

We'd like to point out to the Court too that when this '26 map with the thalweg is placed upon the 1890 map, the thalweg runs right along that Iowa bank, right along the Iowa bank, and it fits very well within the channel of the river. Tree 259 is just to the Nebraska side of that thalweg. What we think all this shows is if it's assumed that Mr. Weakly is correct, the river was moving into Iowa and this tree started to grow on the Nebraska side behind this movement from the '95 survey to the Seth Dean survey shows that it continued to move over. And, incidentally --

THE COURT: Those exhibits show the build-up of the island on the Nebraska side?

MR. MOLDENHAUER: Yes, sir, that's exactly it, and we think that there's physical evidence which is the tree itself which also confirms this build up. I guess that this is the map which Mr. Huber made where he went around, his thalweg went around the wrong side, ours went right around that bank, and it was in this area where that tree was.

Then the same thing is corroborated by these atlases, which we don't think they're precise, we don't think they're maps that are precise surveys, but the '91 survey shows the original line, which shows the river having cut into Sections 18, Sec-

tion 19, and shows some of these areas.

The 1910 survey shows that part of this Mickey Fulton 80 was cut away, the river is over here, Section 20, your Section 20, so the river is cut over here at this point and it's moved over here into Section 17, it's continued to move over to Iowa.

THE COURT: Is that because generally speaking that's on the outside of the bend, do you contend to think that or not, or moves where it cuts into Iowa?

MR. MOLDENHAUER: Well, I think that well could be, because this area started building up, and it doesn't develop a bend as it does in the Schemmel case, but it is eroding that way. And another reason is too we've got Queen Hill over here and we've got Rock Bluff, which are very hard points, and the river isn't going to erode that way because that's where those rocks quarries were.

Then when we put P-1691 on P-737, which is the atlas, we see that the whole island area is, almost all of it is riverward from where the Iowa bank runs as is shown in that atlas, but, again, that atlas is a general map which is really helpful in determining who lived there and whose area was cut away.

In 1926, before that -- the next map we found

then was Exhibit P-720 which is a U.S. Agricultural Survey Map. A 1920 soil survey, which was printed in 1923, and when the island is placed on this map it shows -- and there's no island but there's the bank line showing, it shows a distinct bend which would be at the northern part at least around what is the east side of Nottleman Island. This was in 1920. And there is a line here which the index says is the state line, but as we have indicated at the trial we didn't offer it to show the state line because we don't think that it's competent for any single map maker to establish the state line in this kind of a situation.

But this is a good place to point out that if that were in fact the state line the Nottleman Island area would be in Nebraska. In the Schemmel case there's a 1905 U.S. Geological survey, which also purports to show the state line, which if conclusive would put that Schemmel area, the Iowa Chute area, in Iowa, but we don't contend there either that they were qualified to do it.

Now if you are allowed, as Iowa has been in the past, to try these cases one by one without any continuity, you could come into this case and say that state line doesn't mean anything, and there's some law that says that really they weren't competent or the surveyors aren't competent to just set the state line like this, that's what this whole case could be about.

Then they can go down to the Schemmel case

and say, "a-ha, here's the state line, it's running over there." Now unless you can tie these things together and have some consistency it just shows an unfair burden or advantage that can be taken of the landowner. Anyway there's the 1920 soil survey which is consistent with this river cutting and moving over towards the east.

The next map we found which -- here's the soil survey -- which was of great significance was the Seth Dean survey of 1922. And this also illustrates how difficult it is to find some of this evidence. In the first place we found a newspaper article that indicated that there had been a survey back in 1922, and from that newspaper article after a lot of search we went to the Mills County Auditor's office and found in a Ditch Book 3 a record of the river cutting into Iowa and the record of construction of some dikes and revetments pursuant to at that time Iowa's laws.

And this Auditor's record which is an official record in Mills County includes a report to the County Commissioners of Seth Dean, who described how the east bank was meandered and he talked about his 1895 survey. And then he said "These lines are shown on the map," which was attached as Exhibit B, and he said "I find that between the years of 1851 and 1895 the river carried away about 1,140 acres of land, and that since the official survey of 1895 there has been 1,296 acres more taken, making a total of 2,436 acres."

THE COURT: And in Mills County?

MR. MOLDENHAUER: In Mills County, yes, sir. And then they go into a rather elaborate detail about where the river can cut and how it can cut; and we submit that if these section lines are all matched up it shows that this river is cutting right where the map shows it's cutting into Iowa Sections 8, and 17 and 20 and 29. This is where the problem is, this is many, many pages here of proposals for the structures and then the contract with Woods Brothers, and the whole thing is documented here in their county records which shows this tremendous cutting of land.

Then the record shows that pursuant to these plans Woods Brothers went ahead and constructed the revetments and they had a lawsuit then, Dashner versus Woods Brothers Construction Company, which went up to the Iowa Supreme Court.

And, of course, although that lawsuit dealt with really could they properly tax these individuals for the protection works, the Court therein in its opinion recognized and started out with a discussion of the vagaries and the meanders of the Missouri River, said that the Legislature of Iowa took notice of that fact, and enacted their drainage law in order to provide for the construction of these levees, and recognized this situation, and then they held, of course, that the assessment was

proper.

But when it came to finding this document, we didn't find Exhibit P-722 in the Auditor's office, as it said, we went up to the District Court, thinking it might be there, we didn t find it there. We went to the Iowa Supreme Court and we found that they didn't have those exhibits any more, and then we went up to the Iowa Supreme Court's library and went through the briefs of the case, and, sure enough, here was the document together with the testimony for foundation, and that kind of thing, which I think we also have here as a summary, we haven't offered it as testimony. I suppose today it would all be hearsay, but again it's completely consistent with this river cutting, it just establishes everything that they did. But it's an example that if you don't have the time and the resources and the effort to keep digging and digging and digging, then you just don't find these documents, and this is almost conclusive of what happened back at that time.

Now when Nottleman Island is placed on this exhibit, on P-722, it appears to be out in this large bar area. Now another point we should make is that at no time up until the present time really was Nottleman Island exactly like that, it's going to be in the river and the river is going to change, parts of it are going to appear and disappear.

And what this Seth Dean map shows in '22 is a large accretionary area over on the Nebraska

side, and it shows the bank lines which have moved over. It does show what you might call a chute over there by Rock Bluff. But the Missouri River is around this bend on the Iowa side.

THE COURT: On the outer bank, the east bank of the river?

MR. MOLDENHAUER: This is his bank --

THE COURT: Yes.

MR. MOLDENHAUER: Of what he calls the Missouri River, on this side. Now this looks like a chute or water through here, and we have a little bit through here.

The next significant map is the 1923 Corps of Engineers map, and first I'd point out that the '23 map shows retards having been constructed along the Iowa side. It shows the left bank of 1890 and the right bank of 1890. It doesn't show any thalweg yet; and it shows an area referred to as Tobacco Island of 1890 in dotted lines, that's Exhibit P-724.

THE COURT: Whose map is that again?

MR. MOLDENHAUER: This is the United States Army Corps of Engineers map of '23.

Now the problem with the Corps records are

that you just about don't find any surveys from the 1890 map up until '23, so, there's a big gap in there as far as the Corps of Engineers is concerned.

But the significant thing about this '23 map is that when we place the '22 map, or the Seth Dean map, on top of P-724, the '23 map, we now see that it looks like the river has cut through what was this large mass on the Seth Dean map, and was on the Nebraska side of the river, and has left a substantial island. Now we have conflicting testimony as to where the main channel was in all this time, but here is the Seth Dean island and here is the river running to the northwest of it, and here is where we contend this accretionary mass that had built up, if it was cut off, was cut off. There is a lot of conflicting testimony as to how much of the channel was on the east side. This is the first map.

The other thing that I would like to point out is that if Iowa would start in their lawsuit with this '23 map, which we have to admit shows that the Corps of Engineers at least at this time has the river running around the west side of it, they'd say that's an island in the channel of the Missouri River on the Iowa side, we own it, and it was always in Iowa.

But when you look at it in comparison with these other maps it does show that this accretionary mass built up and cutoff. Now this is sub-

stantiated again by the tree study, because when we place these trees first on the island in the Seth Dean map they appear on this area, on this island area, right here, which was, which is a part of the area on the Seth Dean island and is a part of the area which is now on the left bank side of where they put the river in the 1923 Corps map. But these trees are here and the Corps map is '23.

Now, Nebraska's expert, Mr. Weakly, established Tree No. 259 as starting to grow in 1900; but Iowa's experts, Mr. Bensend, started it in '22, and the river cut through in '23. So even under his testimony the tree would have been growing there and not cutoff when that river moved through. Their other expert, McGinnis, said in about '23.

On Tree No. 1106, which is on the same area which was on the Nebraska side in '22, and if the Corps of Engineers map is right ended up on the Iowa side when it cut through.

1106, Mr. Weakly said at 1913 to '15; Dr. Bensend said again in 1922, which was before the river would have cut through in '23. And McGinnis said in '22 and '23; so all the tree experts put those trees there and established those trees there at about or just a little before, two out of the three put it before the river cut through.

So we claim if there was an avulsion, that that's the first one, and that one left Nebraska land, and the land which had been Nebraska land

over there on the Iowa side of the river. And that area from these maps never thereafter washed away, and, of course, the trees are there to indicate it didn't.

We have some pictures of the size of these trees, maybe you have seen them.

THE COURT: Yes. It's amazing how experts can disagree.

MR. MOLDENHAUER: In this case, you see, they, the two out of the three, one of Iowa's gets it '22, and the other '23. Of course, we show the island there in '26, but at this time they put the Rock Bluff bend designation around the Iowa side, or the east side. Our trees, we line them up, go right here on this heavy part which is shown as trees and in that island area.

In '28 we still have that area there, but this time they put the Rock Bluff bend designation on the Nebraska side, the tree areas are still in existence.

THE COURT: What was that last map?

MR. MOLDENHAUER: This is 1928 by the Corps of Engineers, and there's something very interesting here too.

The river has cut considerably over into the Iowa side. We show the '26 bank, what would be

the '26 bank here; by '28 we've got this area over here down below on the southeastern side. We had some witnesses, of course, who testified about cutting down below, and it did cut down below at a later date.

Then we have the 1930 Corps map which shows the river quite spread out, again the Corps of Engineers, with a lot of water around it, the willows area or tree area is still there.

And then, of course, the Corps came in and put their structures on the Iowa side, or the left bank side, and put the river back over on the Nebraska side where it is today in its designed channel.

And the next Corps map which shows that, of course, is the AP map which, Exhibit P-732, which shows the structures, still a considerable amount of water area over on the left side of the island which structures are all in at the time of the AP map. But the area of the tree area, is still in existence. But once that island formed, we contend, on the Nebraska side, it's part of this accretionary mass, and it didn't thereafter ever wash away, although it changed sizes and changed shapes at times. We think that this is corroborated by the testimony of our witnesses. Mr. and Mrs. Eyler testified in about 1908 or '09 that they had a house here on the Iowa side and they had to move away by the 4th of July because the river was cutting that house away. And the bar which they

drove in the ground, or stake which Mr. Brown marked, was in Section 20 over on the east side of where the present island is.

Bruce Connor who lived there all during those years testified that this is the road, that they came down this road, which the Eylers, to get to the Eylers place or the Haffke place, because he lived there in 1905 or '06.

Mase Watts, who lived there all his life, in that area, testified that this point, which is a little bit to the east of the middle Section 20 on the line between Section 17 and 20, was the furthest east the river ever got.

On the Nebraska side we had Jim Lipert testify, who lived above the township line here, that he and Taylor Cuthrell in the late '20's waded across what was a chute on the Nebraska side with their wives and children. And there's a picture here, they are standing right on the bank of the main present channel of the river and Nottleman Island is across on the other side.

We had Mason Watts testify that his family had moved down to this area which is just east of Nottleman Island, he had to move away in 1905 because they were afraid that the river was going to cut in. This is over on the east of Nottleman's Island. The Eyler bar is placed right about here, and he said it didn't cut that far at that time, but they moved away in, according to the deed, about 1905.

And then, of course, we had the testimony of several witnesses on the Iowa side, or, yes, on the Iowa side, who testified with reference to P-721, an enlargement of the Seth Dean survey of 1922, about how the river had cut further into all these areas. These were people who lived there, they were all consistent in their testimony, and they were farmers whose own lands were being attacked and being cut away.

We had some testimony also as to where the boats went on another Seth Dean map, P-2624. Captain Neuhauser, who testified about how when he came up the river in 1915 they started up the west side of what is now Nottleman Island, they couldn't get up as far as Rock Bluff Point, they had to back down, and then they went around the east side. This was a river boat captain, he had been one since he first started on the river in 1912 until he retired from the Corps in about '58. And he testified that later on when he came up, I think it was in '22 or '23 he went around the east side, and about 1930 again he went around the east side, I don't remember the exact dates. But each time he came up he was around that east side. He testified how the water was flat and shallow over on the west side -- Mr. Shamberg -- he went on the east side each time that Mr. Neuhauser came up until the Corps shut off that east side and moved the channel around.

THE COURT: When would you say they started that work?

MR. MOLDENHAUER: They started that work in '34, and --

THE COURT: Oh, just generally, did they finish by '38?

MR. MOLDENHAUER: Yes, I'm sure it was finished by '38. In about '36 or '37 they might have had those structures completed.

I believe there was testimony that after '35 they had difficulty, I know that there was testimony that they had difficulty holding those dikes because the water was deep over there and they had to pull some of the dikes, and now and then they went through on that east side until they got those dikes replaced, because that was the best water.

But it was from '34 to '38, and I'm sure that you can tell from these other maps that it was about '36 or '37. But in doing so, of course, they didn't ever wash away that intervening area.

Now we just happened to have here Iowa's Exhibit D-1112, which are some of these reconnaissance soundings which they offered, but we just wanted to offer this to show how the soundings go right into Rock Bluff; obviously it can't be the main channel.

I would just comment then, we have the plead-

ings in the Supreme Court record, or parts of the brief in the Dashner versus Woods Brothers case where they did all that river work, but it's here in evidence, it's P-623 and P-1080. It all corroborates everything that we have contended.

Now Iowa had a few exhibits, we just comment briefly on some of their photographs. First I should indicate that all of the, several of the witnesses testified that on the Nebraska side when the river was high it was water, when the river was normal they could wade across it, but when the boats came up they went around the east side, the cutting was on the east side, the swift water was on the east side, and the deep water was on the east side. This was confirmed not only by Captain Neuhauser but also by Mr. Gregory who was also a boat captain, who piloted a boat for the Corps of Engineers about 1930 or '32, and he went up, tried to get up that west side but he couldn't make it, and he had to go into Rock Bluff and phone the office in Kansas City and explain to them that he had to go up the east side, and he went around on the east side.

Again, there's a great deal of corroboration that there might have been flat water over there, there might have been shallow water, but there was never any navigable water or the main channel, and the navigable water was over on the east side.

Iowa offered Exhibit D-732, which is a Cole picture supposedly taken in 1912, and D-733, but

we think these are perfectly consistent with that testimony. They show a bunch of ladies sitting out in a boat but there isn't any current there that's taking them anywhere, and there is bar or island on the other side, and we don't think that's inconsistent with the testimony that Nebraska submitted.

The same way with D-733.

THE COURT: It's amazing the number of people in those boats, you know it, and how they're dressed.

MR. MOLDENHAUER: The ladies in the trees, you notice that there's a boat out in the water --

THE COURT: That's the old man's picture, the fellow that had the first car.

MR. MOLDENHAUER: Yes. And observe the ladies just sitting out in the boat.

THE COURT: He was obviously a ladies man too, he had seven ladies out there with him at that picnic, with one automobile.

MR. MOLDENHAUER: My point is that this is not inconsistent with what Nebraska submitted.

We have a Range exhibit, Range 3D-740, but

we only mention this goes to the part of the caliber of some of Iowa's witnesses where it shows supposedly the river and what he called the sandbar, what he called the shadow, which is obviously a sandbar, and if it were a shadow from Queen Hill as he indicated, those trees would have had to have been about four or five hundred feet high.

And this may be an opportune time to point out that 1952 photo of Nottleman Island area just showing what the river could look like in flood time, and that's after the channel has been stabilized, and there's more water over, way over towards the east than there is on Nottleman Island.

THE COURT: What year was that?

MR. MOLDENHAUER: That's '52. But the interesting thing is that all the water that's over towards the west of the levy is 11, and not on the island proper. So there were times when people could take pictures quite a ways from the river and show the water.

Now the aerial photographs also show just what we have contended, and they show as of 1930, this is the 1930 Corps aerial photograph, P-440, the island with area cleared on it, already in 1930, there's a good sized area which has been cleared on that island. We'll go into this with the other evidence.

And P 445 which we got from the National Archives shows a substantial area of island where they had put the dikes in at the upstream end. It really goes -- this would be the upstream end here, there's still bars out in the river in the designed channel on what was then the Nebraska side of the island as of 1938, and in the downstream end, so here's where they put those structures. Here again where they shut it off, but there's a lot of, there's still areas that they are trying to clear away as channel.

Here's another 1938 photo showing the island, the structures are in and here we show two building sites, the river's through here but it's still sort of choked with bars. Up at the northwestern part of the island we show building sites which are in the '38 photo, and there's cleared areas which are visible. Now these pictures came from the National Archives.

And here's one in 1941 which shows Tree 259 and Tree 1106 which Iowa's experts said '23, ours said 1900 a little later than that, but before 1923 so the high part of the island was almost all cleared by 1941, which is still two years before the Compact, and there was still a little bit of it, there's still a chute, there's still water running over there on the Iowa side.

And then we have a 1959 photograph, P-449, which shows the island area, King Hill and Rock Bluff are down below, it shows it almost all cleared

except for this portion of the trees, and you could still see where the old channel was but the island is a part of the mainland for all practical purposes and is now farmable, and you can almost --

THE COURT: When you introduced those wasn't Mr. Brown explaining what they showed?

MR. MOLDENHAUER: I think we, I think these all went in with Mr. Brown's testimony.

THE COURT: Yes.

MR. MOLDENHAUER: And I think they probably show up in the summary that way. But it's a little difficult to get him to point out some of those things when you're arguing, he just points out what's there.

P-450 is a '59 photograph of the whole island, and it shows how big it is and it shows how much has been cleared, and we should point out that trees have been lumbered off this island, there was testimony about all the trees taken off, and all that possibly could have been physical evidence if it hadn't have been destroyed in the process of preparing the island for cultivation and for productive agricultural pursuits. But, here again if the landowner is required to come back in and prove something as of back in 1943, a lot of that evidence has been destroyed in addition to what-

ever witnesses may have passed away, and, well, there are maps you can't find, I know Mr. Jauron testified when he talked about what areas he was finding, that he didn't find any maps showing the river over there, or he said that in a couple of places there was a cutoff over there but he couldn't find any maps showing it as river bed.

Well, that shouldn't be the criteria, whether Iowa can claim land, whether or not they can find maps; the question is was the river there or not. And it's just, as far as they are concerned, where we get the evidence, once we got the evidence, then we have got the presumptions and everything else to go with it.

That takes care of maps, pictures and some of that early testimony which we brushed over, but we have gone over it pretty thoroughly in our Appendix.

But we contend that these people were good solid people who had reason to be there, who knew why they were there and who actually talked knowledgeably and did have knowledge of what happened.

Now as far as Nebraska is concerned, we'd first like to point out that as this accretionary area built up on the Nebraska side, we don't have any separate maps which show Nottleman Island as such until we get to 1933, but what we do show is an accretionary area over there, part of which is where the designed channel is today.

First, on the original survey there was a little nubbin of an island, then on the County Court records there is another island, larger island extended down, but that isn't to say that this wasn't part of Nebraska because on the descriptions, any description of riparian land includes the accretionary land, whether it's separately surveyed or not. But the first separate survey that we find of Nottleman Island was the Fitch survey, who was County Surveyor of Cass County which is where Plattsmouth is the County seat, in 1933, and he surveyed this high bar area and put Harvey Shipley, designated Harvey Shipley's area and John Nottleman's area, and this was recorded in the County Surveyor's office, and they also recorded it in the Register of Deed's or the County Clerk's office where all our title documents are recorded in Nebraska.

On the Register of Deeds --

THE COURT: Just suppose that somebody reads this, your paper here today, that's Cass County, Nebraska, what is the name of the city that you're talking about?

MR. MOLDENHAUER: Plattsmouth is the County seat, Mills County, is the Iowa county. That first Fitch survey is P-2345, and then P-735 is a copy of the one which was filed with the Register of Deeds, and this shows tax lots and

designations of the area as tax lots.

THE COURT: That one?

MR. MOLDENHAUER: Well, it's the Fitch survey of '33, I'm not sure whether this was recorded in '33 with the Register of Deeds or in '35 -- yes, I think it will show as we -- that the tax records show it was placed on their tax records and says "Surveyed by Robert Fitch and reported to the County Assessor for assessment September 7, 1933." So we have that map recorded in two places in Cass County.

THE COURT: What do you show the acreage to be then, do you know?

MR. MOLDENHAUER: Yes, he breaks it down into high bar and low bar, and he shows John Nottleman 162.1 acres of high bar and 218 acres approximately of what would be low bar.

He shows Harvey Shipley who had the north half as 162.1 acres of high bar and 414 acres approximately of low bar.

And, of course, on his map Exhibit P-735 he shows a building site on John Nottleman's side and he shows the Shipley home just above the fence line and he shows the division fence, the Shipley home is shown as here, the building site is shown as here.

Then at some date they have added that William Watts has this Lot 2 up in the northeast corner and we'll go into the Watts deed, of course. But this even shows people living on the island as of that time.

Then we had considerable testimony that this island was inhabited, and we had Mr. and Mrs. Dooley who lived on the island. Mrs. Dooley was a Shipley, and she first went over there, I think it was in 1930 with her uncle Harvey and her grandparents when they were living there, and spent the summer. She was married in 1934 and lived over there in '34 and '35, and came off a year and went back on.

And Harvey Shipley lived on the island during the '30's; Ernest Shipley lived on the island during the '30's. While Ernest Shipley lived there we have records of the pupils enrolled in school, and show that Erma Jean Shipley went to school in Rock Bluff and Georgie Shipley went to school in Rock Bluff.

And I point out that these records with the Superintendent of Schools are required by statute in the Nebraska school laws, according to the records to be filed, so this was in accordance with the regular Nebraska exercise of jurisdiction over this area. And Mrs. Dooley testified that there was no tuition which was charged these people when they went to school in Nebraska. She even testified that they had gone over to inquire into Iowa

but the school officals there said they couldn't go to school over there.

Then we also had, while the Shipleys were living on the island, the birth certificate of Elaine Joy Shipley, December 3, 1936, which Mr. Dooley testified the birth occurred on the island and Mrs. Dooley recalled that this was the child that was born there. That's Exhibit P-526, which was recorded with the Vital Statistics Department in Lincoln, in Nebraska.

There was a death certificate showing that Eleanore C. Shipley died on December 16, 1935; the witnesses did not testify that they could recall this occur.ing on the island, but they did testify that it occurred while the Shipleys were living on the island, and that's as close as we can tie that down. It shows the death of whooping cough.

Then we had some, and there are several school records there, they also show that Donnie Paul Baker was going to school at Rock Bluff while his parents, Toad Baker and Mrs. Baker lived on the island. Mrs. Baker delivered the Shipley girl, but she did not testify.

And we have motor vehicle registration certificates in Nebraska showing that during all this time the Shipleys, or, not during all this time, but at selected points during this time, the Shipleys and the Bakers had automobiles all registered in Nebraska, part of which indicates as the testimony shows that all these people considered themselves

as Nebraskans. There wasn't ever any thought that they were Iowans.

Then we also had personal property tax schedules filed in Nebraska while some of the people lived on the island. Again they are sketchy, but it's a little hard to find all these records, and, I should point out that although each one of these documents, you can go through them very quickly, they take a great deal of time and effort to find out and discover, because they are in different offices, and they are in different books and they are in the attics and in basements, and it's tremendously time-consuming.

THE COURT: I think that's what made Mr. Brown sigh so much when he got on the witness stand.

MR. MOLDENHAUER: The personal property tax schedules do indicate that they had mowers and hay rakes and farming on the island and agriculture, so going through the items, they were living there. And I might point out at this time that Nebraska only had property tax, real and personal, and no income and sales tax.

Then on the real property records they first show the island going on the tax rolls in 1933 on the sheets which are for 1930 through 1933, and almost all of the Nottleman Island area goes on, the indication or notation is made on P548-3

as to owner Harvey Shipley the north half, Nottleman Island, Missouri River, and listing the acreage; and John Nottleman the south half of Nottleman Island, and Missouri River, and listing the acreage.

And then these property tax records carry right on up until the time of the Compact, and they also add the Wattses, when the Wattses purchased their property, and I think that they add Mrs. O'Brien when she acquired hers, and then when Jones and Babbitt picked up the property in about 1941 in the estate sale they had Jones and Babbitt as owners of those areas.

And there's one other thing that we would mention while we are on these tax records, on Exhibit P-548.1, for example, the name Walter Gochenour is shown as having this area which extends, is part of what we have called Tobacco Island, which is extended downstream on the Nebraska side and the designed channel just cuts through that part of the area now. I mentioned Walter Gochenour because two witnesses suggested that Nottleman Island was called Gochenour Island. Jim Lipert on the Nebraska side, Patte Powles who had lived there all his life on the Iowa side and said that that island had been there for many years, and said that, when asked if that ever had a name, he said he thought it was named "Gochenour's Island".

Now we'll see in 1941 that Mr. Gochenour

came in when a quiet title action was instituted and claimed this island, and I'll go through that when I get to it, but I am mentioning this now because it does show that Gochenour has some of that land just upstream at the northwest part of Nottleman Island.

And then we have in connection with the real estate tax records, document P-474, a letter from Richard C. Peck, Cass County Attorney, to the Cass County Assessor, in which he states in 1952, August 20 "An independent investigation reveals that under the Nebraska-Iowa Compact of 1943 this island became a part of the State of Iowa and is presently taxed in that state." And then he gives his opinion that it should be removed from the Cass County tax rolls, and the Board of County Commissioners of Cass County removed it from the Cass County tax rolls for and after the year 1943. That was when Mr. Babbitt attempted to have the land removed from the Nebraska tax rolls, and as he testified, they told him that they'd remove it once he could satisfy them that it was being taxed in the State of Iowa.

Your Honor, that concludes these documents we have brought in. We plan to go briefly over some more of these documents which we have organized in the other room.

THE COURT: On Nottleman Island?

MR. MOLDENHAUER: Continue that on Nottleman Island, or we can --

THE COURT: Yes, we can recess. I want to say as we go along here one reason I brought my law clerk with me was that I hope that he can get these exhibits back to Erie, so these that you put in, and so on, that's why I wanted the record to show what page number, and so on, so if you'll keep those available so that we can take them with us.

We'll recess until 1:30.

(Hearing recessed at 12:10 o'clock p. m.)

1:30 O'CLOCK P.M.
TUESDAY
SEPTEMBER 29, 1970

* * *

THE COURT: Mr. Moldenhauer.

MR. MOLDENHAUER: May it please the Court, with respect still to the Nottleman Island area, we'd first like to call the attention of the Court to Exhibit P-458, which is a deed filed in the Register of Deeds of Cass County, Nebraska in 1939 from Herb Church to Harvey Shipley, and the deed covers land on Nottleman Island east of

Rock Bluff called Queen Hill, which was surveyed by Fitch. It mentions the Fitch survey, and it says that, in the deed, that this deed is to supplement a conveyance to the same real estate by Herbert Church, single, to Harvey Shipley, November, 1928, before Perry Graves, Justice of the Peace of Cass County.

And we have some testimony that people were living on the island in 1930, but that's the first separate conveyance of land on Nottleman Island that we found.

And then we have a quit claim deed from Harvey Shipley to William Watts, which covers the northeast corner of the island, and that's the Watts land, Mason Watts who testified is still in possession of it today, that's P-460.

THE COURT: What is the date of that?

MR. MOLDENHAUER: This deed was filed in the Register of Deeds, Cass County, Nebraska, April 10, 1937, and it was dated April 10th.

Then there's Exhibit P-459, which is a deed from Harvey Shipley to Katherine Julia O'Brien filed 4 December 1939, and that covers the land on the northwestern part of the island.

Then in 1940 we have a quiet title action in the District Court of Cass County, Nebraska, which is captioned Harvey Shipley, William Watts, Mason Watts and Katherine Julia O'Brien versus

Frank Hull, and others, and this was filed in our District Court of Cass County, which is our Court of general jurisdiction, and it was a quiet title action joining riparian owners, including Walter Gochenour, the Gouchenour that we referred to when we went through the tax records, and James Warga and some Fitchhorns, and the Plattsmouth State Bank, and others. And in this case the allegation was made that these people had been in uninterrupted, continuous and notorious, peaceable and adverse and exclusive possession for more than ten years.

I think the allegation was also made that Herb Church through whom they claimed had been in possession for that period of time. The Court went ahead and published notice and went through all the procedures and quieted title to the north half of Nottleman Island to these landowners. The Wattses still claim it, although Bill Watts is dead; Katherine O'Brien still claims it, and we have, of course, conveyances of the middle of the island. But this was a regular quiet title action.

We point out to the Court that Walter Gochenour came into this case, filed an answer, and in the answer he alleged that this area had built up to his accretion land in the Missouri River and that the Corps of Engineers had changed the channel and cut this land off. So Gochenour was claiming part of that.

The Court found that the plaintiffs had been in

open, notorious possession, in other words, they satisfied the Nebraska adverse possession laws, and the Court awarded the land, quieted title in the plaintiffs, and the position was taken in this case that the river had been east of this island and was placed over to the west by the Corps of Engineers work.

But here we have a quiet title action giving in Nebraska complete title to these private landowners.

THE COURT: Iowa was not a party?

MR. MOLDENHAUER: Iowa was not a party to that.

THE COURT: Was this a trial court judgment?

MR. MOLDENHAUER: Yes, this is in the District Trial Court, it was not appealed.

And the Court also found, incidentally, that Herb Church had been in actual, notorious possession in November of 1928 for at least two years, which would put Church on the island in about 1926. This is fairly consistent with the other evidence that we have in the other documents and the aerial photographs.

Then in 1940, on April 30th, there was filed a petition for probate in the estate of John F.

Nottleman, who died on March 31, 1940, and the inventory, this was filed in the County Court of Cass County, which is our Court of Probate jurisdiction, and the inventory shows included in this area is the south half of Nottleman Island. The north half had the quiet title action. And this was a complete estate proceedings, and the administrator, of course, it lists the ferry boat under the property, it lists the stacker, and it lists some other equipment, it even lists some wild turkeys over on the island, or apparently on the island.

The administrator sold some old machinery and two old tractors, which the application says was almost junk, to D. M. Babbitt, Sandy Babbitt, one of the defendants in the Nottleman Island case, and they listed received of " Jones and Babbitt, sale of island and personal property thereon."

And the administrator went into the County Court and got approval to go to the District Court to sell real estate, because we have to sell our real estate out of the District Court, the Court of general jurisdiction. The probate proceedings are P-464 and P-463. We have the petition in the District Court of Cass County, where, of course, they allege the ownership, and this is an asset of the estate.

We have an order to show cause why it shouldn't be sold, and we have a publication and we have an order authorizing the administrator to sell this

area at public sale. The sale is confirmed on the 6th of February, 1941, and the land was sold to J. L. Jones and D. M. Babbitt, and that's Exhibit P-463.

An administrator's deed was given to Jones and Babbitt in Exhibit P-469, which was in 1941, and this was recorded with the Register of Deeds of Cass County. So here we have the claim of Babbitt, who is not a squatter and who bought it at a Court sale in Nebraska.

And then there's also a mortgage from Babbitt to Jones, filed on February 13, 1941, for a thousand dollars, and that's Exhibit P-465. But we point out that here is a mortgage in existence at the time of the Compact which was later satisfied, and we think the mortgage was good, we don't think that the Compact rendered that mortgage null.

Then there is a release from J. L. and Pearl Jones to D. M. Babbitt, Exhibit P-466, filed April 1, 1949, with the County Recorder in Iowa, in Mills County, Iowa, releasing the Babbitt mortgage.

Then we have as another indicia of title a County Treasurer's tax deed from Ruth Patton, County Treasurer, to Margaret T. O'Brien, which was filed with the Register of Deeds of Cass County, Nebraska on January 3, 1945. And this deed states that it was at a public sale of real estate for non-payment of taxes made in the County

of Cass on the 21st of November, 1942, at which these lots which are designated as being on Nottleman's Island were conveyed.

Just roughly it looks like about 180 or 185 acres, and it's that part in the northwest corner of Nottleman's Island.

Here is a deed for taxes which we claim is protected and recognized by Section 4 of the Compact, which had to do with the asserting of claims and tax claims within the five year period following the Compact. This was for taxes in Nebraska in '42, the deed was issued in 1945, because they'd have to wait for certain periods after the taxes become delinquent and after they buy them in order to give the people the right to redeem. So here's a tax deed which we say Section 4 was intended to protect.

Then we have a deed from Katherine O'Brien to Margaret O'Brien, filed on March 24, 1947 with the Iowa County Recorder. There is a deed from -- that's Exhibit P-60 and 69 -- there is a deed from Shipley to Troop of September, 1945, in which Shipley conveyed this middle portion of the island to Troop. Watts is here, O'Brien's here, and Babbitt down here, and Babbitt down here, and then there's a deed from Troop to Sargent in 1953 in which Troop conveyed the middle of the island to Sargent.

THE COURT: They were all recorded in

Nebraska?

MR. MOLDENHAUER: No, these later ones, the Troop to Sargent was an Iowa deed filed after the Compact.

THE COURT: Yes.

MR. MOLDENHAUER: And Shipley to Troop is filed in Iowa.

But this brings us to the Iowa situation which starts with Exhibit P-1670, a page from the general index to lands in Mills County from the Mills County recorder's office, which shows an entry with Katherine Julia O'Brien as grantor and Margaret T. O'Brien as grantee, date of filing March 22, 1946.

But then over in "where recorded" there's a notation "Not recorded. Accretions, tax lots, one Section 10, one Section 3," and way over on the right they have the section number which says Cass County, Nebraska. Now it says "Also returned 3-25-46", which is the occasion that the O'Briens tried to record their Nebraska deed over in Iowa. And this precipitated the problems of getting this land on the tax rolls and recognized by the State of Iowa.

Now preliminary to that when this deed was filed Louis Scott Robinson testified that he was the County Auditor of Mills County, and he testi-

fied about the problem of putting this land on the tax rolls because they had nothing on their rolls which indicated where this land was. So he wrote the General Land Office on April 25th of 1946, and his letter discusses that it in 1943, the Legislatures of the two states passed the act establishing the center of the channel of the Missouri as the boundary line, and then he said "Due to this boundary change Mills County, Iowa, has acquired a certain area of land of approximately 1,500 acres. This piece of land formerly of Cass County, Nebraska, known as Nottleman's Island, carries the township and range designations of Nebraska. Now that this area is part of Iowa we are faced with the problem of setting it up for assessment and taxation," and he asked them how he should set this up. And then there was a reply from the General Land Office.

But Mr. Robinson testified that he had a difficult time trying to find this out, that they went to all of the counties up and down the river on the Iowa side and didn't find any satisfactory solutions; and then he testified that he and the County Attorney, Mr. Byington, had gone to Des Moines and talked to the Attorney General's office and submitted a written request for an opinion as to what to do. They had gone over to the County Court House in Plattsmouth in Cass County, and found that this land had been taxed in Nebraska, and they had been up to the Corps of Engineers offices, but

he said that they didn't have any solution as to how they should conduct themselves and treat these lands.

And then he went into the service, and that was the last that he knew about it. So the next step is that these people went to Mr. Whitney Gilliland, who was presently a member of the Aeronautics Board, and who had been a District Judge in Iowa, and who was a lawyer practicing in Glenwood, and they asked him to get these titles recorded for him, and they filed an action in the District Court in Mills County, Iowa on November 23, 1946, which is the case of William Watts, Mason Watts, Harvey Shipley and Margaret T. O'Brien, J. L. Jones, D. M. Babbitt, and George F. and Mary Troop versus Donald Strand, County Auditor of Mills County, Iowa, Hattie Brown, County Recorder of Mills County, Iowa, and Mills County, Iowa, and they allege these various indicia of ownership which we discussed from the State of Nebraska, and they asked for an order requiring them to record and place these instruments of record in Mills County.

Well, the County Attorney of Iowa answered on behalf of these defendants, and I would like to point out right here that under Iowa statutes, the County Attorney is subject to the supervision of the Iowa Attorney General and represents the state and county in local actions. The state was not named as a party. The County Attorney is a

branch although he's in an independent statutory position of the Attorney General's office, and the County Attorney alleged in his answer, which was filed on November 25, 1948, that "These defendants further state to the Court that they have been advised by their attorney, Woodford R. Byington, County Attorney of Mills County, Iowa, that on May 6, 1946 he wrote to the Attorney General of the State of Iowa for an opinion as to the proper procedure in correctly describing this additional land for taxation purposes, and in setting up the necessary plats and transfer records, and so far has not received any opinion."

So here is notice again to the Attorney General's office of the State of Iowa as to what the situation was. And Mr. Byington said that he had, never did hear of them responding with any opinion; but he said that he and Mr. -- I mean, Mr. Robinson said that they hadn't, but he said that he and Mr. Byington had delivered this personally to a Deputy Attorney General in Des Moines.

Then the Court entered its decree and ordered that land to be recorded on the tax rolls and on the rolls of Iowa, and the Clerk of the District Court on January 6, 1947 indicated that he delivered to the County Auditor a true and correct copy of the decree. The decree was entered January 6, 1947, and filed with the County Recorder's office of the State of Iowa, is Exhibit P-1075, which is a map of Nottleman Island showing Lot 1, 2, 3, 5 and 6, and

I think it's a 19-- they are located on, I believe it was a 1945, 1945 dated Corps of Engineers map, placing these areas of Nottleman Island of record in the State of Iowa.

THE COURT: Is there anything in that case to show any reluctance on the part of the county officials not to file those documents on account of any claim of the State of Iowa or anything of that kind?

MR. MOLDENHAUER: No, sir; I believe that the answer admitted these people's ownership, but raised the point that they didn't know how to record it. Well, they didn't possess sufficient knowledge to admit or deny the allegations about the plaintiffs indicia of ownership which were the deeds and titles and things.

But they don't raise any, they don't raise any point that the State might have an interest of any kind. The allegations were made that prior to the Compact, the tracts of real estate were located in Cass County, Nebraska, as paragraph 6, and Iowa admits that paragraph. And paragraph 7 alleged that because the real estate does not lie within the limits of any section surveyed and designated within the State of Iowa, uncertainty has arisen as to the manner and method of indexing, and they admit that paragraph.

Again, Mr. Gilliland testified that he had no

idea that there could be any claim by the State of Iowa, as their attorney, and there was testimony that the witnesses were informed then about this decree and were relying on their attorneys.

The decree then is of record filed March 3, 1947, and is recorded in the Surveyor's record, that's Exhibit P-1074. There were two pages to that is all.

Then in 1950 the problem came up where an individual had requested of the Iowa State Conservation Commission a conveyance to Nottleman Island as an island, and Mr. Gilliland testified that he was approached by a member of the Iowa Conservation Commission who had been looking at the records in Mills County, and they had sent him down to see Mr. Gilliland, and pursuant to this he contacted the Iowa Attorney General's office and he testified that he asked them what to do about it and they said go to see the Conservation Commission.

And so Mr. Gilliland wrote a letter, which was Gilliland Deposition Exhibit 2, on March 20th of 1950, explaining how Nottleman Island came into existence and how the main channel had been on the east side of it, and he also testified in his deposition that he had personal knowledge of the area going back as far as about 1917. That letter was sent to the Iowa Conservation Commission. He mentioned the Compact and he mentioned the lawsuit, and he said "I don't think this is a case

of occupying claimants, I think it's a case of straight-outright ownership." Now that letter shows a copy having been sent to Honorable Robert Larson, Attorney General of Iowa, a copy to the County Auditor of Glenwood, and one to William Watts of Pacific Junction.

And then Mr. Gilliland wrote Gilliland Deposition No. 3, which is a letter to the Honorable Robert Larson, Attorney General, on March 20, 1950, in which he indicated the enclosed letter, and he said "We thought you should be advised as to the situation because we presume that you are advisers to the Conservation Commission and we know that you are to the State Executive Council." There's notice here to the Attorney General's office of the State of Iowa.

Then the reply by Ray Beckman, Chief of the Division of Fish and Game, went to Mr. William Mead of Percival, in which he said "Please be advised that the island that you refer to is not state property. The information we have is that this island belongs to the four parties as follows: William Watts, Margaret O'Brien, M. Babbitt and Jones and Babbitt;" and Mr. Beckman testified that he was instructed to write that letter by the Director of the Iowa State Conservation Commission, who is also a statutory officer of the State of Iowa. His position is created by their statutes. A copy was sent to Gilliland and Thomas, and they acknowledged it.

So here again the Conservation Commission had knowledge of a situation, apparently looked into it, and their Director of, the Chief of the Division of Fish and Game answered the letter at the instance of the Director, indicating that they didn't have any claim to it.

Then we have some other activity by the State of Iowa, in fact, it might be inferred that if many of these people had approached the Conservation Commission at that time they would not have made any claim because they weren't making claims to any lands.

Lee Sargent passed away in Iowa, and the final report in his probate was filed on March 29, 1958, and the Sargent portion of Nottleman Island was included in the description and in their inventory, and they paid an inheritance tax to the State Tax Commission of Iowa, it's a small amount of $153, but they paid that tax on August 21, 1957 on the whole estate which included this area.

Then Mr. Babbitt had a lawsuit against the -- which is captioned Exhibit P-471, in which he brought suit in Iowa against L. E. Edwards, R. W. Mansfield and Warren Honeyman as members of the County Board of Review of Mills County, which is a statutory board, and Harry Markel, County Assessor of Mills County, in which he attempted to have his taxes reduced, alleged that he was the owner of the real estate and described it. The defendants admitted those allegations, and the Court

found that the assessment was not illegal, excessive, unfair, unjust or inequitable and was not contrary to law, and that decree, the District Court of Iowa for Mills County filed in 1961, on November 30th. That's this area that is described on their tax plats. That's the case where Mr. Jauron testified that from the vegetation on the island that he determined that it started to form in the early '30's.

Then Bill Watts passed away on August 7, 1964 in Iowa, and his estate was probated there, and the interest of Mason Watts who was a joint tenant on the island then with Bill was included as a part of the inventory.

THE COURT: What does that record show as to why Jauron was called as a witness in that case, what was his --

MR. MOLDENHAUER: The record does not show, it just shows his testimony. I can say off the record that Mr. Babbitt wanted to put him under oath, and that's why he called him, I have been told that, but I, there's nothing that I see in the record.

THE COURT: What, as to value or description?

MR. MOLDENHAUER: Well, I think they raised

the question of whether of Iowa was claiming the land in the testimony at that time, that's just recollection.

But the land in the Watts estate, that undivided interest of John William Watts or Bill Watts, was estimated, I believe, at $10,000, and there was an inheritance tax paid to the State of Iowa in that case, and I believe that receipt is --

THE COURT: Who was that again?

MR. MOLDENHAUER: Well, this is Bill Watts' estate, the northwest corner.

THE COURT: Yes.

MR. MOLDENHAUER: And he passed away on August 7, 1964. The inheritance, the order for approving the final report, was on 30 October 1967, and I think that we have a receipt from the Iowa State Tax Commissioner here, filed October 12, '67, in the amount of 566 and sixty-seven hundredths dollars as payment of inheritance tax, signed by the State Tax Commission, by, by someone who was counsel for the Inheritance Tax Department. There's another state agency which isn't questioning the title.

Then the testimony is as far as the property tax status is concerned that this land went on the tax rolls in 1947, and we have certified excerpts

prepared by the Mills County Treasurer of all the areas on Nottleman Island, starting with 1947 and carrying through May 22, 1967, when the certificate was obtained, showing payment of taxes on all the land by these private individuals on Nottleman Island.

I think the record indicated that the total was something like twenty-seven or twenty-eight thousand dollars at that time. But the important thing is that they are still assessing and collecting taxes, and I think we should point out this again was a tremendous amount of work to obtain because it's extracts on all these different legal descriptions for all these different years, for all of these different people. But the process of taxation is really several steps, it has to be assessed by the assessors, the tax has to be levied, it has to be collected by the Treasurer, it could be sold for delinquent taxes, it could be redeemed so it could involve the County Attorney, it involves several steps by all these officials, it just isn't a simple thing of collection.

We have in the record the tax plats which shows, which just shows, just shows them and followed them and see what was included in as tax.

Then in 19-- back in, on December 31, 1949, we have a document, Exhibit P-1664, which shows that George Troop's land was sold for taxes to Bonnie Powles, and he had to redeem it December 31 of '49, way back then.

We have a notice of expiration of taxes served on Babbitt, P-84, back in 1963. We have an indication of payment and redemption of taxes, Exhibit P-2613, where this totals $4,101.69 for land sold in 1960, he did that in 1963, in October.

We have drainage tax receipts, which is another Iowa operation. It's paid to the Treasurer but it's a drainage tax district, they are just another area of government, and without mentioning all of them we have many, many tax receipts here and statements. We have assessment rolls, and, incidentally, on the assessment rolls I think there's mention that the landowners are required to list according to Iowa statutes their place, list all their property which they own. These refer to the Iowa statutes and all the authority of all these officials is derived from the Iowa law, and they are performing their duties supposedly in pursuance of Iowa law when they engage in this taxation.

Then we have a '63 newspaper article which, Exhibit P-510, in 1965, correction, showing Babbitt's land listed as delinquent for property purposes, and if he doesn't come in and redeem his taxes it's going to be sold. So even during this case one branch of local state government is threatening to take his land if he doesn't pay his taxes, and the other branch, or the other, the state government itself, is threatening to take it away.

THE COURT: What is its status now?

MR. MOLDENHAUER: The last thing that happened was that he paid under protest, December 1968, and I had a -- P-2614, so he paid them up, and I think that came out, it was over $5,000, that's for the delinquent taxes for the year 1964.

That takes care of the taxation, but all the parties testified that they had been paying taxes and are paying taxes up until the present time. We might mention too that, of course, when this is raised Iowa immediately says, I think they did in the Babbitt case, that these taxes are too small, that we're not bound by this action anyway, so that this is all irrelevant. But we think it is significant. I think they told Mr. Babbitt in answers to interrogatories that this was an attempt to cast an unfair burden of proof on them.

Then we have, moving now from some of these acts of conduct by the State of Iowa, we wanted to mention some of the other documents which indicate that people were exercising ownership in open and notorious possession of the Nottleman Island land. And this is relevant not, we're not arguing adverse possession for these people, but this is all indicative of the fact that they had title, they were there, nobody was contesting it, they were doing everything that any landowner can do under as good a title as any landowner ever had.

We had a bunch of photographs from Mrs.

Mathis, 1763A through N, who lived there in about '46 or '47 on the island. It shows Mr. Babbitt hunting rabbits and raising pigs, and farm operations, and that sort of thing, taken way back in the '40's. P-1850 is a cabin which they had on the island in the early 1950's.

There were several articles in newspapers which are about as open and notorious notice as you can get. Exhibit P-487, dated February 7, '54, shows the land being cleared on the island, it shows Bill Babbitt measuring a tree trunk which had been felled, which was thirty-six inches wide, and it shows them clearing land with a cutter blade in the Omaha World-Herald, which has wide circulation in all of Nebraska and southwest Iowa.

There are also photographs taken at the same time of some of these same things. It shows open operation here, and while the Babbitts are doing this, I think there was testimony as to how many people they employed, so there were a lot of people involved in this operation and there was just a lot of notice as to what was going on.

And then Mr. Babbitt filed the Fitch survey over in Iowa on September 30, 1955, Exhibit P-1076, so here again notice, record notice, in 1955 by a landowner of that survey, and anybody going to the Court House records and looking at that area supposedly could find that.

A newspaper article in the World-Herald showing Mr. Babbitt with some soy beans grown

on the island, October 2, 1955, with an article, and it looks like it's on the front page of their second section.

THE COURT: He looks a little younger than he does today.

MR. MOLDENHAUER: He claims he looks as young now.

THE COURT: Okay.

MR. MOLDENHAUER: Then Mr. Babbitt had a farm sale in 1956, and this was widely advertised, and this indicates a mile west of Pacific Junction and halfway between Plattsmouth and Glenwood, but here again it shows wide knowledge and the things that he's selling are 326 head of livestock and farm machinery and all this type of thing, which is over on the island, that's Exhibit P-2236, which is in the Glenwood, Iowa Opinion Tribune of November 29, 1956. The same thing in Exhibit P-2237, it was advertised in the Plattsmouth Semi-Weekly Journal, on December 3, 1956, and underneath his "big farm sale" it says "Farm known as Babbitt's Island."

What's interesting is all the machinery and all the livestock, and Mr. Babbitt testified as to a lot of livestock. Then there was the same --

THE COURT: Does it say that in this one?

MR. MOLDENHAUER: No, I don't think it does, but --

THE COURT: He testified that it was on the island, is that it?

MR. MOLDENHAUER: Yes; and on this one he says "Farm known as Babbitt's Island" in the ad itself.

Exhibit P-1849 is an ad in the Omaha World-Herald in connection with this same sale, it's a very poor copy, it's dated December 2, of '56. Here again there's little excuse for anybody at all familiar with the area not having knowledge that they are out there and they are conducting operations.

And then Mr. Babbitt entered into a fence line agreement in 1956 which was filed February 6, 1956 in Iowa with the Recorder, with Good, in which he agreed to the fence line or boundary agreement on the east side of this island. That's shown here as being in that area. But the instrument was January 31, 1956, Exhibit P-1073. This again was record notice to everybody.

The Sargents in 1957 in connection with their father's estate entered into a mortgage with the Travelers Insurance Company, it included land on the island, and it included other land too, but I

think the total consideration was, oh, something like $110,000. This was filed of record. So here again at least the insurance company recognized that property as mortgagor, or, mortgagee. And the Sargents filed an affidavit of possession on June 12, 1957 in accordance with, as Mr. Sargent testified, on the instructions of their attorney.

Now this again -- I don't purport to be knowledgeable in Iowa property law, but it cites Section 614.17 of the 1954 Code of Iowa, and this is their marketable title type of procedure whereby if they file the affidavit and it's not contested the landowner clears his title. It's in accordance again with their statute, and I don't want to argue whether that's binding on the state or not, but the fact is what they have done is cleared their title as far as any private claimant is concerned, no private claimant can really come in and question it.

Mr. Babbitt had the area surveyed in Exhibit P-1077, and this was filed, the instrument was dated December 11, '59 and filed December 14, '59, filed in Iowa showing the survey of his land.

He had his property in the agricultural program and he got a farm bin, and he mortgaged to the Commodity Credit Corporation that bin and the land it was on on Nottleman Island for $6,164; so here again in the farm program they were recognizing his title, that's Exhibit P-486.

Then the real hooker came along, because he testified that he found out about the Iowa claim to his land in the newspaper article which came out after the Planning Report, nobody talked to him, but somebody called him and said that they made this claim in the newspapers, which listed these areas.

So he tried to get a loan after that, and we've got Exhibit P-475, which is a letter from the South Omaha Production Credit Corporation of October 20, 1961, in which they say "Although your present loan is of a reasonable size in comparison to your financial position, we cannot see our way clear to actually base the loan on the 640 acres of real estate. The State of Iowa apparently claims an interest in this land and in our opinion this clouds the title. If our attorneys were satisfied that you own an absolutely clear title you have no problem in meeting your needs. As it now stands we cannot do more than offer a loan which is based entirely on chattel property."

And then I think he testified, too, that he tried to obtain a loan and couldn't.

On November 22nd of '61 he wrote the Attorney General as to the situation, and the -- Mr. John M. Creger, Assistant Attorney General, answered by letter of November 22, '61, Exhibit P-1775, in which he said "Although it's impossible to give an absolutely definite answer to your questions at this time for a number of reasons, I think that you may

definitely assume for the present, at least, that the State of Iowa through the State Conservation Commission does, in fact, claim title to so much of the above property "as is physically located within the State of Iowa, and intends to commence action." Here again he isn't getting an absolutely definite answer.

THE COURT: It says through the State Conservation Commission?

MR. MOLDENHAUER: Yes, sir, that's what it says.

THE COURT: The basis of the claim.

MR. MOLDENHAUER: Well, it's very interesting, because in the interrogatories which we have quoted in our appendix, they were asked if the State Conservation Commission had any interest in the action, and their answer was "No," but that if once it was determined they owned it they would then administer it.

THE COURT: Yes.

MR. MOLDENHAUER: I don't know where they got the basis for their "No" answer, but it's one of the many, what we consider inconsistencies.

And then he also tried to get a loan from

Metropolitan Life Insurance, and we have a copy, P-476, from lawyers in Harlan, Iowa, who answered, and they start out "You have asked me why the Metropolitan Life Insurance Co. has been unwilling to make a loan on your property secured by the real estate," they quote pages 42 and 43 of the Planning Report, and the lawyer says "It's my opinion that the Metropolitan Life Insurance Company cannot safely make you a loan upon this tract until the claim of the State of Iowa is disposed of in your favor." Now he didn't have the second page of that letter. But this really demonstrates what the State of Iowa can do to an owner and the position that they can strap him in, because if they agreed that the titles were any good, once they attack them they cloud that title, and it's no longer good until that cloud is lifted. And that landowner is effectively deprived of many things which he could otherwise do in connection with that land. But a mere attack --

THE COURT: Does that proposition you're talking about right now entitle Nebraska to say to the Supreme Court of the United States to enforce the Compact?

MR. MOLDENHAUER: Yes, sir.

THE COURT: Or is that a private proposition?

MR. MOLDENHAUER: No, because we would never have entered into the Compact if we hadn't been assured that our people were going to be fairly treated over there, we wouldn't have entered into it at all, it's got to be why that language is there, and Iowa put the same kind of language in, and not only that but when they referred the Compact to us they had an additional section which says that not only will the terms of the Nebraska Act be the same as Section 1 and 2, which set up the boundary, but it will also be identical to Sections 3 and 4, so they put specific emphasis --

THE COURT: Well, you're saying then, aren't you, that Nebraska has the right to insist that Iowa adhere to the proposition that a title good in Nebraska is good in Iowa, is that it?

MR. MOLDENHAUER: Yes, sir.

THE COURT: And when they do this they are not, they're violating that, and therefore the Court has to enforce that, abide by the Compact, and this is one of the things that you have got to abide by.

MR. MOLDENHAUER: Yes, sir, that's right, it goes beyond that because we think that when we get through that it really goes so far as to say

"Iowa, you can't come in and attack these titles, because once you attack this man's title you have clouded it, and you're attacking a title that you agreed would be good, and you can't attack it because if you do you put all these unfair burdens on him, you make him go through this mass of evidence, you sit back and you deprive, you can effectively take away his land."

THE COURT: Yes, but that's a pretty large order to say that to Iowa, and then some fellow down the line, some county official or somebody, or somebody comes along and says, here, we're going to do this, maybe it isn't the administration of the State of Iowa. Don't you have to go at it piecemeal and say that this is --

MR. MOLDENHAUER: No, because when we decided to enter into the Compact we didn't go at it piecemeal, we said we're not going to make these determinations. We could have, it would have cost us, we could have gone through all this. but we said, no, and you're going to have to recognize the titles. Now I don't know what that means unless it's recognize everything that's there, because they weren't making any claim here. And otherwise, if you go back now and make them determine that,I don't know what the Compact did.

THE COURT: Well, I understand that's --

MR. MOLDENHAUER: That's our argument, and I think the state itself agreed it was good, the state didn't say "We're going to let you" --

THE COURT: What I'm discussing here now, what I'm discussing here now is the possible decree for the Supreme Court to say --

MR. MOLDENHAUER: Yes, sir.

THE COURT: (Continuing) the language of it, what the Special Master shall recommend shall be the order.

MR. MOLDENHAUER: Right, and we think -- we think when we get through, we'll go through this again, because we'll have these other illustrations.

THE COURT: All right.

MR. MOLDENHAUER: But we think at this time what that Compact did was recognize effectively that Iowa had no more than Nebraska did, and that's an easement or a public right to use the stream which is what they were exercising then, and that they didn't, they weren't deprived of anything because they didn't have anything.

They had recognized that the river was in Nebraska many places where they had no claim whatsoever, and what Iowa's got today is the right to use that stream for the public just as Nebraska has, but they don't have any right to assert title to that bed or area, because as soon as they do that they force that landowner to come in and prove where the boundary was before the Compact, and we agreed that that didn't have to be done, and we agreed that that title would be protected.

And we think that this is fair, we don't think that they're deprived of anything because they aren't as a practical matter deprived of anything, and that way reads the Compact to settle the problems instead of creating a controversy, because what they have done by taking this approach now is twenty years later clouding everything up and down the river. And we think that their conduct which we will go into later on shows that they are picking and choosing areas and they are not consistent, and under their theory they don't have to be consistent.

THE COURT: Well, under that proposition wouldn't it be sufficient to tell the Courts of the State of Iowa that the Compact supersedes your common law, period, and stop there?

MR. MOLDENHAUER: Your Honor, with most people that's probably true, but they come

in now and say that "We're not claiming ceded land," and we're going to show tomorrow that they are claiming ceded land, they can still talk out of both sides of their mouth, and we can't -- and they do it, and we can't understand how. And that's the bad part of all of this, they stand here with their sanctimonious statements, saying "We're obeying the Compact," and when we look at the facts they are not, and any decree which allows them to say this or which gives them another excuse may not be adequate.

THE COURT: All right, go ahead.

MR. MOLDENHAUER: Then we have got an affidavit of possession filed by Babbitt, September 16th of '63, on the advice of his attorney, and an affidavit of possession filed by Mrs. O'Brien on the 2nd of June of '64.

And we have had a few -- those are P-1698 and P-1072 -- a few pictures, P-616 through P-621, really which are just to show this isn't just a sandbar, Babbitt's got some bins there, good corn, good high corn, in fact, and this is valuable farm land that they are coming in and trying to take.

Now that, Your Honor, pretty much summarizes the documents, showing the occupancy and what's going on, but it's a wealth of material and it's material that anybody, if they want to spend

enough time, should find. But we think now too that the testimony of the witnesses corroborated this evidence.

Floyd Fulton by deposition, lived down in this area, and he testified how back in between 1897 and 1908 there was a chute over on the other side, and an island out there, and his father used to do a lot of fishing, and the main river was over on this side, and he testified how they moved away in 1908 and the river was only thirty-three steps from their house, but when they moved there in 1900 or 1901 it was a half a mile away, testimony of cutting away back when he was young, true, but he lived there.

The Eylers, as we mentioned, testified about the Hafke place cutting away in March of 1909, and that was up in this area, and they were there, that's something that somebody never forgets, and they talk about the force of the river up against that Iowa bank, which has to put it over there. Then the house later cut in.

Bruce Connor who lived there during all those years, had lived on the Hafke place in 1905, he worked for Woods Brothers in 1921, he said everybody regarded, or, he talked about how again specific areas cut away on that Iowa side, all over on the eastern part of Nottleman Island.

Whitney Gillilland, a member of the CAB, his first recollection was 1917, testified that everybody regarded this as part of Nebraska up until the

Compact.

Patte Powles who was eighty and whose parents lived down at the south part of Nottleman's Island, and had lived in Mills County all his life testified about the island being on the Nebraska side. And his brother Swede Powles owned this land right here, he said that across the river was this Gochenour's Island, and he testified how this was when it started forming over the years, over on the west side.

Genevieve and Luther Johnson testified when they lived down near the south end between 1926 and 1945 how the river cut away, and these are all people who lived there. They testified too how there was a boat tied up on the Iowa side and how they'd come and eat at the Johnson's and so did the Johnsons .

On the Nebraska side we had Jim Lipert, who in the '20's walked over there. We had Albert Warga, who said that in 1913, and the Wargas lived up in here in 1913, the river was about a mile east of Queen Hill, and he was out there hunting ducks at the time of that cyclone on Easter day, and everybody who was alive at that time still remembers that.

We had another witness in the early '20's, said that when he came here that this was just slough. The Liperts walked across this, several witnesses talked about this slough at times but water was there on the Nebraska side. As far as

living on the island, of course, we had Mrs. Dooley who testified that there were times when "We waded across to the island." Mason Watts said the same thing.

We had Ed Dooley testify who lived on the island, and all those people, we think, had every reason to be there and were knowledgeable.

We think by the same token that Iowa's witnesses were casual, that they really weren't there, they had no reason to be there. They might have hunted and fished there now and then, but they didn't ever, there wasn't any real reason for them to be there or to remember these things.

We had Mr. Babbitt testify about how he took possession of that island and he got his first crop in '41 and '42 when they first started clearing, and all the time and effort and money that went into clearing. Mrs. O'Brien, the lawyer's widow, who was relying on a part of that island for her retirement income, the Sargents testifying about how good this land was and how they cleared it, all of this mass of work which went into this island all the time that these people lived here, and it's all pretty well detailed.

THE COURT: How do you characterize that type of evidence, I know that you have been calling it prescriptive with reference to adverse possession and all that sort of thing, how are we going to call that, now you've got documentary evidence,

and so on, or is there any way of doing that?

MR. MOLDENHAUER: I don't know. It's just this, it's evidence of ownership, it's evidence of title, I think it's evidence of even where the boundary was because everybody recognized this fact.

If we were talking about the time of the Compact and if we were at common law it might be evidence of acquiescence and prescription as between states. There you might have the question of how much time intervened and whether it was long enough.

But the fact is that in '43 when we entered into the Compact it cuts things off, and they not only recognized all this as Nebraska, but after the Compact they recognized it as going on the rolls of Iowa, so we add another twenty, twenty-seven years onto this general recognition.

Yes -- Mr. Moore called my attention to the fact that somewhere I had it under the proposed rules of evidence for the Federal District Courts a recitation and knowledge in the vicinity as to boundary is admissible evidence. That has not been adopted but they are considering it.

THE COURT: I'm just trying to get some nomenclature on the record.

MR. MOLDENHAUER: In part it's evidence

of general reputation as to boundary, in part it's evidence that they own it, that they were there and that there weren't any adverse claims.

Now I should mention the witness Red Jones who testified that he logged 240,000 board feet off the Babbitt land, and he took 150,000 feet off the Sargent land and 46,000 feet off the Watts land and 20,000 feet off the O'Brien land, so there was about a two year period there when Red Jones was in logging. And it's hard to think that Iowa was in possession at the time that all this logging was going on. So we've got no question about the title, it's there, and if anybody ever had a good title in Nebraska before the Compact these people did, particularly when they got through the quiet title action. We think that they had a title good in Nebraska and they had a title good in Iowa until somebody in the State decided to attack.

Your Honor, that covers the Nottleman situation and we're ready to move to Schemmel Island and get those documents, and it would be very opportune for a short recess.

THE COURT: All right, you can get the documents out, we can have a recess for fifteen minutes.

(Short recess at 2:20 o'clock p.m.)

THE COURT: Mr. Moldenhauer.

MR. MOLDENHAUER: Moving now, Your Honor, to Schemmel Island or Otoe Bend Island, we first mention at page 48 of the Missouri River Planning Report Otoe Bend Island was shown.

It shows a large cleared area and is described as 550 acres of land. We would mention that the description describes it as "side of new channel" in Iowa. And they use that side of new channel designation almost all the way through the Planning Report, and, of course, title, the recommendation is made to quiet title in the name of the state, and then the statement "If title is granted in the State of Iowa then plan to use these islands. No further recommendations are made because of the possibility of a long time before the title is quieted, and, of course, plans should be determined then based on need."

Pointing out again that it's obvious from the photograph that there's someone here, someone here made it valuable into agriculture, and there's a necessity by Iowa to quiet the title.

In the Schemmel case again statements were made that they hadn't interviewed the landowners or discussed it with the landowners the fact that they were going to quiet the title, they treated them just as shabbily as they did Babbitt by moving in and claiming the land immediately without giving them any consideration. Here again in the Schemmel case the record shows that they only called two witnesses, they called Mr. Windenberg, their sur-

veyor, and they called Mr. Huber who testified in that case, and also in this case, with many variances.

They only started out with the history in the middle '20's, and then they relied on the presumption and they specifically stated that there had been no avulsions in the area and they were going to rely on the presumptions, which means that they particularly ignored all the prior history of the Schemmel area which we claim is quite important. Here again to trace this prior history is a tremendous burden and a great deal of effort for any individual to have to sustain.

Exhibit P-208 is the government tie survey with the original Nebraska survey and the original Iowa survey, and it shows an island originally surveyed in the State of Nebraska because it has the Nebraska section numbers on it. The very northwestern tip of Schemmle Island overlaps that island, but we are not claiming that that is still in existence.

THE COURT: On this, going just back just a minute, I notice it says here on this Planning Report "Note old channel location separating island from mainland." First we look at the right side for a mile -- is this the line here that you're talking about, that's been mentioned, is this it here, do you think?

MR. MOLDENHAUER: When they say "Note old channel" --

THE COURT: Yes, are they talking about this?

MR. MOLDENHAUER: Yes, sir, I'm sure that it is, here's where the river is.

THE COURT: What is this?

MR. MOLDENHAUER: I don't think so, I think there's the levee there, I think that's the levee, and you may recall from that testimony how they built that levee up. I think that they were referring to that channel because in all of these instances where they selected an area they apparently took an area which showed some old chute or channel over there between that place and the river in order to establish that this arose in the bed of the stream.

THE COURT: All right.

MR. MOLDENHAUER: Although there are many of those such chutes in existence between, and, land, between that and the river where they didn't come in between.

Originally we see that much of the Schemmel land in the original government survey would have

been over in Iowa in Section 15, the major part of it is in Iowa Section 15, of course the lower part of the traverse is way over towards the east.

The next map is the 1879 Corps of Engineers map. On the 1879 map when Schemmel Island is placed upon it you can see a couple things. There's a -- what was the island on the original government survey or Frazier's Island is now a part of the bank and the bend is moving toward the east and developing towards the east in rather a pronounced bend. We have Sidney -- the Sidney Landing is marked there later, but the river, -- Frazier's Island was in the river, and now this whole area has been attached to the Nebraska shore as accretion and the river has moved over towards the east, towards Iowa.

The next map then is the 1890 Corps of Engineer's map, and when the present Schemmel location is placed upon that map we see that at least the western two-thirds or maybe more of the area is located on the Nebraska accretion area which is identified in part as Frazier's Island, and there's also an area which looks like a depression or some kind of a possible dry chute which runs right along the western, just inside the western part of the island, but this bend is developed considerably over towards the east again, and Sidney Landing, which is here, was marked on that '79 map demonstrating at that point that it moved over down in this area.

This is a little bit more complicated, Your Honor. Then the next survey which Nebraska discovered was in 1895, Pierce Survey, and this was a survey that's Exhibit P-213. We also have in evidence Exhibit P-137, which is a document showing that this survey was recorded in the Otoe County Clerk's office, and Mr. Brown testified that it was generally referred to as the Pierce Survey. He was County Surveyor at that time, and the document indicates that it was to collect taxes levied for the year 1895.

Now this survey Mr. Brown testified was apparently quite accurate because the land designations are broken down into hundredths of acres, and this was recorded in 1895 in the Otoe County Clerk's office.

We take the Pierce Survey and place it on the 1890 survey, and the Pierce Survey only shows the right bank or the Nebraska bank. We see the river has moved, this is to the right bank now, the river is here somewhere, we don't know exactly where, but it's again, this bend is moving towards the east and it's moving downstream a little bit. There's a little knob there at the upstream end, but Pierce put all this area, which on the '90 survey appeared as Frazier's Island, over on the bank, just about over to where Sidney Landing is on the '90 map were placed on the Nebraska tax rolls and included in his 1895 survey. What we contend this shows is a progressive, orderly de-

velopment of the bend to the east and downstream, which is consistent with everything the Corps of Engineers studies and theories.

We also have an exhibit, P-370, which is a map of the Missouri River by the Corps of Engineers in December '76 and January 1877, showing this pronounced bend, this came out of the Corps of Engineers reports, showing the pronounced bend and Frazier Island. Also interestingly the Nebraska City Island with the river going around the east side and a slough going around this side, and we'll talk about the Nebraska City Island later. This again became a cutoff, and it can be seen in comparison withthe '79 and '90 maps, between those two periods of time it cut off.

P-211 is the '90 map, and up here we see that the river cut through leaving Nebraska City Island, and all of this Eastport Bend they have, and down here is where we contend that Iowa purchased land which was on the other side of the channel, and the Corps of Engineers reports indicate that there was a slough here and the river cut through.

Now this map, the '93 map, also shows McKissick Island which was the subject of the case of Missouri versus Nebraska back in 1903 or 1905, where the Court held an avulsion here, in fact, I think it was described in the Corps of Engineer's reports very graphically, and the boundary runs around the outside of that bend and there's land on the Missouri side which is a part of Nebraska

and has been since that time.

So above and below we had easterly developing bends, both of which cut off.

Then we also have Exhibit P-2627, which is again from official Corps of Engineer's documents, this was obtained from the Nebraska State Historical Society in the reports of the Missouri River Commission from July 1, 1885 to June 30, 1887. I went through all of the reports of the Corps of Engineers offices and did not find this particular report, but it was in the Nebraska State Historical Society.

And this map shows the development of the eastern bend, but it does more than that, it shows how much more land is referred to as having been cut. And the comment is made "Cut M to N," which is in the Schemmel area, from 1879 to 1886, 1,002 acres, indicating that that land was cut away as that river moved to the east.

THE COURT: Now what period of time?

MR. MOLDENHAUER: Cut M, here's N, from 1879 to 1886, 1,002 acres. It has other areas where it shows how much it has cut, which we contend indicates that it moved gradually washing everything away. Now on the attached exhibit the Schemmel area has been placed by Mr. Brown, and again showing the eastward development of that bend and that large meander which was developed

there, which is not too dissimilar from what happened up above and what happened down below.

And then we have a survey which we found in Iowa, Exhibit P-172, which is referred to as the Gagnebin Survey, obtained from the Auditor's office in Fremont County, which shows the original bank line of the Missouri River, the meander of December of 1884, which is down the middle of Section 14, and then a measurement of 1888, which is still a little bit to the west of the Iowa chute, and we see a road at some later time called the Given's Road which was imposed on this, again on the Iowa side, showing that various stages of the bank line although they're not, as we contend, it moved to the east.

You see the Schemmel land is in 15 and 14 is pretty much to the east of where the Schemmel area is today.

Then, Your Honor, we refer to Exhibit P-176 and 177, which are from the Journal of the Iowa Board of Supervisors for April 2, 1889, and here they resolved that part of the taxes against the south half, against certain lands be reduced for the year 1888, part of the same having gone into the Missouri River, and point out that this is east of the Schemmel, of where the Schemmel area is located, Iowa documents indicating the recognition of this movement of the river to the east.

Exhibit P-372 is a plat of Washington Township in 1891, showing a large easterly bend, Iowa Sect-

tion 15 where the Schemmel area now is, is to the west of that bend. It just gets into the corner of the John Foster 80 acres, which is just to the west of the M. U. Payne place. The Payne school has been circled by Mr. Brown.

This is just another plat book, but it shows where it is, or where they, it shows the large bend. And then we had a newspaper clipping from the Nebraska City News of April 16, 1897, Exhibit P-200, which stated that about four miles northwest of Hamburg near the railroad is the Payne school house. The river is three-quarters of a mile west of the road at this point. And then it talks about the flooding at the John Payne levy. The three-quarters of the mile as shown by the index map west of the Payne school is just about in the location of where the configuration known as the Iowa Chute is, that was dated 1897.

THE COURT: You contend that the Iowa, the river was in the Iowa Chute at that time?

MR. MOLDENHAUER: Our witnesses, Your Honor, put the river in the Iowa Chute in 1899 and 1900. Cliff Cochran testified that a boat was tied up right there west of Propps, I think something like three hundred yards or three hundred feet west of Propps. And Frank Duncan testified that he lived right here on Givens Place, in Section 10, from 1896 to 1900, and in 1899 his mother

took him right down the road, it's here, these buildings, right down the road and he stood there, and Mr. Brown placed a stake, and he said that the boats came right up from the south and went toward the west, the first boat he ever saw in his life, and Mr. Duncan moved away from there in 1900, although he was still in the same general area but he said he never forgot that. And the only time that he lived in that area was 1896 to 1900.

THE COURT: I remember my first automobile, how about you?

MR. MOLDENHAUER: We discovered it, nobody had any idea, nobody dreamed that he'd ever lived over there until somebody just talking to him on the street one day, I guess he was talking to Mr. Schemmel, he said that he'd lived over there, he moved away in 1900.

Cal Taylor, who was eighty-eight or eighty-nine years old, when we took his deposition, had Mr. Brown place a stake right there on that chute west of the Propps, and testified the river was there when he was a pretty good sized boy, but he would not commit himself as to what date it was.

Mr. Taylor's dead, Mr. Cochran's dead, Mr. Duncan has had serious heart trouble, and they may be the only three witnesses left alive who remember that, so it's one of those problems

that exist.

Well, we may have these a little bit out of order, but I'm trying to move through this as as fast as I can.

Then Exhibit P-174 is a resolution from the County Board of Supervisors, Fremont County, Iowa, August 1, 1905, "Resolved that the County Auditor be and is instructed to redeem from tax sale for the years '93 and '94 the following described land for the reason of wrongful assessment and the name may not be the owner.

"And for the further reason that at that time said lands had mostly washed into the Missouri River and should not have been assessed for taxation." And that area is shown in Section 14 which is again just to the west of the Iowa Chute. This is in '93 and '94, so the river is right in here. Iowa's witness Ruhe contends that it was coming back, but the tax documents indicate that it was still moving in the '90's over to that Iowa Chute, position.

Then we have several documents in the Fremont County, Iowa record book. Record Book No. 1, delinquent real estate tax list of Iowa, showing land described as being in the river. And its first few documents are very sketchy and spotty over the original Schemmel Island area.

But in 1900 we get the Auditor's record of tax sales which shows the 77 acre tract. This is in Iowa again, with 57 acres listed as in the river,

which is right -- here is the Iowa Chute, there's just about that 20 acre difference over here which would be east of the Iowa Chute, and the 57 acres is about the same amount of land that is west of the Iowa Chute, this is in 1900. That's P-150 and P-151.

And we have another indication of land being in the river, I think this is 1900, and the sale to J. J. Cook, but there are 40 acres shown as in the river which is in this northeast corner of 14.

Then we have here an 1899 entry in the record of sales of real estate of Fremont County, the east 77 acres, the west half, it says east but it has to mean the west 77, the west half of the northwest quarter, showing it as 57 acres in the river out of that 77 acre tract, and the Iowa Chute runs right through it, this is 1900, and this is from the, again, from the Fremont County Courthouse. J. J. Cook is shown as having bought this little piece over here in 1900.

And then we have another page 24 from the record of sales of real estate of Fremont County, 57 acres in the river, sold to J. J. Cook, and I think that's, that's 1901, showing that same piece of land over there, so at the time that we contend this area, and that's Exhibit P-160, that the river was over there in the Iowa Chute the tax records are indicating as of 1900 and 1901 that that's where it is.

THE COURT: What is the significance of that now?

MR. MOELDENHAUER: Well, all we're establishing here, now we really get, Your Honor, to how the river got back. We contend that this corroborates how the river moved over towards the east and the fact that it was there. Now we've got to get into our argument how it got back over towards the Nebraska side.

But all these things substantiate, number one, that Professor Ruhe was wrong in his conclusion the river had started to retreat back, because these documents show it moving over, and the tax documents show that in 1900 it was there where our witnesses said it was. We've got to get it back admittedly.

But normally when the river moved, as Dr. Gilliland testified, the main channel would be on the outside of that bend, and Frank Duncan put the main channel right there because of the course the boat took, cutting away that land.

THE COURT: You contend that there's avulsion there?

MR. MOELDENHAUER: We are contending that there's avulsion there between 1900 and 1905.

Now we have P-2389, which is also compiled from the Treasurer's plat book. It shows the bank

of the river over in the northwest corner of Section 13, here's Section 14, Schemmel Island is mostly in 15. It shows various banks all during the years, not dated, again confirming that that's where the bank of the river was.

And we have pages from an ancient Treasurer's plat book, P-171, or, P-166 through P-171, from which those entries were taken.

Again, tremendous search through all kinds of dusty old records to try and find what existed there at one time.

Going back just to a brief mention of the Duncan rebar where Mr. Duncan saw the river in 1900, or 1899, I believe it is, it is right here, right along the Iowa Chute, right south of the Givens' house. There's a picture of Mr. Brown and Mr. Duncan looking up the Iowa Chute. This is just a picture of the railroad tracks and the houses, he talked about two houses which were north of the railroad track. This is looking down the railroad tracks and looking south from the north. The Taylor rebar was put right here along the edge of the chute and the Propps' place was right here.

And here, before we go further, is a '65 snapshot looking down that Iowa Chute in 1965, showing some water still standing there at that time in that area. There is not flowing water there, but part of it, it just indicates the depression that still exists there.

Now to further point out, Your Honor, that the

river was not, that the Iowa Chute is further to the east of the '90 bank line, and Professor Ruhe testified if he was wrong in that regard then his conclusions and other conclusions would be wrong. We would like to put P-212, which is the 1890 overlay on the tri-color map, and we have lined up the railroad tracks here, the state line here, but we'd like to compare the Iowa Chute which on the tri-color has been outlined in red with this 1890 bank and point out as we mentioned in the brief the exact distances, but the 1890 bank intersects the section line of 14 and 23. But the Iowa Chute is over here along that section line between 14 and 23, and intersects the line between 13 and 24, a considerable distance to the east here.

There's a little bit of a distance right about the Propps' buildings where the Iowa Chute is to the east of the 1890 bank, and if you measure it at right angles to the Payne farmstread there's a considerable distance between the Iowa Chute and the 1890 bank.

And we would also point out that there is no feature on the 1890 bank showing the Iowa Chute, so it had to have moved further east as we will be able to see that feature afterwards. And, of course, Ruhe placed this as his easternmost bank and called that the Iowa Chute. The river continued to move east and downstream up until our next map of 1905.

THE COURT: Is there an avulsion here be-

tween here and here?

MR. MOLDENHAUER: No, sir, when -- this river --

THE COURT: Gradually?

MR. MOLDENHAUER: Still moving gradually to the east, because it's cutting away that outside --

THE COURT: No avulsion yet?

MR. MOLDENHAUER: No avulsion yet.

THE COURT: All right.

MR. MOLDENHAUER: Now, Your Honor, we'd like to commence with Exhibit P-234, which is our outline of the group of trees, and place it on the 1895 Pierce Survey, which is P-213 and show Tree No. 230 in Section 33, which is on the Nebraska side.

Our expert Professor Weakly placed that tree's growth commencing in 1895. Iowa's experts placed it as 1903; but in 1895 we show it on this bank.

We also at this time, with reference to the tree, would like to point out Exhibit P-381, which shows the tree standing, and mention that this tree, as was testified, was standing all by itself. The only reason that it was there is that it was along the

property line or a fence line, I'm not sure that there was a fence there, but it's right along the property line, and it's the only one in that vicinity. And Exhibit P-382 shows Mr. Weakly with one of Mr. Brown's assistants who surveyed it with the slab. But this was the only tree standing there, isolated, in that particular place, all the rest of them had been cleared.

And then the next map which we have is the 1905 U.S. Geological Survey, which is the first map which places the river back to the west again. And this map shows the river running back through what is Nebraska Section 32. Here was the '95 right bank line, here is where we contend, any way the tree is lined up properly, but here is where we contend that the river cut back without destroying the tree, and this is what constitutes the physical evidence that there was an avulsion between 1900, where the witnesses placed it over there, and 1905 when it cut back through this bend.

I'd like to point out one further thing, and that is take the 1905 survey P-215 and place it on P-212, which is the 1890 survey.

THE COURT: What evidence do we have of a quick cutting being an avulsion?

MR. MOLDENHAUER: Well, we have the evidence, Your Honor, that the tree was never washed away, and then I finally go into Professor

Gilliland's testimony as to the behavior of the river and the bends and how this is so consistent with what has happened in these areas. I would like to point out here that when the 1905 overlay is placed on the 1890 overlay, that the northern part of the river cut right through where that same opening was, which is apparently this chute over on the Nebraska side. Now it's straightened out a little bit, moved a little bit more to the east, but the opening came right down through that what appears to be a depression.

I'd like to also call the Court's attention at this time to the case of Arkansas versus Tennessee, where they found a classic case of avulsion, and just mention the map which appeared with the Supreme Court opinion showing the Ike Chute, the remarkable similarity between that chute and what we have as the Iowa Chute, and the Court found a classic case of avulsion cut back.

We had Dr. Gilliland's testimony, the geologist, and I'll just refer to these Exhibits P-24 and 23, showing the successive bank lines, and P-24 and 22, again showing these movements of the bank lines, and our P-235A and 236A, which show the bend and show the river running through that bend.

Now Dr. Gilliland used as illustrations for his discussion of the development of this bend certain documents which were taken from basic geologic textbooks. One showed Moss Island, which was

the subject of a Supreme Court opinion, and they show these cutoff channels and they illustrated how the river cuts and how the channel trends towards the outside of the bend and how areas of deposition build up behind it, and this is what we contend was the natural formation in Otoe Bend up until this time.

These illustrations were taken from the laboratory study by the U.S, Waterways Experiment Station of the Mississippi River Commission, and our Corps of Engineers and War Department studies, the discussion about how they build up and establish the point bar, and the river can cut across that point bar, and we think confirmed, and Dr. Gilliland testified, that it was confirmed by all the basic standard geologic principles, and certainly by the study and by the type of thing that the Corps of Engineers relied upon in putting the river in a stabilized channel, because that channel is on the outside of the bends and scours out, and the illustration showed the turbulence on the outside of the bends and the maximum velocity.

And we think that his testimony that there was no other natural way that this river could have come back is what actually happened and is certainly corroborated by our 1895 tree, and is corroborated by these geological principles that he testified to.

We don't think that any of their expert testimony countered that, but we think that Dr. Ruhe's

maps and some of his thesis were shown to be in error, what Dr. Ruhe considered to be a chute in the Missouri River in his study was a borrow area where they built the levee. Professor Gilliland said a study of these soils would not corroborate or confirm anything because they're easily erodible being in the plain, and leveling, agriculture, levees, and dikes, rain and wind could change that contour. We think that all the facts in that area support this thesis that in 18 -- between 1900 and 1905 there was a avulsion cutting off this area and leaving the abandoned channel in the Iowa Chute, which was the last place where the water flowed.

THE COURT: You contend that that would leave the land all in Nebraska?

MR. MOLDENHAUER: Right, that would leave the entire river, Your Honor, in Nebraska from that time on, and no matter what the Corps of Engineers did, the whole bed, both sides, were in Nebraska.

Now we think that we had a second avulsion. I might comment here that there was a Payne-Hall case in Iowa, which Iowa has offered. It's above this area, upstream, and there's really nothing inconsistent with it in the sense that as the river moves downstream and enlarges its bend eastward and downstream it could build up land up

above, it could build up on the other bank, and we don't think that there's anything inconsistent although we weren't parties to that case and none of the people below were parties. That's our first contention as far as the first avulsion which we contend was a nautral avulsion as far as that area in the river is concerned.

I might also mention that Drs. Bensend and McGinnis place that tree in 1903, the first map we get back is 1905, our testimony really put the river in the Iowa Chute in 1900, but they don't really, the cut could have taken place between 1903 and 1905. At some stage, though, we can go back to, it's not logical to have moved back gradually, no matter how they try to present evidence that this wasn't a meandering stream, it was a meandering stream, and they called Dr. Brush, who cited Leopold, I think that a meander ratio of 01.5 was a meandering stream, and Ruhe found it was 1.7, or, more than 1.5. You can come up with all the theory that you want that it's different down here, but it isn't, it ignores the cutoff above and ignores the cutoff down below, and it ignores all the Corps of Engineers writings and all of the Corps of Engineers theories and principles.

Now going on from that 1905 what we contend is the 1905 avulsion, and we recognize that it's tremendously difficult to establish, but we're trying, but we're forced to try and trace the his-

tory here, and we're trying to establish something that goes back for fifty-five or sixty years. But we think that this evidence is as good as anything that can be found, and is better than much evidence where they found avulsions.

We have several other recognitions by the State of Iowa that this was the Missouri River bank and the abandoned Missouri River bank, and this is in their old documents too, but I should comment there's no map that we found that shows the river right there in the Iowa Chute. The last, 1905 one, shows it back, and the '95 one shows the bank line. But we haven't anywhere found any map that puts it there, the testimony puts it there, and if somebody were looking for a map I would almost defy them to find it.

THE COURT: Why couldn't it be said that it's all over the place and that that was the left bank line?

MR. MOLDENHAUER: Because our testimony is that the boats came up here and around, which would make it the boat channel, because it is completely consistent with the theory, as a river moves and develops and meanders, that it is eroding and cutting on the outside of the bend, and this is where the turbulence is and this is where your best water is, because something has to erode, and the force --

THE COURT: Why can't the river go on the right bank on the Nebraska side and be way over to the left of where it is right now, I mean, ten or twelve miles wide instead of --

MR. MOLDENHAUER: Well, we know, Your Honor, that it isn't west of where the '95 Pierce Survey is because that's our right bank, so we know that it's confined to that specific, and we know that the main channel is cutting like this, because this has been a tremendous cutting, a thousand and one acres up until 1888, or whatever it is, it isn't just a little trickle or chute cutting, but it's the force of the river which is moving over, and this land as we'll show goes on the tax rolls in Nebraska if I'm not mistaken.

Now we have Exhibit P-196, which is a resolution establishing the Knox Drainage District of June 11, 1909. This is in Iowa, it's dated, a resolution of the Board of Supervisors filed December 9, 1908, and subsequently amended. This resolution makes reference to the levee on the east bank of the Missouri River, thence northerly up said levee, and that levee, of course, is the Iowa Chute, now it refers to, at that time, as the levee upon the east bank. Here's the Schemmel area roughly over here.

The testimony of some of the witnesses was, I think it was Mr. Garrison, that the water was still flowing for a time up until 1909 or '10, and

after they did something up here or dozed it in, or something, water was in --or, wait, maybe at some time in that period the water stopped flowing in the Iowa Chute, but there was testimony that there was continually water in there for ten or twelve years after 1900, which is the natural result in this kind of situation. But we contend that's the last place that that water flowed.

And, of course, the testimony was that this chute started at the Missouri River and ended at the Missouri River.

Then we have Exhibit P-1765, which is a photographic reproduction of the Knox Drainage District filed September 2, 1920 in Iowa, showing it running right along the Iowa Chute, and I believe that we will come to a document which describes what that is.

Exhibit P-1707 is an official road map of Fremont County by the State Highway Commission, which shows a pronounced bend. We don't contend that the river was there in 1914, but we contend this is another recognition by another Iowa agency that this bank constitutes the limits of Fremont County, Iowa. And they have sketched in here a little road, it looks like somebody sketched that in, but this also is a Highway Commission map, the significant thing, though, showing that big bend which was recognized. And this is on file in the Fremont County Courthouse.

Exhibit P-1766 is filed with the Auditor of

Fremont County, Missouri Valley Drainage District No. 1, filed February 5, 1923, and the description of the boundaries of that District goes "thence west to the high bank of the Missouri River, and thence north along said high bank," and this is the area right along the Iowa Chute, again going north along the high bank.

Now I think that there's one other significant thing here, and that is that at some times Iowa claims from the high bank to the thread of the stream. This is still recognized as the high bank back then, but no claim by the State of Iowa to any abandoned channel which is west of the Iowa Chute.

We have Exhibit P-198, which is an Engineers Report dated November 14, 1922, recorded in Ditch Record No. 5 in Fremont County. This also runs along the, goes thence west to the high bank of the Missouri River, and thence said, and thence along said high bank, which is right along the Iowa Chute. Mr. Brown didn't draw it because the description just said along a high bank, but then the description picks up here again and goes on around the District. But they are still recognizing that as the high bank and they are recognizing that limitation.

And then we have Exhibit P-1768, and another map which is in the Missouri Valley Drainage District No. 1 drawer in the office of the Fremont County Auditor, a map of Election District No. 3, which again goes along the Iowa Chute. And this

describes it as "in a southeasterly direction following a meander of the abandoned Missouri River bank through the west half of the southwest quarter of Section 12." So they are referring to this as the meander of the abandoned Missouri River bank, which is right along the east side of the Iowa Chute.

THE COURT: What is that date?

MR. MOLDENHAUER: That's dated the 4th day of May, 1931, and the map shows 1931 without a month or day, that's Election District No. 3 of Missouri Valley Drainage District No. 1 of Fremont County, Iowa.

Now the next map that we have of the Schemmel area is 1923, and this is a Corps of Engineers map, so we have that void between 1890 in the Corps records and 1923.

Since this gets us to the, almost a separate section of this, Your Honor, could I have about five minutes?

THE COURT: All right, we'll take ten minutes.

(Short recess at 3:30 o'clock p.m.)

THE COURT: Mr. Moldenhauer.

MR. MOLDENHAUER: Your Honor, now as I mentioned we move to the 1923 and subsequent maps --

if I said 1943, Mr. Reporter, I meant 1923.

From this stage until the time the Corps of Engineers commenced their work we contend that it doesn't really make any difference where the river was because Iowa has taken the position there were no avulsions whatsoever in this area.

So what we contend is critical and we're willing to accept that fact that any movements of the river between 1923 and 1934 when the Corps started their work were the typical usual gradual movements washing everything away, and would be considered analogous to movements by accretion.

Now, we first contend though that by now the river is entirely in Nebraska, so it doesn't make any difference; but beyond that, assuming for the purposes of argument and for the purposes of showing how difficult it is to prove what happened in any area, but also showing for the purposes that even if it was the boundary is still in the river, there was an avulsion by the Corps work, it would be proper to go right to '34 when the Corps started to work, at which time when we get to it we'll discuss the testimony that indicates the river was against the east bank.

So these maps which were in between were really from our standpoint are just of background or historical information, but we carry the river through in 1923, which is the first Corps map following '95, we can't deny that there's some bars

out there, but the island out there may encroach a tiny bit on the Nebraska bank here, but in 1923 that area is located in the general Missouri River area.

The thing we might point out, however, is even on this 1923 map there are retards which Woods Brothers Construction Company, according to the Corps reports, placed over here by Hamburg where the river was cutting, right in here, and they show up first, here's the state line and here the retards over on the east side, that's on Exhibit P-220.

Going to 1926, and putting P-233 on P-223, again the river bank area is on both sides and the island is there, or, where the island is located is out in the Missouri River.

There's also a 1926 series of aerial photographs showing the Iowa Chute, showing a wide river at that time.

THE COURT: Give me the month and year that that was taken, that aerial.

MR. MOLDENHAUER: Yes, sir. The map was a revision from airplane photographs of November 21 and December 14, 1926, so it's in the wintertime, and there's ice, there's sand, and if there were ice and blow sand on top of the ice it would be pretty hard to tell what was underneath, it's a difficult thing to maybe tell, in fact --

THE COURT: It looks wide anyway.

MR. MOLDENHAUER: Yes, sir, in fact, on the Nottleman Island area to which the defendant offered a photograph on, the same thing, here's Nottleman Island, the Corps map puts the Missouri River designation there, but it's difficult to read because of the winter conditions taken at the same time. Unless you have the ability to place the thalweg on there when you weren't there for another ten years, but we don't think that we have that ability.

Then we come to the 1930 Corps map, and when Exhibit P-233 is placed on 226 the river here is, the island area is in the river, but it's very close to what is bar area and didn't reproduce very well, over on the Nebraska side.

The northwest part is right close to what is the high bank on the Nebraska side. This is shown a little clearer because it didn't print when Mr. Brown made the overlay, but it's shown a little clearer on the actual map as bar area or accretion area, it shows up, which did not reproduce very well in the overlay. It shows up better on P-225.

And on the map for the bottom half, 1930, it also shows bars and things out there in the river. Wait a minute, I have to backtrack, let me correct myself, Your Honor.

Exhibit P-226 is 1928, the one I just showed

is 1928 instead of 1930.

THE COURT: All right.

MR. MOLDENHAUER: Which takes us to 1930 in Exhibit P-229, which has that accretion area and the map we showed was 1930. There is area which on the map shows up as a part of Nebraska, attached somewhat to the Nebraska bank, which is over on the northwest corner of the island.

Now some of Mr. Weakly's trees appear very, very close to this area right here. In fact, if we take Mr. Weakly's tree map and we place it on the 19-- on the island in the 1930 map, it shows some of his trees, 1115, 30, 40 over close to that Nebraska side, and I'll talk about that later, it shows it very close to this bar area in the river, and very frankly it's just close, very close.

And this, Your Honor, gets us to the time that they started construction of the Corps of Engineers control works in 1934. There weren't any maps immediately prior to '34, such as in '33. Iowa offered a map in '30-'32 there was a lot of controversy about in testimony.

But in 1934, just before the construction started, several of the witnesses testified that the river was over on the east bank. General Loper, who is with the Corps of Engineers and was District Engineer at that time, said it was, when they asked what was out there, said it was what they

called a high bar, had vegetation on it. And he said that the river in that area although one long bend, not one straight reach, as Iowa would imply, but he testified it was a long bend, and he said it trended towards the east side. And General Loper's testimony would indicate that it was over there towards the east side, although he did recognize chutes and subsidiary channels further to the west.

Toot James, the fisherman, said that Schemmel Island was originally west of this channel, and as he knew it and as he learned it, he was down there two or three times a week fishing. He said that before the Corps had started their work, he was down there fishing many times, from Nebraska City, and that's how he made his living.

Many of the witnesses testified that there was something there which they considered as Schemmel Island during this period. Even Iowa's witnesses, Albert Propp and Otto Hinze, did recognize something there. Many of these witnesses placed it out there, but we'd like to point out that in this time there isn't any doubt that the river was moving around a lot, and there wasn't any physical island that looks like Schemmel Island today, but there had to be things there, several of the witnesses testified there was an island there with a cabin on it. What it looked like was a little difficult, but you can't necessarily take a map, or these maps, and place them on top of each other and say, well, this area was a high nucleus which you have on

Nottleman Island, on Nottleman Island you've got a firm circle there.

Schemmel Island is out there in the bed, but we want to point out too that the Nebraska owner owns the bed, and he owns accretion to the bed, so all it has to be is on the Nebraska side in the thalweg of the navigable channel.

Toot James talked about the island out there; Loper said that there were several channels with the major thrust being on the east, which is another expression that he used.

At the time that they started the work in '34 Loper said the principal water was going down the Iowa side, although there were subsidiary channels through the bar. James, the fisherman, said the deepest water was at Hamburg Landing before the Corps of Engineers started their river work and was right against the Iowa bank. He said the whole river in that area was the deepest, that's where the water was, the deep water, and that's where his fishing was.

THE COURT: Is he the fellow that had the first outboard motor?

MR. MOLDENHAUER: I believe that that might be somebody else, but James was the fisherman.

THE COURT: Yes.

MR. MOLDENHAUER: And he was asked if there was a channel on the Iowa side, and he said, "Well, there should be because that's where all the boats went through." And he said even after the Corps started to work the boats went through there because they couldn't get around on the outside of the dikes over on the western side. And he was asked if he observed the progression of the work as they drove the dikes from the west to the east, and he said "I was going down through there two or three times a week."

Glenn Doyle worked for the Corps of Engineers and testified the water was running along the Iowa shore and it was about twelve feet deep because somebody had died there and they fished him out of twelve, or, somebody had drowned there and they fished him out of twelve feet of water.

Fred Walker said he first saw boats on the river in about '33, and when they came up past Hamburg Landing he lived about a half a mile from Hamburg Landing, they'd throw him a tow and they'd pull him up the island, they'd tow him up around the east side of that island, and the main channel was over there on the east side and that's where all these boats went.

And all these witnesses recognized that the Corps moved the river over into Nebraska. So we contend at the start of the river work, which is at that next critical date, that that main channel was right over there on the Iowa side.

Then General Loper testified that that design called for the making of three bends out of that one long bend, so they had to get the river over toward the Iowa side where the Schemmel area is, and the Court asked if those original maps showed the elimination of the east channel, and he said the original maps showed where the east channel was, and where the new channel was to be, and they showed the elimination of that eastern channel, which we contend is along this area.

The witnesses, again, that the plaintiff called worked in the area and were familiar with it, they weren't office people, they were field people. We've got then, of course, the construction of the Otoe Canal. We contend that the movement of the dikes and the construction of the Otoe Canal constituted one effort and one major effort in which they moved that river over into the encroachment upon the Nebraska bank, and that the Otoe Canal was dug on the Nebraska bank.

Now we just point out in the project and index maps which showed the status of the projects as of September 30, 1934. The 1934 one is Exhibit P-410, and it shows the dikes which have been constructed in the dark line, the proposed in the dotted line, but proposed 601.9, the long dike, encroaches over on the Nebraska bank, and they are building revetment over here, which is over on the Nebraska bank. They have already put in these upper dikes.

In '35, Exhibit P-411, the same area shows with the revetment on the Nebraska bank, more water really going through those dikes than around the outside. We -- there was testimony during the trial by Mr. Huber that in the Otoe Bend area more water went through the dikes at times than went around the outside. There was testimony by some of the people there that the boats could not go around the outside, there was, we think that when that water was going through the dikes, the dike system, wherever it was, they were blocking it off and then they waited and all of a sudden the main, the navigable water, ended up outside the dikes, that this constituted an avulsion, because they didn't move the river over gradually.

And then Mr. -- General Loper and Mr. Huber, both recognized, that when they went out in that area they didn't wash away everything, if there was a bar or an island they went around it, if there was a subsidiary chute they could direct the river into they did, to move it over into another area. They didn't say "We're going to wash everything away," but "we're going to get there the easiest way possible."

The 1936 index map, P-699, also shows some of these encroachments which they were going to make over on the Nebraska bank, and if there's a channel there it's a pretty tiny one.

And at that same time we have a 1936 aerial photograph, P-2641 and P-248, which shows where

that encroachment area is that we saw, that's the same feature opposite 601.9. It looks like there's a hole through that dike, and it looks like there's water running through there, and there's some siltation right above it, and there's certainly more water in that area where that, what we call the hole in the dike is, than there is around the outside, with a substantial bar area there. It's a little bit enlarged here, but it's very close to that east bank.

Then we have '37 aerial photographs by the Corps, P-250 and P-2642 which also show that area over here, around the end of 601.9, there's quite a tree area right here at the end of the trail dike, 601.9A, shows where the structures are on the Iowa side and eventually the canal was cut down through here. I think that was 1937, and General Loper testified as to the difficulties they had of getting the river moved over in that area. It kept wanting to cut back to the Iowa side. There's this, for instance, shows -- .

THE COURT: Wasn't he the one that, didn't he say the object anyway was to get it away from the cutting on the Iowa side, that was one of the big purposes, along there, somebody said that?

MR. MOLDENHAUER: Yes, now that might have been James.

THE COURT: What cutting there was, was on the Iowa side?

MR. MOLDENHAUER: I don't recall that he was the one who said that.

Then we get to 1938, which was the year that they dug the Otoe Canal. And I want to say first that this is just the problem we ran into, the first time we went to the Corps of Engineers and asked them for documents about the Otoe Canal, they said, everybody we talked to, said they'd never dug a canal down there. And we had witnesses who said they had, and we looked and we looked and we looked, and we finally found some photographs and we finally found some indication that they had, but the head of the Channel Stabilization Section and the gentleman who we thought most familiar with the record said that they didn't ever dig a canal there.

But it just illustrates the problems that we had, and Mr. Brown testified of course that at times he'd go to the Corps and ask for documents and they'd be there, and a month later, or sometime later he'd go to the Corps and the documents wouldn't be there.

In 1938 they dug the canal, and Exhibit P-413, the 1938 project and index map, has a notation of Otoe Bend Canal mile 601.3, and mentions the work order and the removal of 107,263 cubic yards of earth by leased dredge, started May 6, 1938

and completed June 10, 1938. And this Otoe Bend Canal is shown around the outside of dike 601.8 and down to 600.6on the '38 project and index map. It also shows a clump of trees right at the end of 601.9A which we contend was cut over from the Nebraska side, or land and tree area,also this area also appears on the AP maps which we based our Compact on.

I'd also mention while we have this that down below there's an Upper Hamburg, or Hamburg Bend Canal, also cutting some land off from this long area here which was on the Nebraska side. Some of that land is now on State Line Island, which is the area immediately below Schemmel Island that Iowa is claiming in its planning report. There was another canal down below, the land on the east side would have ended up as part of State Line Island, and that part Iowa is also claiming as having always, I suppose, been in Iowa.

But this shows the location of the canal, and this brings us to the ground level photographs which establish this canal. Now Stewart Smith, the surveyor, testified that when they went to that place where they dredged the canal they took a truck and then they walked to the site where they were staking the canal.

THE COURT: Where do you say the canal is on this exhibit? I notice the big, the river part, says Otoe Bend, then we've got a small --

MR. MOLDENHAUER: The river is in the canal.

THE COURT: Yes.

MR. MOLDENHAUER: And the canal ran from right about the end of 601.9 here a mile towards Hamburg Landing down to about here, and ran right along here.

And Mr. Smith said when they staked it they walked to the site, and there wasn't any water over there, and they walked from the Nebraska bank. So that was a part of the Nebraska bank, and Iowa in interrogatories when asked if a canal was dug, said "Yes," and when asked in what state it was dug, said "Nebraska." So it's hard to dispute that that canal was dug completely in Nebraska.

Now on this tri-color, P-1036, Mr. Smith located the top of the canal as just about at the end of 601.9, and the lower part of the canal right here. Several witnesses testified that the canal was about a mile long which would take it further down to about 601.6A, but this was the area where they dredged the canal.

And, of course, the canal is in the designed channel. This is a '47 map, there's water down through here in '47, so in '47 that doesn't show how it looked like in '38. But at that time the testimony was that they walked out here when they staked it, and the ground level photographs substantiate the

fact that this canal was dug through ground and there was vegetation on both sides.

THE COURT: Where is the northern part of the island, of Schemmel?

MR. MOLDENHAUER: This is the northern part of Schemmel Island, or, this is the '47 picture, the Schemmel area is right through here.

THE COURT: But this canal is just opposite the --

MR. MOLDENHAUER: The canal is through the south half or the southwest part. And cut land, left land on both sides. Now when Mr. Schemmel gets his title he gets title to both sides of the canal, and the evidence will show that the title that he got in Nebraska was recognized on the Nebraska side, the same title, the same indicia of ownership.

Now the ground level photos, which are someplace else in the Corps, you find the maps somewhere, you find your aerial photos somewhere and you find your ground levels somewhere, once you find out whether or not they exist. P-2636 shows the canal in 5-21-38, and it shows land on both sides and the spoil and vegetation. P-2630 and P-2684A, P-2638 show all work on this canal, and they show a substantial area of trees over here on the part that was cut off.

P-2635 is a view upstream looking at a tree area, I think it's upstream of all this spoil on the land, but again they're using a dragline here which is a land operated vehicle.

Then we show mile 601.3, and on Exhibit P-2633, the canal, but what's important is there's substantial vegetation on both sides with a pretty deep ditch through the canal at that time.

P-2628 again shows vegetation on both sides, and it's widening out, it's two months later than the previous picture.

P-2629 shows vegetation on both sides, it shows the dredge there. P-2632, vegetation on both sides. P-2631 shows quite a little clump of trees on the part that was cut off and left on the Iowa side. Now we'll go into our maps and we contend that it was in this area that two of Mr. Weakly's trees were cut down which he indicated started growing in about 1933.

The Iowa experts showed they started growing in 1937, but that was even prior to the Otoe canal, and this picture pretty much substantiates Mr. Weakly's findings because those trees could very well have been five or six years old at the time.

THE COURT: They are taller trees than what the others look like.

MR. MOLDENHAUER: And here on P-2634 we see the canal. This is the area to the left, a

large tree area, which is cut off, it's looking downstream, and that is under any supposed landowner's definition a substantial area.

THE COURT: A lot of air pollution there from those steam operated outfits.

MR. MOLDENHAUER: Now plaintiff also offered some ground level photographs and I call the Court's attention to, these are all in the book P-2637, to photo No. 290, which is dike No. 601.9A.

THE COURT: I remember that.

MR. MOLDENHAUER: That's the one going, this is headed right for this large area of trees, the picture is 7-28-37. This is some of what they cut off, but it shows them headed right straight for what is the Nebraska bank, and it's all trees on both sides.

Then we point out at pictures 300 and 301, which is at the upstream end. Picture 301 is dike 602.7, the Nebraska bank, where there is bank, water and bar which they are driving across and water over on the other side. They are not always pushing water on the outside.

Here again on picture 300 there's bank, water and bar, this is up at the top part, upstream end of Schemmel Island. But illustrative of the fact

that they are not always been washing everything away as they do their work.

And here again we have picture 602.9, which is the dike right here at the top of Schemmel Island, on which we have on picture 318 the bank work, a gap in the dike, and then they are starting to lay their mat out on the bar. So that they are working out there without cutting off that channel or what-have-you as they go across. And here again we've got the same kind of situation in 602.9 on picture 320, we've got the bank, we've got the start of the dikes, we've got, they laid mat out on the bar, and then they've got a driver out beyond that, beyond the bar in the water, so we've got bank, water, bar, mat and the driver, and they are driving piling outside, they didn't drive it, just starting to go all the way.

Again to counter any argument that all the Corps did was push the river gradually, because obviously that isn't the way they worked.

In 1939 we see the river on the project and index map P-414 in the designed channel. There's still a little bar out there in the word "bend" but it's in the channel, quite a channel running around the east side of it still, and clumps of trees, we see a little clump at the bottom of 601.9A, just above where 601.9A takes off from 601.9.

But at this stage from here on the river is pretty well confined to the designed channel, this area down below is all solid, of course, this was

cut off by the Otoe Canal.

We have an aerial photograph, P-255, which shows the Otoe Canal downstream, a large area of trees up here at the end of 601.9, a large area of trees down at the lower end of the canal which were cut through by the canal. It even shows boats here and it shows a hole in this lower dike, and this channel around here and this channel on the east is where we contend is the last place the water flowed after they finished this process of moving the river, and under Arkansas versus Tennessee would, if the river had been the boundary, then have been the boundary.

Another photo D-1108, I think this is a Corps photo of the same year showing the river quite a bit in the canal and still spread out over quite an area, but showing the tree areas at the upper and lower ends which we contend were Nebraska land which were cut off.

And then while we're at it we'll refer back to the alluvial plain maps upon which the Compact was based and point out the same tree area at the lower end of 601.9A, which appears on the Compact map. On the left bank, what is then the left bank of the designed channel, but which we contend was the area which was cut off, and that's this area right here. So the very maps which we used on the Compact showed this area, a part, or portion anyway.

And then we have Exhibit P-231, which is the

AP map, here's this area here, and when we take the overlay of the trees, here's Schemmel Island, there is a channel on the east side, and when we place this overlay in the various trees on the 1940 AP map, tree No. 1220 and 1210 are right in that clump, which was cut off by the canal.

And Mr. Weakly stated that tree No. 1220 began to grow in 1932. Iowa's witness Bensend, in '36, and Iowa's witness McGinnis, in '36 or '37, so even they admit that the vegetation started in that area before the Otoe Canal was dug. All the tree experts recognized that.

On tree No. 1210, which is also in that clump, Weakly said 1932, Bensend "36 and McGinnis '36-37; so again the witnesses recognized that that was cut off by the Otoe Canal or was growing before the river was moved over, and the river when it moved over did not undermine the soil and destroy those trees.

On tree No. 11, which is up here and very close to what we considered the '30 bank on the 1930 map, Weakly said '36, Bensend '42 and McGinnis '42 or '43, but according to Weakly this would have started before the Corps moved the river around that area and moved it over into Nebraska.

1115, Weakly said 1930, Bensend '40 and McGinnis '39 or '40. Tree 1130, I think Weakly said -- I have a discrepancy -- but it was before 1934, Bensend '42 and McGinnis '42 or '43.

Tree 1140, Weakly said '32. Tree 1150 Weakly said '33. On each of those latter ones Bensend and McGinnis had it in the 1940's, '41 or '42.

But we contend that all of this evidence shows they didn't wash everything away as they moved that river over. And then, of course, the last place that the water flowed was around the east side.

Carrying the island on up then to its formation, there's a 19 -- complete formation how it looks today, there's a Exhibit P-256, which is a 1960 aerial photograph, which points up the large land area and the area that was cleared by the Schemmels by 1960, which was before Iowa filed any action against it.

It shows where the borrow area was when they dug, when they put up the levee, and you can see the haul roads which Mr. Barrett testified to. The Schemmel buildings which are on the east side of the levee up in the corner which incidentally are claimed by the same indicia of ownership as Schemmels' claim on everything else. And an area over here near the bank where the trees were taken. What it shows is a great deal of vegetation destroyed, the trees which were cut down were the only two or three trees standing over along the bank, there are practically no more trees over there in that location, the ones that we think conclusively proved the Otoe Canal cut off Nebraska land.

The area north of that is area that the Givens claim, the riparian owners north and east of the Schemmels, and we point out that some of this area is as much a character as river bed as Schemmel's land is, if Schemmel land is. But the State of Iowa has never made any claim to any of that.

Of course, the Propp farm is in the Iowa Chute, and is over here and obviously there's been river movement just from the aerial photograph.

THE COURT: Does Givens claim any of this area?

MR. MOLDENHAUER: This is the area that Givens is claiming and Iowa has never made any claim to. I think there was testimony about that trickle, I think that trickle was, perhaps is this blue line here. Of course, Iowa has never claimed anything as against Propp.

And then we have a '66 photo, and as I recall, this is Exhibit P-2647, this is the most recent photo to date that we have, and as I recall this red area was in alfalfa. This shows there is a road, here are the Schemmel buildings, there's a road out to the island, there's still remnants of the channel over there on the east side of the last place water flowed. There's a building on the island, and it's practically all cleared and there's a road across the center.

Now backtracking a little bit to the exercises of jurisdiction by Nebraska over this land in addition to what we have referred to, we find back in 1895, the Clerk of the Otoe County who was in charge of the records, added accretions to the tax list, and that is the original Frazier's Island area, and the area which goes over just about to the bank of the Pierce Survey, this top part will go on next year.

We also should point out that Frazier's Island, original Frazier's Island, originally was divided into all little tiny kinds of timber lots. So if you have to go back and want to try and trace the title to that area, it's a tremendous job because those are little 10 acre small tracts, and if you have to trace it, it is a terrific job.

Now originally the river was here, this was the Nebraska bank, this was in Nebraska, but in 1895 it went on the tax rolls pursuant to the Pierce Survey.

Then in 1905 we have a decree in the District Court of Otoe County, Nebraska, our Court of general jurisdiction, captioned State of Nebraska, Plaintiff, versus the several parcels of land hereinafter described, which refers to some of the area which is in that Pierce Survey.

In 1907 -- that was Exhibit P-138 -- the land added to the Otoe County tax rolls was P-133 -- in 1907 in the Register of Deeds office of Otoe County there's a Treasurer's deed from F.M. Cook,

County Treasurer, to H. H. Hanks, filed for record December 14, 1908, which recites that at a public sale in the state tax suit for the year 1905 held in Otoe County on the 8th and 13th days of November, the following described real estate was sold, and it includes accretions in 32 and it includes area which goes over to the Pierce Survey and the lower half about of Schemmel Island. That Treasurer's deed went to H. H. Hanks. So again 1905 after the USGS map would have shown the river back over in here, there's a sale to this area that was put on in 1895.

There's a warranty deed then from Howard Huston Henks to George Ward, filed for record October 29, 1918, and then a deed from George -- that's P-1529 -- and then a deed from George Ward, a widower, to Dan Hill and Henry Schemmel, Exhibit P-192 which was filed in Otoe County on the 29th of January 1938, and it was filed in Iowa on the 22nd of August, 1939, again record notice on both sides of the river, and Mr. Schemmel testified he filed it over there so that there would be record notice of his claim to that area.

And that is the deed describing the land as in Otoe County.

Exhibit P-192 or 192A, I think, is a copy of that deed -- yes, it's the same deed, it covers Section 29 of Township 8. This is the north part of 29, here's Nebraska 30, 29 would be on this side.

Then there is a quit claim deed January 11,

1938 between George Ward and Dan Hill and Henry Schemmel land in Section 32, which is this major part of the island, and that was recorded also in the Fremont County Recorder's office on the 22nd of August, 1939, describes the land, of course, as Nebraska land.

Then there's also a warranty deed from Almond and Cynthia Engelman to Dan Hill and Henry Schemmel, filed for record September 13, 1939, to the Missouri River island and accretions of land thereto within and including the south half of 32 and other land, which includes the south part of Schemmel Island, including part which was cut off by that Otoe Canal.

Now the Schemmels got land on the Nebraska side and on the Iowa side, and some of the Court decrees will show there that this title was good, but it comes from the same indicia of ownership for the whole piece.

Then in 1939 an action was filed in the District Court of Otoe County, Nebraska, called Charles G. Zimmerer versus Dan Hill, Mildred Hill, his wife, Henry Schemmel, Lucille Schemmel, his wife, and a lot of other people to quiet title to land on the Nebraska side of the river. And the defendants Henry Schemmel and Dan Hill answered and cross-petitioned, and they alleged they were owners of certain land on the island and the Court quieted title, finding that, well, quieted title to Hill and Schemmel and also finding that they had the right-

of-way of ingress and egress to certain portions of the area. This decree, I think, was dated, was filed May 28, 1941, and is Exhibit P-189. The area shown is the area covering, including a large part of Section 32.

THE COURT: Is that a friendly suit or is that an adverse suit?

MR. MOLDENHAUER: This one looks quite adverse, although whether it went to trial I'm not sure, it was set for hearing and it was heard on May 28, 1941, and evidently they reached a stipulation, but --

THE COURT: You say that was a good title in Nebraska, it should be recognized?

MR. MOLDENHAUER: That was a good title, and not only should be recognized in Nebraska, but the fact that the later Nebraska Courts recognized it is an indication that it was good in Nebraska. Iowa offered a decree, I think we'll get to it, where they recognized the Schemmel hunting and fishing rights in a quiet title action in the 1960's, '67 or '68, which goes back to this, and some of the Schemmel conveyances.

And then there was an action Martha Higgins versus Dan Hill, Mildred Hill, his wife, Henry Schemmel and Lucille Schemmel, and others, in

Nebraska, filed July 12, 1939, to quiet title to some of this property. And the Court entered a decree on the 28th of May, 1941 quieting title to Hill and Schemmel, and this just covers really the southern part of the traverse, of the Iowa traverse, and land on the Nebraska side. There were two quiet title actions involving Hill and Schemmel in which their title was recognized.

Then Hill died, then there was a decree in the Hill estate which we put in evidence, and Mr. Schemmel testified that he got deeds from the heirs of Hill and he also got deeds from some of the other Nebraska riparian owners which are not in evidence.

In 1943, on May 29th, Dan Hill and Henry Schemmel and their wives gave a deed to Charles Tyson and David Tyson to some of this land which they had acquired in 38.

Then we get to the Otoe County Court decrees offered by Iowa, D-708, in which, in the case in the District Court of Otoe County Forest Binder versus Carl H. Schimke and Clorine Schimke, in which the decree was filed on January 15, 1965. And David Tyson is mentioned in this case; and the Court further ordered, on January 15, 1965, that the right and license to hunt and fish on Section 32, Township 8 North, Range 15, east of the 6th P.M., Otoe County, reserved by defendant Schemmel in a deed referred to, described in the findings, is declared, determined and established

to be valid and subsisting in defendants Henry D. Schemmel, Douglas Schemmel and Robert Schemmel, their families and their guests accompanying them. So they quieted title in Binder against all defendants subject to Schemmel's right to hunt and fish, so they are still recognizing rights which the Schemmels reserved when they conveyed that land on the Nebraska side, so we think this pretty well establishes that they had a title good in Nebraska because it has been recognized in Nebraska.

We have Exhibit P-2224, which Mr. Brown prepared, showing the area in the northeast part of Iowa Section 15 which the Schemmels claim and the Schemmels' buildings are right in this corner, but which is east of the Iowa traverse, and the Schemmels claimed that land east of the traverse, they claimed the land which was cut off by the canal but left on the Nebraska side west of the traverse. They've got no attack on their title here and no attack on their title here, and it just doesn't seem -- it seems incongruous that somebody is going to take the middle right out of their title. But that's the result that would happen if Iowa is correct in what it's doing.

We also have Exhibit P-188, which is Yearsley versus Gipple a quiet title action which is on the Nebraska riparian side and just really gets close to where the island was, but again the Corps moved that river over into this area of the corner

section of 31. That's in 1920 -- oh, I'm sorry, it goes further and it includes other area which is presently located where the island is and includes part of the area that was cut off. That's 1920.

Again there are other areas described, but the one just referred to overlaps considerably on the island.

Then there is a quiet title Joy A. Larson versus William Ivers, also in our District Court. The decree is dated November 25, 1922, it's Exhibit P-187, which quieted title to what was the original Frazier Island description and accretions which overlap on the northwest part of what was the Schemmel Island.

In 1939 Mr. Schemmel sent Exhibit P-163 to the Register of Deeds of Fremont County, in which he notified them that this land was on the Iowa side of the river, and it was filed on the 22nd of August, 1939. He said "during the Government river improvement program of 1933 to 1939 the Missouri River has been changed by levee and dikes so that this land will be on the Iowa side of the river," but notice to Iowa officials of what his contentions are. That notice was on record when the Compact was entered into and when Iowa agreed to recognize Nebraska titles.

Then we have a deed from, another deed from George Ward to Dan Hill and Henry Schemmel in 1938, but this certificate indicates that the deed was recorded in Iowa on the 22nd of August, 1939,

Exhibit P-193; so Mr. Schemmel was doing what he could to put on record over in Iowa his Nebraska claim.

The decree Zimmerer versus Hill quiet title, Exhibit P-194, was filed in Iowa on the 25th of August, 1941, so at the time the Compact was entered into Mr. Schemmel's quiet title decree in Nebraska had been of record for two years.

Mr. Schemmel in 1941 sent a letter to the County Recorder of Fremont County, Iowa, which he said was returned, and was then filed for record on March 1, 1956, in which he mentioned the land had been assessed in Otoe County since 1895 and due to the changing of the Missouri River by the construction of pile dikes, dredging and revetment works by the U.S. Government Corps of Engineers a large part of the island will be on the Iowa side of the river. Again notifying them that some of that land had been moved over to the Iowa side.

We have the tax records, Your Honor, a few tax sale deeds, and we'll be through with Schemmel, do you want to conclude that this evening?

THECOURT: All right.

MR. MOLDENHAUER: Now, Your Honor, going to the tax records of Otoe County in this tax book, Mr. Brown has placed on here the lands placed on the tax rolls. 1895 shows the original

island and a major portion of the Schemmel area over to the Pierce Survey. The rest of it comes on in 1896, and he's listed the parties, and all this study meant going into all these tax books and researching every single piece of land, and each year shows a different date, so it's a tremendous amount of effort. There are a few discrepancies, going through the books, but there was some testimony, I think, that, Section 29 ends up as Section 19, another section, but they have added the acres on so it appears that this land was taxed in Nebraska during all this period, and we contend that almost the whole area was on the tax rolls from '95 up to the present time, up until '43.

THE COURT: There has been no significant break in that assessment for taxation during that period, is there?

MR. MOLDENHAUER: There was a section which was misdescribed, and I think the testimony indicated that land either in 19 was added on to 29, or vice versa, because a number of acres in that other section were way over what was in the section, or the quarter section, and so it appeared that there was a . . . 29 we find shows up in 19, and I think Mr. Brown testified to that effect.

But this area all in 32 is almost unbroken, and here it's back on again, so it bobbed back and forth, but the fact is as we attempted to show when

we went through those first maps that the status of these areas along the river has been very, has been somewhat difficult to establish because of the many movements. The fact is still that it was there -- here's where 29, in this area I think the testimony was it also was up in 19.

There's no land in 33, but those acres which are in here are added onto 32, so the whole thing comes out to more than the normal 640 acres. Here again 29 would be up in 32, you see here 29 is shown as 19, and here he's marked it what he's indicated as shown as 19. But that carries the history of the Nebraska taxation up until 1943 from 1895.

In Iowa, Your Honor, Mr. Schemmel testified that in 19 -- about, I think it was '47, but it might have been '49, the Auditor -- no, it must have been '47, the Treasurer and the Auditor of the Iowa counties, Mr. Van Syoc and Mr. Cowden came over to Otoe County to look into their real estate records because they said that there had been a case in Mills County which required them to put some land on the tax rolls, and they wondered where it was and he said he was in the Treasurer's office and he referred them over to the Clerk. And then in 1949 that land went on the tax rolls.

Now Mr. Schemmel testified that he -- in Iowa -- he testified that he let some of it go for taxes in, I believe in '50, and bought it back because they had different descriptions, had Iowa

descriptions, and his land was originally Nebrasa descriptions, and he was a little upset about it and he wanted to get it clarified that this was the area he was claiming. Then the land was sold for taxes and the Treasurer on the 2nd of August, 1955 issued a tax deed in Fremont County testifying that the lands were situated in Fremont County and were subject to taxation for the year 1950, whereas the taxes assessed remained due and unpaid, and the County Treasurer on the 3rd of December of 1951 by virtue of the authority in him vested by law at regular sale sold it at public sale. So that there are tax deeds to various of these areas in 1955, and we got these Exhibits P-1553, P-185, P-186.

Now here again that sale was pursuant to Iowa statutory procedure, and the Iowa statutes cover the effect of tax deeds pretty thoroughly. And one of the, I know that Iowa may attack it by saying it's an illegal tax, but the fact is that the Iowa statutes say that a tax deed carries the title, carries "all the estate of the former owner and the land conveyed subject to all restrictive covenants resulting from prior conveyances in the chain of title of the former owner and all the right, title, interest and claim of the state and county thereto."

So the Treasurer has the authority under the law when they give a tax deed to convey the title of the State of Iowa. Now we don't want to argue Iowa tax law and that's proper, but the fact is that

if they contend that they are not bound by any of these acts, a tax deed will carry the title of the state and county, and the Treasurer is doing all this pursuant to the state law.

And then, of course, the Schemmels testified that they paid taxes up until the present time and rather than offer all those tax records we just offered the tax receipts for '68 paid in '69, Exhibit P-2643, and as I recall the taxes for that year were just under twelve hundred dollars, $1,180. I haven't added them up.

But that completes the factual history of the Schemmel area, and I think in the morning we can go into a little bit of the ownership incidence of the Schemmels, then take the areas in the rest of the river, and we should be through shortly after noon.

THE COURT: All right, what time do you want to start?

MR. MOLDENHAUER: 9:30 would be fine.

THE COURT: All right, we'll start at 9:30, I'm here at your service, I live across the street now.

(Thereupon, at 4:40 o'clock p.m., the hearing in the above entitled matter was recessed until 9:30 o'clock a.m. the following Monday, Wednesday,

September 30, 1970.)

(Whereupon, at 9:30 o'clock a.m., Wednesday, September 30, 1970, the hearing in the above entitled cause was resumed, and the following proceedings were had and done, to-wit:)

9:30 O'CLOCK A.M.,
WEDNESDAY
SEPTEMBER 30, 1970

* * *

THE COURT: Good morning, gentlemen. Well, I guess we're ready when you're ready.

MR. MOLDENHAUER: May it please the Court, we have a few more comments with regard to the Schemmel area, and then we'll be in a position to move on to other areas.

We make the comment that there was testimony by Winifred Rhoades about the taxation of the land, how Section 15, which is the major portion of the island, was off the tax rolls in 1881-1887, and from 1883 to 1933 there were no books, and then she testified that a little piece up in 15 went on between '43 and '48, and then '49 and '50 and thereafter, it was on the tax rolls. It first went on in unnamed parties and then to the Schemmels. So they have been paying taxes on the island, I think

it can be said since 1949 and it was not taxed in Iowa before the Compact.

Iowa did offer some tax records for 1934, '5 and '6 and '43, showing that some of the land between the Iowa Chute and Schemmel Island went on the tax rolls, so there was a period which it was evidently on the tax rolls of both states, but all the time up to '43, of course, Nebraska continued to have the area over to the Pierce Survey on its tax rolls.

And I just point out in that connection that Mr. Bartleman testified in connection with Exhibits P-1200A, 1201A, 1202A and 1203A that there were some areas shown on the tax rolls of 29 acre tracts which he put on his maps as showing 80 acres, and a 50 acre tract that he put on as 160 acres, and a 19.3 acre tract he put on his maps as 40 acres, so there's quite a bit of discrepancy between what they actually show and what Bartleman's maps show as to Iowa's tax maps.

But again it was generally recognized when the Compact was entered into that there were areas that were taxed in both states. This was at least as to this part over here evidently the case at about the time of the Compact.

Moving just briefly to the Schemmel occupancy and possession, in 1938 or '39 the Schemmels went over on the land, and Mr. Schemmel testified that they put No Trespassing signs up in '39 and planted Reed canary grass. Bob Schemmel

testified that there were No Trespassing signs in the '40's. Cecil McAlexander who did a lot of dozing testified that there were No Trespassing signs in the '50's. Doug Schemmel testified that the land has been in the farm program since 1957 with one small exception. They had leased it over the years. In 1947 they brought Paul Womack to clear over to see if he could clear the island, but he said this chute was too much of a channel and he wasn't about to cross that chute.

But he did, which is what is shown as the chute here, what we contend was the remnants of the main channel, but he did help clear the island later.

Now Mr. Schemmel testified that they had a garden on the island in around '53 or '54, and they got their first crop in about 1956. They first cleared some land over on the east, and there were some Corps of Engineers photographs, Exhibits P-2639, and P-2640, looking across at the island showing where they had girdled the trees on that west side by 1957, but what it shows is a great deal of vegetation still there on the island, a lot of dead trees and the tremendous amount of work that it takes to clear that area as well as possibly destroying evidence which might have, physical evidence, which might have helped them later in a case like this.

So there isn't any question but what the Schemmels were there, exercising all the owner-

ship rights over the area and using the area as it could best be used.

I might mention in that connection that there's a statement in Iowa's brief about the Krimlofsky case, and that was the only case that they could find in Nebraska which said that use of land for hunting and fishing by people could constitute evidence of adverse possession. But under our adverse possession law all you need is adverse possession and all you have to do is utilize the land for the best purposes for which it is then suited. And if at a certain time it is not suitable for agriculture, if you utilize it for what it's suited for, that can be evidence of adverse possession and although the Schemmels we claim had title, they were there and putting in Reed canary grass, from the early days they had signs up all through the period, and they were excluding trespassers and they were exercising exclusive control over the area. And, of course, this has continued up until the present time.

Just briefly then, going back into the character of the witnesses which the plaintiff called in this area. Lewis Martin was the gentleman who was the first to have the motor boat. He had lived on Frazier Island, which is right up in here, since about 1923, and he's lived there all his life, over forty years. He also worked on the dredge on the canal, and testified about that canal being about a mile long.

Toot James, the fisherman, was also an oiler on a dragline in this canal. Here were two people that we e down there all the time. Glen Doyle, who talked about laying the mats during 1934 across from Yearsley land which is the Schemmel Island area, was there working on the river all during 1934, and Fred Walker, who lived near Hamburg Landing, also was familiar with the river and had been towed up this side with the boats.

Now all these people and Stew Smith, who was a surveyor, testified that he walked to the place where they laid out the canal -- so all these people we feel were very familiar with the area and they lived there and they knew about it. They all put the major water and the main channel over on the east side before that work started.

I'd like to straighten out a little bit General Loper's statements, because I believe he said on cross examination when he was shown the 1931 map by the defendant State of Iowa that on that map he first said it looked like the river was trending to the west. Then he corrected it and said he used the wrong word, he said the better expression as shown on the '31 map was that the river was actually located closer to the Nebraska bank than the east bank. But he said that map didn't show the condition in '34, and he was very careful to state that that map didn't show anything that he had personal familiarity with.

Then he said before the work started when he

first got there that the principal water was going down the Iowa side, and he said below the place where the two channels came together, below Frazier Island; and that other channel came right around here like this.

He said there were several channels in there with the major thrust of these being to the east, and he said that there was a, to the west of that major thrust there was a high bar which had vegetation and it was quite a substantial piece of land in there.

So we think all of this testimony put the main channel over here. We might mention that Mr. James also testified that he knew Joe Crumes who he had seen several times take boats up this east side, and Crumes had died a week before the trial, just illustrative of how your evidence and your boat people can pass away and disappear.

So we think all of this shows that even if the river had been the boundary during the period during which the Corps of Engineers were working, the Corps moved it by an avulsion into the designed channel, the last place that water flowed is shown by this '47 map over here. There's testimony as to subsidiary channels to the island, and everything else, this is the place, the last place that it flowed, and where, if the river was the actual boundary and we had to prove where it was before the Compact, we would contend that it was in that eastern channel shown on the '47 tri-color.

There was also some testimony, of course, by John Olson, an appraiser, that as of '67 in his opinion Nottleman Island's value was $607,300, and Schemmel area $180,500, so there's a substantial piece of valuable land involved in both these cases.

That concludes the comments which we make right now as to these two areas, we may get back to these in general argument as to what Iowa's general conduct is, but for now we want to go to other areas in the river where Iowa has conducted themselves in what we consider is to be a violation of the Compact, and also where they have conducted themselves in what we consider to be inconsistent methods and what we think these other areas also show is that under their present interpretation or construction of the Compact there's a completely unjust and inequitable result which we couldn't have contracted for.

We didn't contract with regard to one area or two areas, that Compact covered the entire main channel, the entire channel of the Missouri River where it constituted a boundary between the two states. And we don't think it's fair to just, now go back, as Iowa has done and pick out certain areas, and say, well, the Compact doesn't apply here, and it doesn't apply here, but it may have applied up there.

The first area we'd like to discuss is mentioned in the Planning Report as Winnebago Bend, found

at page 18 of the Planning Report.

And this is an area, the Flower Island area, where the Planning Report says the area is now a part of Iowa and will lie entirely on the east side of the new channel. We point out that every reference in the Planning Report always mentions that the land is now in Iowa, which we think is very significant because the lands that they tried to quiet title to are all the lands that are in Iowa, the fact that it's in Iowa because of the boundary is a significant thing. And, of course, the suggestion is made that they quiet title to the 1,050 acres as shown above, and if title is quieted they can continue some of their other action.

Also on the map they say, on the right-hand page 19, location of Winnebago Bend in relation to newly designed channel. This is the Flowers Island area where Iowa in their brief apparently recognized avulsion, and we'd like to show the Court how they are claiming land which was in this previous avulsion and which was ceded land.

We have in evidence, Your Honor, a record of the Flowers Island case, Exhibit P-2661, which was decided by the Eighth Circuit Court of Appeals in 1939, I believe, and this is just from memory, that the case was originally filed by the United States Government in about 1934, but it was filed by the United States of America trustee and guardian for the Winnebago Tribe of Indians, plaintiff, versus Wilbur Flower, et al, defendants, and it

alleged that there was land belonging to the tribe which received its grant as Nebraska land which was on the Iowa side of the river.

This was a very heavily contested case, and in the case the State of Iowa came in and intervened, and in their petition for intervention they, in the District Court of the United States in and for the District of Nebraska, Attorney General John H. Mitchell was the Attorney General, and they alleged that all of this land was in the State of Iowa and also said in paragraph 6 that in order to protect its rights as a sovereign in and over territory belonging to it and to save and protect its rights to assess and collect taxes on said lands as aforesaid, the intervenor desires to intervene and adopt certain paragraphs of the defendant Flower's answers.

One of those paragraphs which was adopted in the answer of defendants Wilbur Flower and the State Bank of Winnebago and Ernest J. Smith, was paragraph 11, and in paragraph 11 it was alleged, answering paragraph 10 of the bill of complaint, "these answering defendants admit that the Missouri River has by avulsion abandoned its channel and formed a new channel at numerous places throughout its course, which is a common characteristic of said river, that these answering defendants specifically deny at the time alleged in paragraph of said bill the river by avulsion had formed a channel which now constituted the western boundary

of the land in controversy."

I would like to point out that back at this time, which was about 1937, the Iowa Attorney General's office admitted that there were numerous avulsions along the Missouri River, which is a little bit, I think, in their brief in this case, that they denied that there were many avulsions or several avulsions or something, but here again it's a recognition of the general characteristics of the river.

Then the Court filed a memorandum concerning this intervention of the State of Iowa, and in it they indicated that the record showed that there had been an avulsion here, but the State of Iowa didn't have any interest because the sovereignty of Iowa may extend to the Nebraska boundary and any boundary conflict can only be determined in the Supreme Court. But the Court went on and said, "As I view the testimony there is proof that part of the river bed was abandoned by the river and it has been shown that at least some part thereof belongs to the State of Iowa and the State would be entitled to contest the apportionment of such abandoned river bed. Accordingly, unless the State elects to amend within twenty days its intervention will stand dismissed."

The Court first put the State of Iowa on notice that there had been an avulsion here and there might be abandoned river bed. Well then, the State of Iowa came in on October 29th of '37 and filed a petition to withdraw, signed by their At-

torney General and their Assistant Attorney General. And the Court on October 9th entered its special findings of fact and conclusions of law.

Now the Court in the Flowers Island case found that there had been an avulsion and that Iowa did not appear and did not make any claim to any abandoned river bed -- in this Flowers Island case the Court found that there were two avulsions and in the decree of the Eighth Circuit which affirmed the lower Court, I point out paragraph 15, I want to show the Court where this was, here is Exhibit P-2661A, in which Mr. Brown outlined the area which that decree, in black, awarded to the Indian tribe as their Nebraska land, this is the area in black.

Now what the Court -- this area here is the area that the State of Iowa is claiming -- what the Court did was it said that sometime between 1870 and 1879 an avulsion changed the channel from its location on the northerly boundary of fractional Sections 31 and 32, and thereafter the river ran in almost a straight line from east to west for about two miles from the east line of Section 4, which is right here -- across Sections 4, 5 and 6, so the river was running this way, and what happened was an avulsion, and by this avulsion the boundary between Iowa and Nebraska south of the tribe's fractional township in the southern boundary of the tribal lands in such fractional township were left unchanged along the center line of the river channel

as it was before the avulsion.

So it says that there was an avulsion here leaving this, where the river left this, and left their boundary here, and at the time of said avulsion some original Iowa land was left intact in said fractional Sections 31 and 32 in Woodbury County.

So what the Court says as far as the first avulsion is concerned is that this land here was cut over on the Nebraska side of the river, and the Court in finding that this was the southern boundary of the Indian lands, this area along the, along that quarter, or eighth section line there along 32 and 33, was the boundary of the Indian lands because of that 1879 avulsion.

Then the Court later found that there was an avulsion, the river still flowed around this way, and there was an avulsion which cut this area off and left this part as Nebraska land. The reason this is the line the Court found is because this was along the avulsion in 1870 to 1879.

Am I clear?

THE COURT: Quite clear.

MR. MOLDENHAUER: But that is to remove any confusion as to that early avulsion and point out something else, that there would be if there had been an avulsion here, abandoned river bed right along this line on the Iowa side of the line.

THE COURT: Do you agree with that decision?

MR. MOLDENHAUER: With this decision?

THE COURT: The Flower case, it practically decided it in other words, considering the present situation?

MR. MOLDENHAUER: Our evidence in this case, which was by Mr. Leo Peterson, testified, and who did the survey for the Government, that he could find no evidence of this earlier avulsion although he heard people discuss it.

I find it difficult to, in my own mind, justify the lines which appear here, but --

THE COURT: It's hard to read the decision, to come to that conclusion.

MR. MOLDENHAUER: Yes, I have to say very frankly that I believe that the Court entered sort of a compromise decision in this case. But the fact is that when the decision was entered there was a public recognition at least that there was abandoned channel in here and that there was abondoned channel around this side, because there had been an avulsion cutting back original Nebraska land.

Now in support of this, of course, our evidence

by Mr. Peterson shows, and I have here Exhibit 9 Peterson, the original Nebraska land which was cut off, and this was the original Nebraska land from the Beaman Survey, which he has outlined in red, we have this full crescent here, but he found circled in green two bearing trees which were part of the original Nebraska survey by surveyor Beaman in 1875. So he found the original land, and, of course, he had some very interesting affidavits which are in the record about how some people were supposedly on this land when it cut off. Those affidavits, I think said about 1912, the Court found the avulsion was about 1916 or sometime.

But, again, the fact that this original tree was there indicates that that land didn't wash away. And he testified that along this area where the red was, there was a bank and this ground is really the high ground, so the river might have gotten to here but didn't wash away that crescent. And, of course, the Court recognized this in the Flowers Island case and drew the Indians' line as outlined by Mr. Brown.

THE COURT: Any private owners involved in this case?

MR. MOLDENHAUER: Now the mandate from the Circuit Court, I believe, was amended slightly to except a -- and piece in this area, I think it was

80 acres, because the Indians didn't claim it, and I think they allege that they didn't claim it, but that was still, had been Indian land and was a part of the, the Indians I believe had disposed ot it, and weren't claiming title to it, but it was still in that part that was cut off from Nebraska, or that was a part of what was the Nebraska original land plus accretions as the river moved over here. There is still a pronounced chute, as Mr. Peterson found, an outside chute around the island.

THE COURT: What is on that now, what is on this area now?

MR. MOLDENHAUER: Well, Mr. Brown testified that, well, we have an aerial photograph, he testified that he found some of those original caps that Mr. Peterson had placed and some of those caps were, I think, in a farmyard. On some of them they were covered with sand, and I think we'll get to an aerial photograph here which shows a little bit of the character of it.

What really happened, you see, Your Honor, is that after they dug a canal in 1939, '38 or '39, the river got out after the Compact and went back in here, and there's a lake here, but not again washing away what was the original Nebraska land.

And Iowa is claiming everything that has been outlined in green on this map and identified as Tract No. 5A as Iowa land because it's the bed of

the channel, but the fact is when this river moved back out it didn't ever wash away Nebraska land that it was to the east of it.

THE COURT: Who else claimed that land besides Iowa?

MR. MOLDENHAUER: The Indians, as I understand it, the Winnebago Indian tribe, claims it.

And our contention, of course, is that once this avulsion was established the whole - and we're going to show another canal -- the whole Missouri River is in Nebraska before the Compact, so this whole area was ceded clear over to here. Now it doesn't make any difference that Mr. Peterson's Survey was made in about 1927 and the area was surveyed in, or, the case came down in 1938 or '39, because even at that time the river hadn't ever washed away what the Court found was original Nebraska land, it never got back over here.

And Mr. Brown testified that he went up during trial and he identified on Exhibit P-2655 the caps which, or many of the caps, which Mr. Peterson had set in his 1927 survey; and he had pictures of the caps and he testified that the caps were facing south as they were when he worked for the General Land office back in between 1930 and '35.

THE COURT: What puzzles me on this particular tract is, for instance, in speaking of the other two islands, we talked of what was ceded, and then we have been talking about where it was formed, and we are talking about these recognition by the citizens, state government, both sides of the river, and so on; and that Nebraska says "Well, Iowa wasn't living up to the terms of the Compact, Sections 3 and 4, see."

MR. MOLDENHAUER: Yes, sir.

THE COURT: These people were being deprived, that shows, that tends to prove your case. Iowa claims the land against these people who have a paper title, and all of this other evidence in their favor.

MR. MOLDENHAUER: Yes, sir.

THE COURT: We don't have that here, do we?

MR. MOLDENHAUER: What we have here, Your Honor --

THE COURT: In other words you're not fighting anybody else's battle here?

MR. MOLDENHAUER: No, and we're not

there. What we have here is ceded land.

THE COURT: Actual ceded land.

MR. MOLDENHAUER: Land which was established by the '38 Court case, to which Iowa was a party until it withdrew, as being Nebraska land left over on the Iowa side of the river, so this is ceded.

THE COURT: And you're just saying now --

MR. MOLDENHAUER: And we're saying now the river is entirely in Nebraska at that area, and when the river moves around after that, particularly if it never washes away the Nebraska land to the east, that whole bed is in a riparian owner, we don't care whether it's in the Indians or somebody else. And so Iowa -- it's an illustration --

THE COURT: It's just an unjust claim by Iowa?

MR. MOLDENHAUER: That's right, it's an illustration that when we entered into the Compact with the river in the channel, and let me now show the Court a picture, Exhibit P-1878, which is a 1939 photograph of Winnebago Bend, where you can still see the outline of that crescent-shaped area which never washed away, and the canal which

the Corps of Engineers dug, where Mr. Brown wrote in red "canal", moving the river further into Nebraska. So there's another avulsion moving it over here into what is the designed channel.

And then, of course, when the states -- this shows up on the Project and Index map, and I think it may even show up on the AP map.

THE COURT: You know, I had some thought, I think people sometimes think that judges sit in a vacuum and don't think about anything, kind of accuse judges of that from time to time, they accuse them of being, having a lack of intellect, and that they don't use what they do have, you see.

Now, so it occurred to me that this case really divides itself into two parts, we're talking about below the river and below Omaha, and then we're talking about above Omaha.

Supposing the case was presented to the Supreme Court in a report involving what we talked about yesterday and up until today, see; and the Court decided in your favor, Nebraska's favor, Nebraska prevails. Would there be any serious dispute about these other people, about these other parties up north?

You know I'm trying to make it easier for the Court, and maybe myself, because, just put this in mind, you see, they lay down the rule, the trouble is here we don't know what the rules are here, with finality, we haven't had an inter-

pretation of the Compact.

MR. MOLDENHAUER: That's correct.

THE COURT: Everybody has their own idea about it, but if we had an interpretation of the Compact as to what it means, and the Court found, as you contend, both on the facts and on the recognition testimony and all that sort of thing that Iowa has got to back away from those two islands, that the law is that the Compact superseded Iowa's common law, the river bed law, and all that sort of thing. And in most cases that I have seen Special Master's Report, he says to the Court, the Special Master usually does, "I recommend that there be a survey," you see, we've got the law now from the report, and the Court approves it, and they send somebody out and it's usually supervised by the Special Master, and they make the survey, that's what most cases are, Judge Johnson's case is that way, I think Judge Nordbye's case is that way.

And if we submit it to the Court on this basis, if we could tell the Court that by agreement we wouldn't have any trouble among the three of us, you and I and the two states, except some of the northern part, we got the south part settled and we got the rules, it would make it a little bit easier for everybody, wouldn't it?

MR. MOLDENHAUER: It all depends on their conduct, Your Honor.

THE COURT: What I mean, you're agreeable?

MR. MOLDENHAUER: On their conduct, I say, if the Court finds that they don't have any title in this present bed and they have an easement, that would clarify the whole situation, and if the public has the right to use it but they don't have that proprietary title in the bed, because they can't put that burden on the landowner --

THE COURT: Well, why not -- couldn't that be decided on the evidence that we have talked about today, through the last two days, I just toss that in for convenience, see. The Court, after all, the Supreme Court is busy and I got lots of time, but I don't --

MR. MOLDENHAUER: Well, Your Honor, if --

THE COURT: I'd rather play golf than monkey around with all these islands up there.

MR. MOLDENHAUER: Your Honor, if the decision hinges on Schemmel and Babbitt, on where the land formed, and that the determination has to be made where the land formed before the

conclusion can be reached that Iowa can or cannot claim it, then that doesn't solve anything, in fact --

THE COURT: No, I don't mean to submit it on that basis, submit it on everything, but on these two islands, your whole contention which I think has a lot, has a great deal of merit.

MR. MOLDENHAUER: That would be --

THE COURT: Except, for the Court to tell the states, well, for instance, to make it just coldly, "Iowa, you're wrong, you see, you've got to give way," and then the law is that that recognition testimony, you don't have that recognition testimony up north, or do you?

MR. MOLDENHAUER: We haven't even gone into it because we're illustrating again where they're claiming land because of the Compact.

THE COURT: That isn't going to help us up north, is it?

MR. MOLDENHAUER: No, that kind of testimony.

THE COURT: But it's very valuable to you, as I understand it, for the two islands here, and if the Court says that's good testimony, that's good

evidence, that's persuasive, that it's controlling perhaps, if we can't find the boundary any other way, that's controlling; and so you prevail on those two things. What is there to argue about up above Omaha, I just toss that in.

MR. MOLDENHAUER: Well, as long as the result is, Your Honor, that it's clear that because the state --

THE COURT: Well, if you lose out, if you lose out entirely, what is there to argue about?

MR. MOLDENHAUER: Well, if we lose out they can continue their present program.

THE COURT: That's what I mean, so what's the use of arguing about that up north?

MR. MOLDENHAUER: Well, we think what it illustrates is, you see, we've had all the statements about how they are abiding by the Compact, of course, maybe they think they are by their interpretation, but these areas show where there was clearly ceded land. The reason that they're claiming this --

THE COURT: Now listen, don't misunderstand me, I don't mean to foreclose you from making this argument and making that record that

you started to make, you see, but if the report would indicate to the Court that the settlement of this in Nebraska's favor settles the whole dispute so far as any real, any real controversy that the Supreme Court has to decide --

MR. MOLDENHAUER: I think, Your Honor, it could be worded so that it could. There's another controversy that we want to emphasize, of course, and that's the question of accreting across state lines where they have contended when we set the boundary at a fixed line, they also set the private boundaries in a fixed line.

THE COURT: I just wanted you to think about this, and it occurred to me before I got here, and then again yesterday and again this morning, that you have to prevail, for you to prevail in the whole case you have to prevail in the Schemmel and Nottleman Islands.

MR. MOLDENHAUER: That's right, and we have to prevail --

THE COURT: And you have tried your case on that basis, presented it, generally speaking.

MR. MOLDENHAUER: Generally speaking we have concentrated on those two areas, because we only had seven years, or six years.

THE COURT: What?

MR. MOLDENHAUER: We only had six years so we could only concentrate on the two areas.

But a decree could be reached with regard to those areas that would resolve everything and we wouldn't have to go into it.

But we want to know what they are doing under the Compact and we think that some of the things that they are doing --

THE COURT: Well, you could say, couldn't we, I don't know, we might have to revise this thing and we'll have to agree on language, we might say that the same situation prevails, that is, Iowa is making claims up there based on its common law that if, that if Iowa's contention is correct it's entitled to the land, no real dispute. But if the dispute here is in general terms, if they decide it, which they would like to do, if I understand it.

MR. MOLDENHAUER: That's right, I think they want a doctrine that will settle everything.

THE COURT: Yes, they want to get it settled now, this time.

MR. MOLDENHAUER: I think that that can

be done, but if it's done on the basis that the only reason that Nebraska wins is that because they have to come back and prove where the boundary line was before '43, we think that we lose because that still allows Iowa to go in and make any other private person prove where the boundary line was before the Compact, and we think that we contracted away that possibility when we decided to settle the boundary without determining where it was and by recognizing the titles.

THE COURT: Well, without binding Iowa, that what we're saying is isn't that their real contention?

MR. MOLDENHAUER: Yes, sir, I have no doubt their contention is that we have -- that somebody else has to prove now that the land was ceded, was transferred to one state's sovereignty.

THE COURT: Yes, I think that's right.

MR. MOLDENHAUER: Yes, and I understand that is their argument.

THE COURT: Now the Court is going to say to one of these states "You're incorrect," aren't they?

MR. MOLDENAUER: That's right.

THE COURT: I mean, you're all lawyers here, you know somebody is going to win this case and somebody is going to lose it probably, unless we can agree on a compromise, and it's not that friendly a lawsuit.

Go ahead, I just put that out in the hopes that we might before it's over get together on something of that kind and present it to the Court on the basis of not having the Court review -- how many pieces are there?

MR. MOLDENHAUER: Well, what we have got here as examples are eight or nine, but they are going to point out some things that are also applicable in Schemmel and Babbitt which aren't --

THE COURT: Well, that's all right, I just toss that out for what it's worth at the time being.

MR. MOLDENHAUER: But here in the '39 Project and Index maps, P-414, we see the canal that the Corps dug through Winnebago Bend when they placed it in the designed channel, this is the same canal that shows up on the photograph.

THE COURT: Yes.

MR. MOLDENHAUER: And I believe that it

shows up on the AP maps as such, that the river is in there, in that design through the canal. So what we think we have shown there are two avulsions moving it further into Nebraska, and -- well, we'll disregard the AP map.

Well, first, we'll go then to the case of Kirk versus Wilcox, which was filed in the District Court of Iowa in and for Woodbury County, Exhibit P-2339, in 1956, on July 20th, and joined as defendants were the State of Iowa and Woodbury County in a quiet title action.

And the State of Iowa came in, and first, it was alleged that they had an interest in this action in that the east-west center line of Section 28, which is shown here as the north boundary of the Indian land in the Flowers Island case, herein referred to is the boundary line between the State of Iowa and the State of Nebraska, and the location and establishment of said center line affects the jurisdiction of the State of Iowa and the State of Iowa may also be interested in the determination of the western boundary line of the accretions claimed by the plaintiff.

And the Kirk v. Wilcox area has been outlined here in red and designated by Mr. Brown.

We point out that it adjoins the north line of the Indian land in the Flowers Island case, so it goes right to the line, and when this line would have been determined by the Federal Court there would have had to have been abandoned channel on

this side, the Iowa half of the abandoned channel, wherever that was, the Nebraska part being over here.

The State of Iowa, and it came into that case and first after entering, I think it was, a general denial for lack of information, appeared and the decree was entered on November 20, 1956, and the Court said that "the defendants having filed answer herein denying the plaintiff's petition because of lack of knowledge and information now admits that by reason of information since obtained that the plaintiffs are the owners of the real estate described in the plaintiff's petition as accretion land."

It shows that Iowa appeared by its Assistant Attorney General, George West. So here in '56 where there's known abandoned channel we point out that Iowa has made no claim, again making it very questionable whether abandoned channel is any kind of so-called trust land. This is before they started their land, immediately before they started their land acquisition program.

THE COURT: Maybe they had a different Attorney General then, did they?

MR. MOLDENHAUER: Yes, I guess they did, and I know there's been testimony they changed Attorneys General.

THE COURT: Mike was representing them over there, wasn't he, were you in that case?

MR. MURRAY: That's just about the time I started.

MR. WALKER: He wasn't in that case.

THE COURT: Hewasn't, I notice he was in quite a few of them afterwards.

MR. MOLDENHAUER: Either that or the law of Woodbury and Mills County is different from the law of Otoe County.

THE COURT: Can the state be sued in Iowa in the County Court?

MR. MOLDENHAUER: This is District Court for quiet title, I think, isn't there a special statutory provision that authorizes the state?

MR. WALKER: Well, they can under several instances, one of them is a quiet title action.

THE COURT: Oh, I see.

MR. MOLDENHAUER: Then I'd also mention the case of Wilcox v. Pinney, Exhibit 2338, only because it's a quiet title action to the area

right above that, and if the abandoned channel went up to here, Wilcox and Pinney, although they did not join the State of Iowa, quieted title to this area clear over to the river, and we've also offered the Iowa Supreme Court -- I'm not sure that we have, but the Iowa Supreme Court decree in 98 Northwest Second 720 shows the clear chute here, and the, portion of the accretion is from the chute over to the Missouri River, it's the same area just north of the Flowers Island land.

And the Court found in this case, which was in 1959, and, incidentally, decided by the Honorable Chief Justice Robert Larson, who was also the Attorney General at the time of the Nottleman Island inquiry with the state, that this was accretion land although the higher land was riverward from this chute, and that there was a chute still here. A very interesting case when you look at how they considered the land formed and how they applied their law back in '59.

And then the last thing that we would point out in this area is Iowa's Exhibit D-1152, and the attached overlays in which they show an area which they purchased from Grosvenor, and they offered two deeds from Ray Grosvenor to the Iowa Conservation Commission, one shows the consideration of $3,000, another a consideration of $2,000.

And the thing herewe'd like to show the Court is the area that they purchased extends into this

lower part of fractional Section 32, a little bit where 33 would be, which we contend is about where the abandoned channel was that was abandoned by that early avulsion which the Court found which left Iowa land over on the Nebraska side. So we think here it looks like they bought land again in a former abandoned channel.

Again, questioning very seriously whether they treat their so-called trust lands similarly in the various parts of the State of Iowa.

We had one other document then, Your Honor, with regard to this Flowers Island area which is somewhat significant. In 1961 as I mentioned the testimony is that the river got back out of the designed channel in that Flowers Island area, came back like this.

In 1961 the United States in the District Court for the District of Nebraska on March 1 filed a condemnation action, Exhibit P-2684, to condemn land in that channel so they could put the river back in the designed channel.

It illustrates a couple of things, number one, it illustrates --

THE COURT: What is that case?

MR. MOLDENHAUER: It's United States of America, Plaintiff, versus 90.18 acres of land more or less situated in Thurston County, State of Nebraska, Winnebago Tribe of Sioux Indians,

the Tribal Council, and others, Civil No. 414L.

And they filed, although we did not offer it, I think they filed a similar action in Iowa for what was the Iowa half of the abandoned channel because of the Compact, really, still all in Nebraska, we contend.

But they condemned -- it shows two things, one when they put it in here in '38 or '39, they did not condemn, and they did not condemn in the Otoe Bend Canal. And as the Court may recall Mr. Huber said that at some stage they changed their policy about condemning lands. But here again it indicates back before the Compact they didn't pay that much attention to how they got the land. And then --

THECOURT: You're talking about the Government?

MR. MOLDENHAUER: The Federal Government, yes, sir, when they designed the channel.

THE COURT: In other words, you're saying that in the river there prior to this '43 when they wanted to dig a canal they didn't pay any attention to who owned the land or anything like that?

MR. MOLDENHAUER: That's right, they just went up and did the work. And here they condemned as they did in many cases, an ease-

ment to excavate and dredge and put spoiled matter in order to put the canal in there, but they didn't take the fee, but they condemned the easement.

And then the Corps placed the river back over in the canal, and what Iowa we think is claiming is that area where the river was when it got out. So, claiming that here's the State of Iowa, here's the state line, this land's in Iowa, Iowa owns the bed, this is all river bed, and we own it. So, but, without the Compact the line would be over in here, and they'd have no claim whatsoever.

Now, I think they show here, it says State of Iowa by deed, but I think the area they show is the east part of the designed channel and that canal was where they might have gotten the proceeds in the condemnation on the Iowa side.

But again the fact that the Indians didn't fight over that 300 foot strip, all it really means is that it might not have been worth fighting over.

This is the situation where in a normal case if you had two people arguing over a title they'd have to take into account the value of the land and what their attorneys' fees would be in the costs of preparing the case and what evidence was available and what the possession and ownership and incidents of title were. But the State of Iowa didn't have to worry about that. We'll illustrate that a little later. They can attack title just to obtain precedent if they care to, just because other land

someplace else along the river might be involved.

The next area we'd like to treat lightly is the Peterson-Lakin area and Blackbird Bend, and this is Exhibit P-2663. The tri-color shows where Mr. Brown has placed Nos. 10 and No. 9, which are the areas that the State of Iowa is claiming. We point out this very pronounced easterly developed bend, we point out the 1890 thalweg through this area.

Now on Myrland Exhibit 1, Mr. Myrland, who was the Assessor for Monona County, testified that the high bank was this red line, which is initialed with "LCM", he testified that at the time the deposition was taken, it was either '67 or '68, all this land riverward had not been on the tax rolls, and they were just working on putting it on.

Jack Virtue who did a survey for the State of Iowa, placed his high bank along the red one except for the green area over in Section 33, and so we have a high bank of the river clear back here, land never, never assessed for taxation.

Now Virtue also put a bank line here on this green line which he initialed with a "J. V." and another bank line here. So Virtue shows three, and really four, bank lines in the vicinity, indicating that you can go out in these areas and you might find several bank lines, and what lands Iowa claims may just depend on which bank line they choose. The bank of the Missouri River really is clear over here where it's in the designed

channel.

Now we had the testimonyny of Bertha Kirk that Joe Kirk put this cabin on, thathat's the shed, and here's the cabin and that whenen he constructed that cabin on the island there e was water all around the island and this was sort ofof sand bar and low willows and that type of thing.g. And she said they went over to a boat to thahat area where the cabins are, the cabin site wasas circled right here in 1915, Joe Kirk had passed d away, and that was about the year that the cabin w was built, and the cabin has still survived, so it it didn't ever wash away since that time. It was s sandy then and a little willows.

We also took the depositicion of Merle Cutler, who identified this cabin, and d he testified about how there was water in this oldld chute that came around which followed the higlgh bank around, and it was knee deep and moving, , back in 1925 and 1926. And he said he had beenen clear around this area in a boat some years agozo.

In about '34 Kirk built a lelevee across about a mile west of the cabin and shuiut the water off. Then Dale Blankenhorn testifiefied, and he was on the County Board, and evidently th the land went on the tax rolls finally in '69, that he he had hunted over in what he called an ox bow lake.e. It showed a lot of water in these locations with th the bank, and he testified that how the water wavas deeper on the outside of that bank.

Mr. Brown went up and took some pictures, and he shows his son with the bank, the pictures are identified on this other map as to where they were taken. Where he took the pictures are identified on Exhibit P-2663.

And, for instance, this was looking southeast, P-2709 at this location, but his son is holding, I think it was a nine-foot pole, so it shows how high that bank is. The same bank here, tremendously high bank, and a high bank here, and it's difficult to believe that this accreted to the bank with that kind of ox bow configuration and that much water that the river moved gradually out of that location plastering all this area up against the bank, that's a tremendous bank.

Now we contend that this area is as much an abandoned channel as any other area along the river, and Iowa, if they are consistent in their theory, and if the law is the same up there in Monona County, and if this was trust land, would be claiming that area; but the fact is that they didn't claim it, they disclaimed it, and rather than go through all of these documents which are in evidence as to the contracts in which Mr. Peterson and Mr. Laking obtained the land from Mrs. Kirk, they did obtain conveyances, I think the consideration was something like 120 or $125,000, so it was a substantial amount.

But when they filed quiet title actions then in 1964, the State of Iowa came in and filed disclaimers.

Exhibit P-1755 and 1757, and there may be another, there's one other exhibit I think that, in which they disclaim.

Now the next area that we would move to is the Riley Williams area in Decatur Bend. In that case the United States filed a condemnation action on 6-28-60, in the U.S. District Court for the Northern District of Iowa. And this was the area where Mr. P.M. Moodie testified that he was attorney for Mr. Riley Williams, and how the Corps of Engineers had listed Mr. Williams as the owner of this land and that they had worked out a settlement, and I believe the terms of the settlement were about $2,000, just slightly over $2,000.

The area in question is shown on the map which is attached to the complaint, the map is P-2695, and we show Nebraska land here, the area they are taking, 103E, 2E and 1E, and then the state line which is on the lower right-hand part of that bend, so the area being taken in Iowa is this little piece here. The state line is shown running through the channel which the Corps proposes to take an easement for and their river bank is shown to the right bank of the river is the other boundary, so one side of this that the Corps is taking is the state line, they show as the state line, and the other side is the right bank of the river.

We don't know, I don't know how the state can start picking up land at the state line if this is the

right bank. We didn't have a fixed boundary, I don't know the factual situations enough, but it's hard to conceive of a situation where they start picking up land at the state boundary and the bank is further over towards the east. And it shows there that there's a little tiny piece of land, but there's a lot of land further upstream.

Then in this action the State of Iowa intervened and claimed the proceeds shown here, I believe it's $2,070, which is the amount that would be involved, and the State of Iowa in their resistance to motion, the Corps had entered into an agreement for judgment with Riley Williams, as Mr. Moodie testified to, and in their resistance to motion which the State of Iowa came in and filed, Mr. Murray and Mr. Erbe and Mr. Gritton's names appear on the resistance --

THE COURT: What was that again now, in Nebraska or Iowa?

MR. MOLDENHAUER: This is in Iowa. The U.S. District Court for the Northern District of Iowa. You see this part, all the Nebraska area, was condemned in Nebraska, and there wasn't this problem. We're talking now about the Iowa side, and the Iowa Federal Court.

And they alleged they had no knowledge or information as to why or under what theory or under what facts Riley Williams and Norma Jean

Williams claimed any interest in that tract; they stated that Iowa claims it because it is either a part of the bed of the Missouri River, being below the ordinary high water mark of the river, or because same is accretion to the state owned bed of the river.

The fact is that the Corps, if it were below the ordinary high water mark probably wouldn't have had to condemn it.

Further concerning said issue this defendant, Iowa, states that if Riley J. Williams and Norma Jean Williams are Nebraska riparian landowners claiming to own tract 103 Iowa, Middle Decatur Bend, as accretion to their Nebraska lands, such claim of ownership has no validity, because under the law there can be no extension of accretion lines across a fixed and established state boundary line and into the State of Iowa from the State of Nebraska.

Then they go on and say that this is under consideration in what is the Tyson case in the Eighth Circuit Court of Appeals, and in view of the fact that that was under issue they ask the Court that the quiet title question be continued until the Tyson case is decided. Again, the Tyson case going to constitute precedent for them in this situation.

Then we offered in evidence as a part of this document a letter from Michael Murray on October 7, 1960 to the United States District Attorney in

Sioux City, in re this case. And Mr. Murray says "Perhaps you are wondering what the theory of the State of Iowa is in this matter and what a trial as to title might involve.

"Tract 103E Middle Decatur Bend, is a tract of land on the west side of the main channel of the Missouri River, but it is in Iowa because it is east of the state line established by 1943 Compact.

"We believe that the tract is accretion land, that is, it is land that has been created in relatively recent times by action of the river. I do not know how or why it is alleged in the complaint that Riley J. Williams and Norma Jean Williams own it, but I suspect that they are alleged to be the owners because they probably own the upland Nebraska land immediately west of it. And their claim to the tract in Iowa would be based on the theory that it is accretion to the Nebraska holdings.

"It may be that Riley Williams and Norma Jean Williams claim the tract on the basis that they own record title to it from the Government going back to the early days."

And then he says that if it's based on record title it's of no validity. But then he goes on to say that "The State claims that if Riley J. and Norma Jean Williams claim the land as accretion to the Nebraska holdings; such claim is invalid because as a matter of law there can be no accretion across a fixed state boundary line from Nebraska

into Iowa."

And then they go on and mention Judge Hicklin's ruling in the Tyson case. And then he says "This case is of considerable importance," this $2,070 case for that little tiny piece of land. "It's of considerable importance to the State of Iowa for a number of reasons.

"First of all it's one of a series of cases which the State has determined to litigate until there is some final answer. Secondly, although that portion of Tract 103E situated in Iowa contains only 22.84 acres, you will see by looking at the plat that there is considerable more land both above and below Tract 103E which the State claims to own.

"The decision in the pending case will probably as a practical matter determine ownership of the additional land also. I do not seek to argue our case with you in this letter, but I wanted you to know the general nature of the State's position."

So what we say they are doing here is that they are picking a little area of $2,070, and a few acres, and attacking it with all the resources that the state can muster. Mr. Moodie testified that at the pre-trial conference they were informed by Iowa counsel that Iowa's evidence would take either two or three weeks, it was either two or three, and that the attorneys' fees for Federal Court, their minimum fee schedule was $150 a day, he had to have Iowa counsel, and that they

couldn't afford to try title to the land, the survey would cost them at a minimum of $300. And they just decided based upon that, that they couldn't afford to fight the case.

Now this illustrates, we think, that to give the landowner a forum to try his title isn't an adequate remedy in this kind of a situation, because Iowa has all the resources, they can try a case because of precedent, once they obtain a precedent then they are free to go after other people and they can pick a little spot, they can pick a little fellow to gain this precedent, and we think this illustrates the disadvantage that the landowner is in if Iowa's interpretation of the Compact is anywhere near correct.

THE COURT: Do you say as of now as between private and landowner, bordering lands on the Compact line, didn't the land accrete across the state line as far as they are concerned?

MR. MOLDENHAUER: Yes, I think it has to, because otherwise we have changed --

THECOURT: We're not talking about the state, we're talking about the private --

MR. MOLDENHAUER: Right, that was the rule before, wherever that boundary was, and we don't think that we can change their boundary,

because if we change their boundary we're changing their vested property rights.

So there's no reason why they can't continue to accrete one way or the other, they may have to establish their title in the forum of the other state, but that shouldn't deprive them --

THE COURT: If they would be taxed in the other state, they would be taxed in two states.

MR. MOLDENHAUER: Yes, sir, that's correct. But that is consistent with all the doctrine of riparian rights that what you stand to have taken away from you, you have to stand added to you, and that's the whole theory.

THE COURT: That wasn't changed by the Compact, that's private law.

MR. MOLDENHAUER: No, we take the position that we could not have changed it, not constitutionally.

The next little area we'd like to mention is in Washington County, the testimony to which Bob Utman testified by deposition. Mr. Stewart Smith, the County Surveyor of Washington County, identified Exhibit P-1625 as a cadastral survey showing where the 1943 center of the designed channel was and how the river had been moved over into Nebraska so that the east bank of the

designed channel is now in Nebraska, the west bank is in Nebraska, this is after the Compact.

There's an area of Nebraska land on the Iowa side of the river which was placed upon the Nebraska tax rolls by Mr. Murray on behalf of Walter Pegg.

Now we also would point out Exhibit P-928, where Bob Utman testified by deposition, he lived right here, he's Walter Pegg's son-in-law, and how this green line on the aerial photograph was a dike line, the blue line was a bank line, and we have this same area depicted here.

Then there's this area in black which is in Nebraska, which was placed on the tax rolls in Washington County on behalf of Mr. Pegg.

So there is here, he testified there was a bank here, there was not running water along it, but there is here a bank, and there is here an abandoned channel and there is here a situation where he also testified that Mr. Jauron and Mr. Murray had hunted or were familiar with it, and Mr. Murray had told Mr. Pegg that the State of Iowa wasn't interested in that land.

Here again we say if this is trust land it has never been treated as trust land, and the whole thing we just think points up that individuals under Iowa's theory make the decision whether Iowa owns it or not. They draw that conclusion, they draw the conclusion whether it was ceded or not, and this is all individuals within the government

who are making the decision.

If the State of Iowa had filed suit for that 350 foot strip of abandoned channel, I have no doubt that they would have acquired it, but they didn't, and they indicated that they weren't interested.

So it's really as much the officials who make the decision that determines what the result is.

THE COURT: Well, according to you that's a breach of their trust then.

MR. MOLDENHAUER: If it's a trust it's certainly a breach, but -- I, of course, we don't, we don't think they ever had a trust.

Then the next area we'd like to mention, of course, is the Tyson Bend case which was decided in the Eighth Circuit, and the important thing about it is that Iowa said in its Planning Report, under Land and Water Ownership, that, in discussing the Tyson Bend case "This action will help in declaring islands to be state-owned." So here's another case where we contend that the State of Iowa has set a precedent, and, of course, they mentioned the Tyson Bend case in the Riley Williams case.

But in that case, which Mr. Jauron testified in our case, he was familiar with, he agreed with language of the Iowa counsel in their briefs in the Dartmouth College case as to how that island formed. And, again, it's an example of where Iowa's title

started at the state line, and the Court may be familiar with it.

THE COURT: I read it a couple times, I read it again last week. I thought maybe you might be discussing it, that's why I read it.

MR. MOLDENHAUER: And what happened was, and this is just a rough sketch, but the river was here, and here would be the center of the designed channel. The river moved south and east, and Mr. Jauron testified, and the facts of the case indicate, some little islands built up behind this movement and got down in here, and then the Corps put it back into the designed channel. That might have moved back there a couple times. But Iowa stated, and Mr. Jauron agreed, that they never did wash this area away which built up behind the movement of the river. Had it not been for the Compact, Tyson's land, whose property line would be the thread, wherever that is, would follow it as it moved south and east, and as land built up behind it this would be part of Tyson's accretion.

Now it might be accretion of his bed, it might not be necessarily accretion to his bank, as in the Kirk bar area there might be a big bank up there with a chute of some kind, but he gets accretion to the bed. And the only reason that the land is in Iowa is because of the '43 Compact making it a

fixed line. When the Corps put it back around here without destroying the island, -- there would have been an avulsion and the boundary would have been over here at common law in this abandoned channel. So the only reason -- and then the Court follows reasoning which on the face of it looks very logical, they say, well, really, it's a little confusing, whether they say "We're not cutting off your title at the state line," but they say "We really don't know," the trial judge said that, we don't really think he meant it, "All we have to determine is that the land formed in Iowa."

THE COURT: Didn't the Court say that the land formed on the Iowa side in the river rather than accretion?

MR. MOLDENHAUER: But it formed in Iowa.

THE COURT: That's what I mean.

MR. MOLDENHAUER: But I don't think that it said it formed, well, I don't think it formed on the Iowa side of the main channel, it formed in Iowa, and it formed in Iowa because of this.

THE COURT: Because of the Compact?

MR. MOLDENHAUER: Yes. And Mr. Jauron testified, I think he testified in the Tyson case,

and he testified in our case, that this is how it moved, and Iowa in its brief said this is how it moved.

Now whether the Court said, no matter what the Court said how it formed, Iowa is still saying it moved this way with the land building up behind it. But the Court seems to in its logic say, the land's in Iowa, and in Iowa the State owns the bed, this is in Iowa so it belongs to the State, but it ignores --

THE COURT: The Court applied the Iowa common law.

MR. MOLDENHAUER: Pardon me.

THE COURT: The Court applied the Iowa common law.

MR. MOLDENHAUER: Yes, sir, and I'm not, I don't fault them, because I think there were $12,000 in condemnation proceeds at issue here, I don't know what lawyers could come in for $12,000 and try what the Compact means. And if you isolate it, it's impossible to tell what the Compact means, if you take these isolated situations.

But again it clearly points out two things; number one, the Compact started Iowa's rights, and it if hadn't have been for the Compact the re-

sults would have been otherw
rwise. And again they
can use the $12,000 case to e
o establish precedent,
and they indicated that in the
ne Planning Report,
and then they can go downstr
tream to the Schemmel
area or the Babbitt area, wh
hich are quite valuable,
and apply that precedent or a
argue that precedent.

THE COURT: This they
y talked too, they are
still in that case, until this is
issue came up after
the Compact too, the Iowa --
--

MR. MOLDENHAUER: Y
Yes, sir, this came
up after the Compact.

THE COURT: That doesn
sn't make any differ-
ence, I mean, the land arose.
e.

MR. MOLDENHAUER: Y
Yes, sir.

THE COURT: No matter
er how it arose.

MR. MOLDENHAUER: R
Right.

THE COURT: After '43.
3.

MR. MOLDENHAUER: Y
Yes, I think about '48
or so.
But the Compact had an ef
effect on it.

THE COURT: Yes, I kno
now that.

MR. MOLDENHAUER: Your Honor, this is an opportune time for a short break.

THE COURT: All right, fifteen minutes.

(Short recess at 10:40 o'clock a.m.)

THE COURT: All right, gentlemen.

MR. MOLDENHAUER: Your Honor, to continue this hasty ride down the river.

On page 29 of Part 1 of the Planning Report there is an area shown which Iowa is claiming, which is Upper Decatur Bend, page 28 and 29, and there was some testimony about that dry land bridge, which can be seen in the photograph, and how the river moved out of the designed channel, they build the bridge on dry land, and then the Corps dredged and put it back under the designed channel. Iowa is claiming all of that area there where the river got out after the 1943 Compact.

And you can see quite a substantial land area in between that wasn't cut off when they put the river back in the designed channel. Just another interesting inconsistency in their theory, because if you speculate the bridge was over the river bed, that they own that half of the bridge because they all of a sudden acquired title to the property the bridge was on, their theory just doesn't, as I'd like to say, hold water.

THE COURT: Hold Missouri water -- who built the bridge?

MR. MOLDENHAUER: I think it was the Bridge Commission, but I don't know, I don't know.

There's also a pipe line across that bridge.

Now one other small item, Iowa filed a list of areas in this case, and I know they claim now this was only a generally a rough list, but Mr. Brown placed these areas on the Tri-color maps, and I'd like to point out just one area particularly, which is on Exhibit 17 of the list of areas that Iowa filed in their pleadings in this case, Exhibit 2651, which shows what they call their Exhibit 17, with the top of it being near the Little Sioux River where the Little Sioux River comes into the Missouri River.

And Mr. Brown said the tri-colors are the same scale as these underlying maps of 1964, what I call U-2 maps or photographs, and they fit right on top because of the same scale, and Mr. Brown's area 17, much of it appears on the Nebraska side of the 1943 channel. Again, right near where the Little Sioux River -- he didn't carry the line, but the land area right near where the Little Sioux River come into the Missouri.

However, and there are many areas where Mr. Brown showed the area as extending over into Nebraska, here is the 1943 Compact line, right

here. And the Little Sioux River is the identifying point, and this particular exhibit is Mr. Brown's area 17. Now many of his areas showed Iowa's line when you put them right on top as going over the '43 designed channel into Nebraska.

But I would point out that Iowa's exhibit which shows this same area, Exhibit D-1154, shows the upstream part as being considerably south of where the Little Sioux River comes into the Missouri, so they are a good half a mile, there's a good half a mile discrepancy between where their upstream end is and Little Sioux Bend on D-1154 series, and where it is on their list.

Again when somebody points to a map and says "This is what we are claiming", that's one thing, but when they go out on the ground and say "here's where that line is," it's something else.

The next area which we'd like to take up is California Bend. California Bend is another area where the State of Iowa in its answer brief recognized an avulsion, and that land was ceded. But it's another area where we contend Iowa is claiming ceded land.

On pages 36 and 37 of the Missouri River Planning Report they refer to the bend, and under "Recommended Action," they state "The title to this land should be quieted probably under the principle of abandoned channel ownership." What that pictures shows is California Bend, the white bar in the river in the designed channel.

Now referring the Court --

THE COURT: What's the claim here, this part of it?

MR. MOLDENHAUER: No, they are claiming this whole area, the whole water area.

THE COURT: The whole area, to the bank?

MR. MOLDENHAUER: Yes, sir, including this water area which we contend was cut off when they put it back in the designed channel by another canal in '58 or '59.

Here on Mr. Brown's Exhibit P-2667, he has shown area No. 22, which is the area which Iowa is claiming. I would point out the 1890 thalweg going considerably to the east of this area.

And then I'd refer the Court to an Exhibit P-2686, from the Corps of Engineers reports for the year 1890; and the testimony was, I believe, that --

THE COURT: Who made this map, again?

MR. MOLDENHAUER: This is Mr. Brown's map, this is a 1946-47 tri-color map from the Corps of Engineers, which is an accurate survey from all the surveyors indications.

There was testimony either by Mr. Jauron or

Mr. Bailey about whether Iowa claimed any other abandoned channels in this area, and they said, no, and they were pointed out this ox bow configuration over in 35-36 in Section 4. But they said they had never made any claim to that area.

Now referring the Court to the official reports of the, this would have been the Missouri River Commission, I think, because it's 1890, or the annual report of the Chief of Engineers for 1890, published by the Government Printing Office. I'd like to point out an area shown as Cut-Off 1881. Here we have Iowa Section 33, 34, here is 35, right here, and here is Section 36, which we, which shows up to be the water area cutting down through the southwest half about of 36, and this area is described as the Cut-Off of 1881.

Then the channel is shown as going through, that's this area right here is shown, this would have cut off down to here, and run through here.

THE COURT: Where is the pre-compact boundary, natural boundary, the middle of the old river, the old bar?

MR. MOLDENHAUER: Well, if this cutoff were an avulsion why, it would be clear over around here, and then it cut off down to here. But before the Corps started their work, the boundary would be about down around here.

THE COURT: The last boundary would be here?

MR. MOLDENHAUER: It's around here, Your Honor. We'll get into those pictures.

THE COURT: Yes.

MR. MOLDENHAUER: This area here which includes area 22 was cut off in '38 when they put the canal in, and it was cut off. I want to point out this early avulsion because here's an official Corps of Engineers map which mentions it but no claim by the State of Iowa since 1881 for that trust land over there, several miles now from the river, at least, one, two, three, three or four miles from the river.

The State of Iowa has filed a quiet title action against Harrison County, Clifford Simmons, William Coulthard, and a lot of other people, Exhibit P-2672 is the original notice of their quiet title to the land in California Bend. This was filed by, on May 10, 1965, signed by Lawrence Scalise, Attorney General, and Robert Scism, Assistant Attorney General, and Sewell Allen as attorneys for Plaintiff.

And that area is shown on Mr. Brown's on the map that Mr. Brown identified as P-1521. Then there's in evidence Exhibit P-2670, which is the, an action in the United States District Court for the Nebraska District, Omaha Division which was a condemnation to condemn an easement across the land in California Bend. And attached to this action is Exhibit P-2669, which shows the tracts which the Corps is condemning, it shows the

river before 1938, and the designed channel where they're going to cut it through this Washington County land. It's designated as the California Bend Pilot Canal.

Those same maps -- and they're asking for an easement to excavate and maintain a channel approximately nine hundred feet in width across the point of land at California Bend of the Missouri River in Washington County. And let's see if I can find the date that that was filed -- it's Civil Action No. 10.

THE COURT: Washington County is Nebraska?

MR. MOLDENHAUER: Washington County is Nebraska.

There was an order of immediate possession entered on the 7th of November, 1938, and attached to that case too, Your Honor, are maps which show the plats and show the area which they're, which the Corps is acquiring the easement through.

THE COURT: That's not a published opinion, is it?

MR. MOLDENHAUER: No, sir, no, this is just in our District Court.

Then there was a lis pendens filed in Washington County, Nebraska, Exhibit P-2671 on Novem-

ber 8, 1938 with regard to that case.

Then we have several photographs, P-2428, 29 and 30, P-2427, 2426, 25 and 24, which show the canal in California Bend, and they are dated in 1939. There's, I should start at the other end -- December 29, 1938 shows a completed section of the canal; December 29, 1938 showing the canal, and other pictures with the canal in the wintertime.

And then we get to P-2430, which shows on April 1, 1939 the opening of the California Bend Canal. And it shows a, it shows them taking out the land there, P-2431, and the bucket in P-2432, and it shows the water rushing through on 2428 and 2429. Again illustrating the type of thing that happened when they pulled that plug in the canals. But again, a pronounced avulsion, and at that time no doubt whatsoever that the land was in Washington County, leaving the river in the designed channel again at the time of the '43 Compact and leaving what would have been in '38 abandoned river bed in California Bend, which might again be --

THE COURT: Well, isn't it, it seems to me, maybe I'm incorrect, but let me discuss this business, when we discuss this business north of Omaha, and so on, that it's clearer where the river was prior to the Compact up there than it is down at the southern part?

MR. MOLDENHAUER: No, I don't think it's

any clearer, Your Honor, no, sir. When we went through those original maps, as you will recall, showing the difference between the 1857 Nebraska bank and the '43 designed channel, there's a great deal of difference all the way through. And going through the tri-colors you'll see the '90 thalweg in all sorts of areas other than where the designed channel is.

In going through the '64 book of aerial photographs we put in you can see all these areas which at one time or other have been the channel of the Missouri River. It was just as undecided all the way from the Missouri line up to the South Dakota line.

Then here's a photograph of the California Bend canal after it is completed, showing the P-2434, showing the land area cut off. Here's a P-2433, which is again this area, and it shows what was the old channel.

Then we call the Court's attention to Exhibit P-2380, which is a 1938 aerial photograph of California cutoff prior to the time that they dug the canal, and they dug it through that open ground.

Then following the time the river got in the designed channel the testimony was that it again got out of the designed channel and cut its way back towards Iowa. Oh, here's a '41 of California Bend where it shows the cutoff, and it shows the river in the designed channel, and there's the '39, again showing the same situation.

In 1956 we have an aerial photograph which is P-2421. It shows the river out of the designed channel and having moved back easterly in the California Bend area. Now Mr. Brown has on P-2668, which is combination of two aerial photographs obtained from the National Archives of this same area showing the 1956 river as it appears on this map, so this is shown in red.

This is the 1938 map prior to the canal, so here is how it looks in '38. Here is where they put the canal, and here's where it got back out in '56.

But I point out that this river bed here is not the same as it was back in '38, although you couldn't tell it, if you just looked at the two pictures separately it would be pretty hard to identify where anything is.

Then we have a 1959 aerial photograph, Exhibit P-921, which shows where the Corps dug another canal prior to '59, I think it was in '58 the testimony indicated, but I don't recall exactly, showing that they put the river back in the designed channel through a canal and left this area which was outlined in red and showing where the abandoned channel is.

Now where Iowa is claiming is all this area from the present designed channel, which became river bed and it was left as river bed, and which was river bed at that time.

So here again we claim that this area was all

ceded, this area Iowa is claiming includes the land which was ceded by the Compact. It includes all this area in here that was ceded by the Compact.

THE COURT: What's incorrect on that contention then, on Iowa's contention?

MR. MOLDENHAUER: When the canal was cut in 1938 the entire river was placed in Nebraska, and there was, assuming that we didn't have any previous cutoffs, the abandoned channel would have been the old river bed and the line would have been a fixed line over to the east, and there would be Nebraska land on the Iowa side of the river.

When the river moved out after this it was still in Nebraska, both banks, and it never washed this part away, so it never did get back, particularly in the downstream area to the old channel, it never again became a movable boundary, so this land has always been ceded.

Now in all fairness to the Court, before the Compact, I think the law is if you have an abandoned channel because of an avulsion and the river gets back into the abandoned channel, it may again become, if it moves, if it erodes back in, I think it may again become a movable boundary.

But in this case we have changed all these principles by fixing a fixed line and by changing the rules that were applicable, and the river particularly on the downstream portion never did

get back into its old channel.

THE COURT: Nebraska itself isn't claiming that land?

MR. MOLDENHAUER: No, they are landowners. Iowa has filed a quiet title action against the landowners to what we say is ceded land.

THE COURT: But you say that there are people, that there are private owners that own that land, and Iowa is claiming that land?

MR. MOLDENHAUER: Yes, sir, and they admit that there was a true avulsion here, but they say that they don't want any ceded land. But again it's an indication we think that their title is protected, we think even, you see, even if it did get back into the channel over here, the canal which cut this off in '58 is another avulsion; so they don't have any claim of this as abandoned river bed, but apparently their claim is, here's the designed channel, the land is in Iowa, therefore we claim the land.

Now it gets a little more interesting to show the situation that these poor landowners can find themselves in. Here's, well here's a picture of California Cutoff, May 13, '64, looking up this way which shows still quite a little water area in here, but land area, it looks like a great place to hunt

ducks.

Here's a picture too of 17 September '56, showing that it had not yet cut through that bar.

Now Mr. Brown also prepared Exhibit P-2717, which shows an area described as Lot 5, completely on the Nebraska bank in 1930, and that is the same as this white configuration here. And what happened to Lot 5 is that all this area silted in here so the bank in '56 was right here, you can't really tell where that whole bed was. Iowa never claimed this bed. The bank is over here, and so this much is out in the river, and the red line through here which show what Iowa claimed, so Iowa would be claiming that north half of the lot we described as Lot 5, which was a ceded lot. I don't think it was ceded under Lot 5. I think that's an Iowa designation.

But then in 1959 the Chicago, Northwestern Railway filed an action against Clifford Simmons, his wife, and several other people, including the State of Iowa, to quiet title to certain area for the railroad, which includes, which goes up to this, to about that '56 line, all this area in here. It includes the abandoned channel from the '38 cutoff, and the State of Iowa, at first, and, they alleged, I believe, that this was a gradual addition, but a gradual shifting to the west of the channel of the Missouri River and gradual addition of lands by extension of the shores of the Iowa or left bank to the west to a point where the river was located in 1940, which became by virtue of the Iowa-Nebraska

compromise acts the boundary between the states. This was the landowners.

And the State of Iowa filed an appearance and motion for additional time to plead, Norman A. Erbe, Attorney General, and James H. Gritton, and they alleged at that time, this is July 22, 1959, "The State of Iowa has reason to believe that it claims by title and interest a large section of this area, but that due to the nature of the claim of the State of Iowa the exact boundaries thereof are difficult to ascertain, and that it may be necessary for a complete survey of the area to be made prior to the filing of answer by the State of Iowa."

Then there's a notice here setting the motion down for hearing and an indication by the Clerk that there's no indication in the Court records whatever happened to that hearing.

But on August 24, 1959 there was a judgment and decree filed, and it quieted title in this area. It is shown as approved as to form, James H. Gritton, Assistant Attorney General. Now here again, in '59, when somebody was quieting title to some of Iowa's trust land which they have been so diligent in protecting all these years, there was no claim they quieted the title.

Then we come to Exhibit P-2718, which is February 16, 1968, the case of Coulthard versus Clifford Simmons and Helen Simmons, and in this case Mr. Coulthard claiming as title in this area, filed an allegation "that during the 1930's and '40's

the U.S. Army Corps of Engineers worked on the Missouri River along the western border of Harrison County, Iowa to place and confine said river within a stabilized channel, which said Corps of Engineers had designed for it.

"That as partly result of said work by the Corps of Engineers and partly as a result of natural forces the left bank of the Missouri River was moved and pressed back in a northwesterly direction so that accretion land formed in the southerly portion of the former location of said Lot 5, Section 12-78-46, said accretion land being in all that portion of the former location of said Lot 5, which is included within the description of real estate set forth in our Exhibit A."

And Mr. Brown has drawn a map showing the area involved here that was -- is that the area, Willis, that the railroad quieted title to, which --

MR. BROWN: It says right on there.

MR. MOLDENHAUER: Well, the red line is Coulthard versus Simmons on this map, showing that they are claiming that south half of Lot 5 as accretion land, and the petition was signed by Michael Murray as attorney for the Coulthards.

Here again an individual decision that what is obviously abandoned river bed is accretion land. And here is Mrs. Simmons claiming this Lot 5, the State of Iowa is claiming the north half because

it's river bed under their sovereign rights, and Coulthard is claiming the south half which was ceded as a part of accretion to the Iowa shore. Now she's in an impossible situation, and if she has an arrangement of half of the land on the north side with her attorney, and then half of her land with the other attorney on the south side, she can win the case and lose the whole piece. We don't really care who owns it, but we do care that Iowa is in here claiming what was ceded land and making the determination that this was abandoned channel or accretion to the bank. And somebody from the State of Iowa made that determination; by making that determination the local officials, the officials of Iowa, can really determine the result.

We have a deed from the Northwestern Railroad to Coulthard which carried that through. Here again, what we contend is a classic case of injustice which we don't think the Compact is ever intended or did authorize.

The next area which we'd like to mention is Lake Manawa, which is now in Pottawattamie County, Iowa, it's just south of Omaha, and from the Top of the World dining room you can look over and see it. This is the area that we have already had some reference to in the early Corps of Engineers reports, it was cut off in either about 1879 or '81, and this is now completely in Iowa because of the Compact. It's shown on Exhibit P-2676.

Then plaintiff has offered in evidence Exhibit P-2678, which is a quit claim deed from the Omaha and Council Bluffs Railway to the State of Iowa, but, prior to that, plaintiff has offered Exhibit P-2677, which is an action between the Omaha, Council Bluffs and Suburban Railway versus James P. Christensen, County Treasurer of Pottawattamie County, in which they alleged that this land was original Nebraska land and they obtained a decree, which I believe found to that effect and restrained the Treasurer from taxing their land.

They found that the Missouri River then was and ever since has been a navigable stream constituting the boundary between the states of Iowa and Nebraska, and after the survey of the land as being in the State of Nebraska up until about 1881 the Missouri River continued to change its course by gradually and imperceptibly washing away the lands above described, and the river continued in its process of erosion.

Then in the year 1881 the Court found that it suddenly changed its channel, cutting a new channel. I believe that was about the same time that the Carter Lake avulsion occurred. This was dated, or filed, the petition was filed November 29, 1915.

Then on P-2678 we found a deed from the Omaha and Council Bluffs Railway and Bridge Company to the State of Iowa, which conveyed land on the, really the north part of Lake Manawa,

up here, and specifically excepted riparian rights.

Here is another area where the river would have been entirely in Nebraska at the time of the Compact, and the Compact, we contend, would not have then given Iowa title to that bed of the stream.

And just one more exhibit with regard to Lake Manawa, or, with regard to the uncertain area, Exhibit P-1774, shows not only Lake Manawa with a notation "State line by decree of Court 1900 A. D.," which Mr. Brown had never found. But also a very uncertain and unsettled part of the river just above where it enters into the Missouri River, also it showing old St. Mary's in 1909 and 1913 river bed, pointing up the uncertainty of the whole situation.

The next area, Your Honor, is St. Mary's Bend where the Corps dug a canal in 1938, and we point out on Exhibit D-1158 the land that Iowa's claiming in St. Mary's Bend. The cutoff was in '38, they are claiming all of the old abandoned river bed.

THE COURT: Is that above Plattsmouth -- or, Rock Bluff?

MR. MOLDENHAUER: Yes, sir, Rock Bluff is here, Plattsmouth is right here, and it's just above it.

We have several photographs showing the dredging of the canal, are the same type of typical

canal photograph, aerial photograph before they dug it, and an aerial photograph after they dug it, showing St. Mary's cutoff in 1938.

And then we have a 1941 photograph of P-2392, showing it completed, and the abandoned channel.

The thing that I want to point out here is that although Iowa has raised the case of Sarpy County versus Leineman, here's Clark's Lake above here, and there's a lot of abandoned river bed which extends considerably south of there; what they are claiming is just the entire abandoned channel.

But I think it illustrates again what they claim, which is all the abandoned channel plus the present half of the channel where the Corps dredged their canal. The photograhs are similar to the other canal.

THE COURT: All right.

MR. MOLDENHAUER: And the next area we want to consider is the Goose Island or Auldon Bar situation. The Auldon Bar appears on page 44 right after Nottleman Island, on page 44 of the Missouri River Planning Report. And the recommended action, "the basic action here is to quiet title, if the title is quieted in the name of the state, then future plans can be made for development for recreational uses. No further action is recommended at this time."

And then it shows 650 acres of land and a hun-

dred acres of water and a considerable amount of Auldon Bar Island is under cultivation and has been cleared. Again they have described it as side of new channel-Iowa, and they always describe these areas as the side of the new channel.

And the Court may recall that Iowa said in its brief that it was quite clear that the islands above and below Nottleman Island and Schemmel Island formed in Nebraska. We'd like to point out that immediately below Nottleman Island, and we're looking at Exhibit P-2680, is the island Goose Island, and the majority of Goose Island appears on the tri-color Exhibit P-2681, which dovetails right in.

Auldon Bar is immediately below Goose Island, and Mr. Brown has designated it as his area No. 27, which Iowa is claiming. But it appears as one island, there's still substantial water in the '47 map around the east side.

I might mention that all the tri-colors just show the '47 situation. I think on the Planning Report that it may not show much of a chute over there any more.

Now we call the Court's attention to Exhibit D-1159 and the attached overlays which shows Iowa's No. 29 Auldon Bar which they are claiming in the green area here, and also shows these island formations above and below and shows Auldon Bar at this time of the AP maps as two islands, one upstream and one downstream; and islands below

that and part of islands above that.

This part just above the northerly Auldon Bar Island is Goose Island, and the lower part is the island which ended up on the Nebraska side and is below Auldon Bar.

The Corps of Engineers dug a canal in Bartlett Bend-Van Horn's Bend, which is the upper bend, and we have photographs dated 12-1-37, P-2510 and P-2509 of October 13th of 1937, showing the Bartlett Bend Canal. The canal was dredged, cutting off the lower part of Goose Island and the upper part of what is later to become known as Auldon Bar.

And in 1938 Project and Index Map, Exhibit P-413, mention is made of the Pin Hook Bend canal and the Bartlett Bend dredging, and they show the Bartlett Bend dredging, cutting off that lower half of the Goose Island, and the Pin Hook dredging and canal, cutting off the north half of the lower island, which is called on that map Auldon Bar, and then there are statistics as to the amount of dredging work which they did; this is the 1938 map.

The 1937 map shows the proposed channel coming through that island, but it hasn't been dredged yet. And on P-412 it showed where the proposed channel is going to come through Goose Island, and then cut back through and make that bend through the lower island. That was '37 and '38; and we have Exhibit P-2506 and 2507, pictures of May 5, 1938 and 10-28-37, showing the canal

and substantial land area on both sides.

There's an aerial photograph of P-2372, which shows Bartlett Bend in 1937 by the Corps of Engineers, and it shows substantial land area both on the lower part of Goose Island and the upper part of the lower area of Auldon Bar.

And we have P-2377, the Bartlett Bend of 1938, showing the lower part of Goose Island, and the downstream picture P-2376, showing the lower part of the island below that. And they are all now on the, Mr. Brown has put in red the designed channel, and these areas show up on the Iowa side.

THE COURT: We had no landowner testimony on these islands?

MR. MOLDENHAUER: No, we did not, Your Honor. We have a '39 aerial photograph P-1880, which now shows it as a land mass, and shows the same areas cut off from the other upstream and downstream islands.

And then in P-415 the Project and Index Map, we again show it as one area on what is, at that time, the east side of the designed channel. Now this is a situation where Iowa has again in their Brief, I think, admitted avulsion, but they have also and they have admitted that the island below Nottleman Island, or at least the evidence shows formed in Nebraska, but part of that land was left on the Iowa side, and Iowa is claiming it. They

are claiming two areas as Auldon Bar, the other parts of each area which ended up in Nebraska because of the Compact and they have made no claim for those areas.

And what we contend is this really, if the river had cut around the other way and left Goose Island on this side and Auldon Bar, left Goose Island on the Iowa side, and Auldon Bar on the Nebraska side, and the lower islands on the Iowa side, they would be in claiming what was left in Iowa.

And again we contend they are using the Compact as a vehicle in order with which to enable them to make a claim to lands and obtain lands.

THE COURT: Against the private title owner?

MR. MOLDENHAUER: Yes, sir, against the private title.

THE COURT: Yes, you have to add that.

MR. MOLDENHAUER: Oh, I thought that was assumed; we as a state don't make any private claim.

THE COURT: I know, but it may be that some of that land nobody claims, Iowa isn't claiming that, if that exists.

MR. MOLDENHAUER: Well, the Planning Report indicates that they have to quiet title and they filed an action.

THE COURT: All right.

MR. MOLDENHAUER: The Planning Report doesn't say that they filed a quiet title action, but in all these cases, Your Honor, they recommend a quiet title and --

THE COURT: That may be because they didn't know at that time.

MR. MOLDENHAUER: Well, the record indicates that they never inquired. But there's no evidence that these areas aren't claimed; the fact is that everybody's moved in and claimed it. If there's -- there isn't going to be any race by the landowners to pick up land along there because there's already somebody there; the only race we contend is by the State of Iowa.

Now the next area we'd like to mention is the one just above the, the next area is in Nebraska City Island, and the Court may recall that we pointed out on the 1879 and the 1890 Corps maps that the river was around Eastport Bend just above Nebraska City. Iowa on their Exhibit D-1159 is shown where they purchased land from the Wurteles, it's right below the bridge at Nebraska City and

goes to the edge of this area here, which we contend is another indication of abandoned, where they purchased some of their trust land which was in abandoned channel. There is a map in the Corps of Engineers reports again of 1890 which shows the designation Old River Bed, and it shows this same feature which we contend is Mule Slough, and they purchased their land right here in the old river bed.

MR. WALKER: What area is that, Howard?

MR. MOLDENHAUER: This is --

THE COURT: Nebraska City.

MR. MOLDENHAUER: It's just at Nebraska City and it isn't designated an area.

MR. WALKER: We didn't claim it.

MR. MOLDENHAUER: You purchased it from Wurtele, it's that Mule Slough area just across from Nebraska City.

THE COURT: I'd take that to be -- off the record --

(Off the record discussion.)

MR. MOLDENHAUER: That may be so, Your

Honor, and we sort of think that a state should be somewhat consistent about it in their treatment of the people.

Then just downstream from Nebraska City we would again like to point out on Exhibit P-2638 what looks like an island area in Section 4 above the Schemmel land, and it looks on the 1947 tri-color as much an island as Schemmel's looks like an island, with water from the river running all the way round it.

And one of these aerial photographs of P-246, which is the '30 aerial showing bar area there, and the aerial photograph P-2703, showing again this island area with water all around it, dated 1938. This shows up on the Project and Index Maps too and it looks as much like an island as Schemmel's does. Mr. Jauron testified that that's the area where some attorney instructed them not to take it and he on cross examination claimed that some sounding map of 1931 showed water over to the west side of it, but in 1930 it shows up as a bar area.

THE COURT: Well, that's never been the subject of any quiet title action.

MR. MOLDENHAUER: Never been the subject of any quiet title action, we haven't researched it, but it's just that Iowa never claimed it.

Another area where somebody decided that they

we ren't going to claim it, and very easily by making that decision determined that some landowner is in peaceable and quiet possession.

Now we have some general photographs which we just show the Court without, I think that we have seen so many canals that you don't have to go through the rest of them, but all of these show canals being dug, being dredged many places along the river bank, consistent with our argument that they had moved that river and everybody recognized that they moved it.

THE COURT: The Engineers all have to do work, you know, they don't get anywhere unless they are out working.

MR. MOLDENHAUER: Now, Your Honor, we are headed for a convenient breaking point for us as far as our presentation is concerned.

THE COURT: Well now, let's see, you have covered up to, what is your next --

MR. MOLDENHAUER: What we have left is some general treatment of Iowa's traverses and surveys.

THE COURT: You have discussed your exhibits?

MR. MOLDENHAUER: We have discussed all the exhibits except these few here, and then we'll go into a summary of argument again and discuss the points which you raised, and we'll be through.

THE COURT: You want to recess now until 1:30, you want to recess now?

MR. MOLDENHAUER: I would prefer to recess until 1:30, we'll be done easily this afternoon.

THE COURT: By about what time, 3 o'clock, an hour and a half?

MR. MOLDENHAUER: I hope so.

THE COURT: We'll recess until 1:30.

(Thereupon, at 11:50 o'clock a.m., the hearing in the above entitled cause was recessed until 1:30 o'clock p.m. of the same day.)

1:30 O"CLOCK P.M.
WEDNESDAY
SEPTEMBER 30, 1970

* * *

THE COURT: All right, sir.

MR. MOLDENHAUER: May it please the Court,

we'd just like to point out a few other documents, particularly in connection with surveying the Compact line.

I'd like to make it very clear that when we have stated that the AP maps were general maps, and that it's almost impossible to locate the Compact line, and the plaintiff has offered evidence from the Corps of Engineers, we can't seem to find the documents right now, but several letters in which the Corps of Engineers has taken a position all along that the inch equals 400 foot construction maps were not retained, which showed the original line of the river. And that it's impossible to locate the boundary on the ground throughout from the maps now in the Corps files.

We think that that is significant for one particular reason, we're not asking this Court to find the boundary in any particular place, but we think -- insofar as the Compact line is concerned -- but we think that it's significant because the states when they entered into this agreement took these general maps and did it in a context in which it was never anticipated that a state would come in and use those maps to survey out a property line.

It's one thing to say that the boundary is out there in the middle of the river for jurisdictional purposes, because some state can obviously take jurisdiction in their fish and game problems and that type of thing, and it's another thing to say, here is the line, and then refer to such general maps,

and fifty feet in a property situation is a little bit different from fifty feet in a jurisdictional situation. It could be far more significant, far more important to the individuals which are involved as far as the property is concerned.

But they used this general line, they didn't survey the boundary as they could have done if they'd wanted to really do this thing in great detail, and they said --

THE COURT: It occurs to me that they did do it around Carter's Lake.

MR. MOLDENHAUER: They did do it around Carter's Lake.

THE COURT: They knew how to do it if they wanted to do it.

MR. MOLDENHAUER: That's right, they knew how.

THE COURT: Is that any significance that they used a surveyor's line to fix points, the exact locations that they were interested in at the time?

MR. MOLDENHAUER: At Carter's Lake?

THE COURT: Yes, at Carter's Lake. Then left the rest of it generally, does that have any sig-

nificance, or doesn't it?

MR. MOLDENHAUER: Well, I -- Carter Lake was surveyed because of the Court decree, and they had it there. Now Carter Lake was always a political issue --

THE COURT: Well, aside from that problem, when was it surveyed, when was that survey made that's found in the Compact?

MR. MOLDENHAUER: Well, it was never surveyed in the Compact, the Carter Lake survey was the result of the 1892 case.

THE COURT: Yes.

MR. MOLDENHAUER: And I think that was of record in the Court decree at least of 1895, I believe it was.

THE COURT: Wasn't that put in the Compact?

MR. MOLDENHAUER: That was excepted from the Compact, yes, sir, they came down, they came to the Carter Lake and excepted it and went on down the river, so above and below they took the middle of the channel as it appeared on the AP maps.

THE COURT: In other words they knew what the line was around Carter Lake.

MR. MOLDENHAUER: Yes, sir, that's the one place they knew.

THE COURT: They knew that was a surveyed line?

MR. MOLDENHAUER: Right.

THE COURT: Because the Court had directed that after the final decree at Omaha, Nebraska?

MR. MOLDENHAUER: Yes, sir, so there was no dispute there. In all the rest of the area there were disputes, and they didn't really know where it was.

THE COURT: Well, what I'm getting at, if they wanted to settle the dispute at the time of the Compact they might have used the same system that was used by the Supreme Court that very often directed the Commissioner have that surveyed.

MR. MOLDENHAUER: Yes, sir.

THE COURT: Come back with the survey and we'll adopt it. They didn't bother to do that in this case.

MR. MOLDENHAUER: That's right.

THE COURT: Does that have any significance?

MR. MOLDENHAUER: I think so, I think it has great significance, because they could have gone to the Supreme Court and said "We're going to settle our differences by original action," and have the Court decide where the lines are. They took the other method, the Compact method, which is a settlement, not a determination, and once they decided to settle it then they changed the entire relationship. I think that's very significant.

And we just wanted to point out and remind the Court in this regard, Exhibit P-746, which showed the line around Nottleman's Island where three surveyors all surveyed a different line. Of course, we allege that Iowa's traverse went fifty feet approximately into Nebraska. Mr. Brown's and Professor Lubsen's line is here, the west one is the -- or, the east one and the west one is Windenburg.

THE COURT: I remember that.

MR. MOLDENHAUER: From which they described their traverse in the petition. When they get down near the bottom, they coincide here, and when they get down to the bottom Professor Lubsen goes even closer to Iowa, and Mr. Brown is in the middle, and the Iowa surveyor's line is

closer to Nebraska.

And Mr. Brown testified that one of the problems was this dike sticking out here, so a judgment decision had to be made. But here were three surveyors who located a different line. We think that it's significant in a way because Iowa keeps coming back to the contention that anybody can locate the state line, or any surveyor can, and the evidence doesn't bear that out.

Now, and, again, when they locate it, it's a rather unilateral determination, and they determine it any way they want to.

In this regard we have mentioned that their surveyor, Mr. Hart, who is now deceased, who did many surveys for the state, at one time surveyed his line using 500-foot chords. This was evident on D-1207, which is just an example; his line is 500-foot chords, but no relationship really to what the bank line is, it's still the 500-foot chords, where we have longer chords on the bank, chords of varying lengths, they haven't, they show the lengths, but they haven't written what the length is.

But this was his method, particularly on this survey of Tieville, Decatur Bend, July 15, 1963, he used a different method on Exhibit D-1209, in which his state line chords are of varying lengths, 460.61, 467,45, and parallel the chords which make the Compact line. Only to point out that both methods can't be right because they're inconsistent, and I don't know how many times you can be a little

bit wrong, particularly a state, and particularly in a situation like this. Now they demonstrated that same degree of imprecision in their surveys, in the Nottleman Island situation, and Mr. Brown placed in evidence several photographs where he showed where their lines went through water right down through the middle of standing water, it didn't go along bank lines, it went across fields and that type of thing. Those Exhibits P-428 and then P-417 through P-423 are on-site pictures.

In the Schemmel situation we had the same thing, he had a little map, P-383, and on Iowa's traverse which they claim was their ordinary high water mark, they go across fields where there's no physical feature whatsoever, alfalfa fields, near water area but, in this one, for instance, he's looking right at the line. There is a bank quite a bit over here to the right side, but there's no consistency in what they are doing. Again, which we think indicates that maybe they may not know for sure, but somebody is telling them where to go without any logical or legal basis or any consistent basis.

Now just a brief comment on some of Iowa evidence, and very briefly. We would mention that Mr. Huber, who has been one of their principal witnesses in all these cases, put the so-called thalweg or the middle of the main channel on a 1930 aerial photograph D-1092. In the Schemmel case, 1964, where this green line is --

well, correction -- where the black line is, and in this case he put it where the green line is, two different places on the same photograph.

He did the same, he made the same type of mistake, on the 1931 map of the Corps of Engineers, the Otoe Bend area, making an eleven hundred foot error in where he placed the thalweg between 1964 and in 1969, this is D-291A, the green line being where he placed it in '69 as of the date of the map, the red line where he placed it in 1964, and the Schemmel case in Fremont County in Sidney, Iowa, being the red line back in 1964.

THE COURT: What was his background, was he a trained engineer?

MR. MOLDENHAUER: He was the head of the Missouri River -- I think he had two years of education, and then he started in the Kansas City office in about '32 or so.

THE COURT: As a clerk?

MR. MOLDENHAUER: Yes, sir, draftsman.

But the thing we'd like to point out is that no landowner's title should be subject to the type of evidence which can vary over the years, the same evidence, there ought to be some kind of rule of law in this kind of situation.

We have mentioned, of course, some of Mr.

Bartleman's drawings, and we mentioned in the reply brief, and in our Appendix, that some of them were obviously off, and it's not necessarily a criticism of Mr. Bartleman because it's very difficult to place these present areas in the various situations. But we contend that you shouldn't be that sloppy either if somebody's title is going to hinge upon where this area may be located along these various documents. It takes a great deal of effort and it's expensive, and it should be done right, particularly when the state is attacking the title.

Then one more thing, one more exhibit, Exhibit P-2181, which we'd like to show the Court before we begin to go back to the Compact, is the 1964 aerial photographs of the Missouri River, which again point out the character, they start at the Dakota City side upstream, and again point out as of 1964 the character of the Missouri River valley north of Omaha, and the chutes and the depressions and the scourings and the ox bows which exist all up and down the river and which are really a matter of general knowledge to anybody who is at all familiar with the Missouri River valley, a recognition before the Compact, just from the physical features of the many changes of the river.

This was the Winnebago Bend situation that when the Court asked what it looks like today, and this is what it would have looked like in 1964, so there is quite an area out there, at least, but, again,

we've got so many ox bows and so many different indications of where the Missouri River has been. Here is Lake Quinnebaugh on the Nebraska side, and I believe Mr. Brown testified that he found Iowa descriptions on filings in Nebraska to the Lake Quinnebaugh area, but here was an ox bow over towards the Nebraska side, and here's an ox bow right there, and all the area north of Omaha obviously has been scoured out by the river at various times.

Here's a Horseshoe Lake, here's a bend here, this is De Soto cutoff where they put a canal, here's the California bend area with those scourings. Another ox box in Washington County.

THE COURT: These are Engineers photos?

MR. MOLDENHAUER: These are Engineer photos, we call them U-2 photos, they were taken at a high level because they cover quite a lot of territory, but the big thing they do here is Lake Manawa and Omaha and Council Bluffs, and here's Carter Lake, but it's so obvious from looking at these where that, how that river is just scouring out areas all across the valley and it's done it both above and below Omaha. There isn't that kind of distinction, or hardly any distinction when you get to looking at the maps and the features and the topography. Of course, this was the existing situation when the states entered into the Compact.

One other comment on the reconnaissance maps, of course, we have put into the record Iowa's contentions in certain cases that they are inaccurate. There was quite a little testimony as to these reconnaissance maps that were brought in by Mr. Loper, by Stewart Smith, as to how general they were and how inaccurate they were, so we won't comment any more at that point.

That concludes -- just one more comment on the evidence I'd like to make, and that is that there was an indication in Iowa's brief that when Mr. Schwob testified, the Director of the Iowa Conservation Commission in '42 to '46, there was reference to a twenty-five year plan, and I want to point out to the Court that there is no such twenty-five year conservation plan in the evidence -- I have the exhibits here, it is not related at all to the Planning Report, and there should be no inference that the twenty-five year plan in 1933 is the Planning Report. I would be happy to give Iowa what areas they claim in that report, if they'd say hands off of the rest of them.

THE COURT: That might be an area of agreement.

MR. MOLDENHAUER: This, Your Honor, gets us back to where we started, and we're through discussing the various exhibits.

I'd like to make some general observations

first before taking up the points that the Court --

THE COURT: I just put those in there to see --

MR. MOLDENHAUER: Well, we're not afraid to meet them at all.

THE COURT: No, I just wanted to hear what you had to say about those features.

MR. MOLDENHAUER: First I'd like to make just a general comment because we've really never gone into this, I don't know how important it is, but it's background, how the states got this diversion of title and easement law.

Originally the common law, as I read the cases at least, and this is just a general summary in England the rivers that were affected by the ebb and flow of the tide belonged to the King, and the rivers that weren't were considered non-navigable and the public had the easement, or, the highway use, but the title was in the riparian owners.

In England, the situation, they didn't have the rivers like we have in America, because the country is much smaller, and the Thames, for instance, was influenced by that tide.

In America when the problem came up some of the states said, well, the test of navigability is whether they are affected by the ebb and flow of the

tide. If they are it's navigable, and the state holds the title; if they are not it's non-navigable.

Other states said, "No, we don't accept that as a fair test in the United States because our country is so much bigger, and we have larger rivers, and we have rivers which are navigable, in fact, and if the river is navigable in fact we're going to hold that the state holds title to the bed on the navigable streams."

So we got this divergence of doctrine; but what I think it was really intended to do was to provide the public with the access and the use of the waters; and the reason that they had them was because were waterways. When the river moved this idea that they keep the old and pick up the new doesn't, is a little bit incongruous because they do pick up the new because it is the waterway, and that's the reason they have got it, the fact there's land where it was is just an incident of that movement.

So I think that the significant thing as far as the use of rivers is concerned is always that it's been that the use of those rivers have been assured to the public. I don't know of any other state except Michigan, and we mentioned that one Michigan case, which have ever tried to use the movement of the river as an acquisition type program.

And, of course, with the Missouri River we have got a little bit of a different situation because on that river besides all the natural cutoffs, the

Corps came in and superimposed the channel for its entire length, and they engaged in structures and canals along the entire length.

And in most of the earlier cases on accretion and avulsion, and that sort of thing, there may have been a structure in one place or upstream, but there were no other rivers until they did this to the Missouri in the United States where they channelized that whole river. And we think this is significant because again everybody recognized that they had done this on the Missouri and everybody recognized that besides the natural movements there were these many man-made movements which existed.

And so in 1943 when the states admitted that they didn't know where the boundary was Iowa at that time didn't have title to the bed in any, in these places, because they never did determine where the bed was, whether it was in Iowa or in Nebraska. And when the Legislatures settled that boundary, the Iowa bill, House File 437, which was subsequently amended in plaintiff's identification, P-1618, said "this measure is intended to fix the boundary line between Iowa and Nebraska now that the channel of the Missouri River is under control. It will be observed that this measure retains the Carter Lake territory in Iowa. Making the present channel of the Missouri River the boundary line will tend to simplify the question of jurisdiction over territory now in dispute." Recognizing

jurisdictional problems over territory in dispute.

And in the House of Representatives in their report Exhibit P-1012, put the same language in the Senate, the language is found "If adopted this measure will settle a large number of jurisdictional disputes which have risen over a long period of time. The States of Iowa and Nebraska after lengthy negotiations have entered into a Compact satisfactory to both states." Again a recognition of the disputes, the jurisdictional disputes, that existed.

And we'd like to point out here that Iowa's title depends upon its jurisdiction. And back in '43 they settled all their jurisdictional disputes and they shouldn't now be able to come in and utlize that same jurisdiction which was supposedly settled to establish their title.

And we think, of course, when they entered into this Compact without investigating at all as to where the land was, and putting in other provisions to protect titles, that they cannot come back and question where that line was beforehand. We don't think Iowa really loses anything because she didn't have it in the past as a state.

And when we entered into the Compact we didn't just say "Here's the line," and we didn't say "We're recognizing that this middle of the A P maps is the boundary, or has always been the boundary."

And some of the early cases talk about the boun-

dary settlement as recognizing this as the time-honored boundary. Here we recognized that it wasn't the boundary, and we recognized that we changed the boundary, and we recognized that we changed it almost its entire length. We did it when Iowa admits and Nebraska admits that there's no public record of lands ceded, and any determination since that time has to just be based on study or possible speculation because the states have not recognized it, and we just ceded all the land that existed on the other side.

We did it in a situation where the state, particularly of Iowa, had obligations to have of record its claims and hadn't fulfilled those obligations. We did it with the fact that these Nebraska titles were in existence, whether or not properly in existence, they were in existence at the time that the states contracted, and everything they contracted to was in light of that fact that existed at that time.

And the result in 1943 should be the same as the result today and should be the same as the result twenty years from now, it shouldn't make a difference what the evidence was in '43 or what the evidence is today or what the evidence is twenty years from now.

In the cases which have been decided recently, like Judge Johnsen's Illinois-Missouri case, or the Arkansas-Tennessee case, they were distinguished from this one because they didn't have a compact, and they were strictly trying to find the line, and

we say that when we adopted the Compact, the Compact became the law of the Missouri River valley as far as the states are concerned and it bound us.

So from there on the common law isn't in force any more, but it's what the Compact provided. And we had a lot of discussion of what the situation might be if the common law were still in effect, and it's important as background material to show what had happened up to that time, but we think that the Compact superseded all this, and now our rights are to be determined by it. Going to the Court's points in its order directing oral argument, we agree with the excerpt from Judge Van Oosterhout in the Tyson versus Iowa case about the movements of the river, of course, we don't agree with the opinion in that case, but again --

THE COURT: Well, he did say in that opinion that when you had a compact it changed the rules, he did say that, didn't he?

MR. MOLDENHAUER: He said as a result in 1943 a Compact was entered into between the states of Iowa and Nebraska and approved by the Congress, which fixed and specifically designated the permanent boundary line between the states. I don't think that opinion goes any further than that as I recall.

THE COURT: Well, he was talking at the very

end of his opinion, as a general rule -- have you got that opinion there?

MR. MOLDENHAUER: I have it in the other room.

THE COURT: He says Compact disputes don't go by the old law, is what he said.

MR. MOLDENHAUER: Well, I have it in the other room, Your Honor, I don't have it here.

THE COURT: I think he said that.

MR. MOLDENHAUER: But we agree with his statement of the description of the movements of the Missouri River.

THE COURT: Yes.

MR. MOLDENHAUER: And, of course, we agree that below Omaha it was in the channel and above Omaha, approximately seventy-eight percent because, in the channel, because that's what the Corps report says and we don't have any other criteria for judging it.

We agree that it's tremendously difficult to identify the boundary in any place, because of the evidence and the time problems that have elapsed since these movements of the river. But, of

course, we feel that in the Nottleman and Schemmel areas that we have shown that those areas formed physically and in fact and through physical evidence as well as testimony on the Nebraska side of the main channel of the Missouri River, so we think they formed in Nebraska. But we admit certainly there are many places where there is a lack of substantial evidence.

THE COURT: Well, one way a Court might look at this case on that score would be to say "Well, it's a tie," you know, pretty even, as to where, as to what that testimony shows. But the recognition testimony, as we were discussing it, and so on, puts it on your side.

What's wrong with that decision?

MR. MOLDENHAUER: Your Honor --

THE COURT: What would be wrong with that decision, it's practically, we can discuss it and talk about it, and talk about the boundary and all the evidence showed it here and there and the other way, well, what's the difference, the recognition testimony is that it was Nebraska land?

MR. MOLDENHAUER: The only problem with that, Your Honor, is that that requires, that allows the State of Iowa by making the claim, that it would require for somebody else to prove what

state it was in prior to the Compact, and then they are allowing, and then they are setting up a requirement which can in the light of all these situations, we think, defeat the other party's remedy, because they are saying "Although we admitted that the boundary was impractical or almost impossible of determination, and that was one of the reasons we compromised, we could now wait twenty years and go back and make you prove where it was before the Compact." And if so, the Compact didn't do anything except put some land in Iowa where certain people would be subject to Iowa's jurisdiction and Iowa's laws, without any remedy, and they couldn't raise any jurisdictional question.

So any time that Iowa can force the people to come back in and prove where it was they are deprived of what we agreed on, because when they said we agreed that titles good in Nebraska are good in Iowa, they didn't say --

THE COURT: Well, what are you saying, that I've got to find that in order to find for Nebraska, that I must find that the channel was on the east side of the island?

MR. MOLDENHAUER: No, we would, we say that we think that we have shown that and that could be a subsidiary finding, but the primary thrust of our argument is we agreed that we wouldn't have to

go through this kind of procedure.

THE COURT: I understand, I'm saying that supposing I reviewed both sides of the evidence as to where the channel was, east or west side of those two islands, I'd say I don't know, I can't find out, I can't make a determination; but the other evidence persuades the Court that it's ceded land because of the title evidence, and all that sort of thing.

MR. MOLDENHAUER: As far as that area is concerned, that would solve that area, it doesn't solve our overall problem, except, and I'm separating them, because our first thrust is the Compact says you can't do this Iowa, and when you say you recognize titles, you agree you won't attack them, because if you say that this is a good title you can't come in and cloud that title, because then it's not a good title any more.

And you yourself have contracted, and you have agreed, so when you agree it's good, you can't attack it.

But that point, if that burden is established, would solve the problem of the difficulty of proving the line. We don't just rely on one thing, we --

THE COURT: Yes, I know, I understand you, but we have to talk about it when it was done.

MR. MOLDENHAUER: Right; and it it gets back to the burden must be met by the person who files the lawsuit, the fact is that Nebraska is in this lawsuit because of Iowa's conduct, because of what Iowa is doing. Iowa meets its burden in its own courts by doing as they did in the Schemmel case by relying on the presumption of gradual movement, and they say, as Mr. Murray said in his opening statement in the Schemmel case, Exhibit P-1658, that they just expect to trace the land back to the early '30's or into the '20's, and rely on the presumptions in the first instance, which puts the burden on somebody else. And if you can rely on those presumptions, and if the presumptions that they rely on are applicable it is almost conclusive in depriving that individual of his land.

The bad part about this whole thing is that giving the individual his day in Court, in the Iowa Courts, doesn't provide him the normal relief, because of the presumptions and because of the original Compact, the contract which was entered into which was supposed to protect him, and because of what they can do now, because they couldn't do this without the Compact, they'd have a big jurisdictional dispute.

Insofar as the second question about, is the Nebraska evidence of adverse possession or prescription sufficient on which to base a decision; we think in this case it is, but that would require again going back and considering the facts as of '43, or,

as if we had to prove what was ceded.

In the Schemmel area since 1895 we'd exercised jurisdiction, and in the Babbitt area it was a little, it was shorter than that, there isn't any doubt about that, but the fact is that in '43 when we transferred it, we didn't cut it off, Iowa continued to recognize it for another, now twenty-seven years.

In some of the older cases the period did run for a long time, it ran eighty or ninety or a hundred years, but as Judge Johnsen pointed out in the Missouri versus Illinois case any doctrine should be subject to the conditions of the times, and in this situation we've got far more communications and we have far more knowledge than they had back in the 1800's, when it was maybe a few days to the county seat or county line. Here you can travel all over the county in one day.

Insofar as the Compact superseding Iowa's common law and changing the rights, which the State of Iowa had, we contend that it did and we contend that this should really decide the case, because there's no way, if Iowa is allowed to prove, require somebody else to prove how land formed they have to go back then and establish where it was before the Compact. And again we say when we entered into the Compact and agreed to settle it, we settled the question of whether or not any state could come in and require proof by that other party as to where it was.

We didn't say when we entered into the Compact "We're going to draw a new line, period." We could have done that, but we didn't do that, and we didn't say "This is the line we have always had," we said "this is a new line." And when we said the titles are going to be good, we didn't say we are going to wait twenty years, and now we, the State, are going to attack your title. Or we didn't say "If you present a title, we can just say it's spurious and fictitious," and disregard it.

We said "We recognize it", and the state recognizes it. I think that's a duty that the Attorney General's office and the Conservation Commission and the Courts and the Governor have to accept. So we think they changed the entire law, and the only really logical way to enforce it is a holding that the most the State of Iowa has is an easement and the use of the bed of the Missouri River just like the public has in Nebraska.

And if Iowa wants land they can acquire it by condemnation, they can acquire it by gift, and they can purchase it; but they shouldn't come in now, at this stage, and be able to rely on any sovereign claim. They were never asserting it at the time of the Compact; if they had it's inconceivable, I think, that the State of Nebraska would have said, "Okay, we'll put this land in your state so you can serve your documents."

THE COURT: What are you saying, are you

saying that I must recommend that all the way up and down the river, the whole 187 miles?

MR. MOLDENHAUER: That's what we -- yes, sir, Your Honor, we say that that's the only way that these people can be assured of the protections which the Compact gave them, because if Iowa can come in and say "You have to prove your title now," and put all these burdens on them and do that maybe when there's just a little tiny bit of land involved, less land than the attorney's fees would be, they are using that sovereign claim of ownership which follows their jurisdiction, in a way that was never ever anticipated, we say, by the Compact.

And we don't think that the Compact can be read to lead to that result because the practical effect is the deprivation of their land. This is the way it's worked out, and all these acts of conduct along the river have only flowed from Iowa's ability to contest where the line was before the Compact, or from Iowa's ability to say the line was presumed to be in the river because that's where it is. They have required that other party to prove otherwise, and they have done it when evidence has been destroyed, witnesses have died, there's a tremendous burden to obtain this sort of thing.

And in their own Planning Report they recognized that this boundary was almost impossible to ascertain; so they are saying that "We realize

that you can't tell where it is, but we're going to attack you anyway, and now you prove otherwise," and they contracted in the situation in which they recognized that it was almost impossible to determine.

THE COURT: Well, it isn't necessary to do that except in cases where somebody contended that there was a good title in Nebraska prior to the Compact, you see what I mean?

MR. MOLDENHAUER: Yes, I see what you mean.

THE COURT: What's the difference if, just assume there's several errors on the east side of the present line that have been there, swamp land, in and out, and so on, and nobody's really claimed it, isn't it Iowa's land now?

MR. MOLDENHAUER: Well --

THE COURT: Under their common law, and nobody else is disturbing it and nobody else is claiming it?

MR. MOLDENHAUER: If you go back and assume that it was always, originally in Iowa and you make a determination --

THE COURT: Well, you're saying for instance, that somebody is claiming all the land on the east side of the river.

MR. MOLDENHAUER: As a practical matter that's the effect, every area that we --

THE COURT: Well, we haven't covered every mile of that river on the east side.

MR. MOLDENHAUER: No, no, we haven't.

THE COURT: So I'm just saying that suppose we assume, for discussion only, that there are areas there that nobody's on, Iowa perhaps doesn't know about it, doesn't know anything, hasn't done anything about it, duck hunters are on it, and goose hunters, and all that sort of thing, and do I have to say, do I have to say from Rulo to Yankton that Iowa must give up on the east half of the channel it's common law right to the bed?

MR. MOLDENHAUER: I think it follows, because otherwise --

THE COURT: When it seems to me that I'm talking about, we're talking about title good in Nebraska must be recognized by Iowa, that's the extent of it, isn't it, Iowa doesn't have to recognize anything else?

MR. MOLDENHAUER: Well --

THE COURT: Do we have to do away with our whole law or just the law that conflicts with --

MR. MOLDENAUER: Well, the only problem with this, Your Honor, is that somebody comes in and says, "Here's a title that's good in Nebraska," and if Iowa can attack that title, as they do, just say it's spurious and fictitious, then they are stuck with their lawsuit again, and Iowa is attacking them, and Iowa has been doing that, they haven't paid any attention to Nebraska titles, they haven't even looked into them.

I can't question that if Iowa was exercising ownership rights over property in '43 that she's entitled to it.

THE COURT: Is it too much of a hardship on a landowner to say "Here, I quieted title in Nebraska on this piece of property, and now it's on the Iowa side, and under the Compact," and under that situation when you prove your -- you always have to prove your title someplace, don't you?

MR. MOLDENHAUER: That's right, but if you have to prove your title based on the jurisdiction --

THE COURT: Well, he comes in and says "I have got a title good in Nebraska," the way Nottle-

man and Schemmels have done, and if I say that's good, why then, it's good, okay, Iowa has got to recognize it, that's all I need to say there.

Or if I was sitting on a Federal Court case, in the Whitney case, you see, I'd say under so-and-so; but is it too much of a hardship on any landowner just to say to him "You prove your title good in Nebraska and Iowa had to recognize it under the Compact," go that far, in other words, do I have to go as far as you are discussing, the Court doesn't want to go any further than it has to, that's what I'm --

MR. MOLDENHAUER: Well, what I want to point out, if you go that far, that's much preferable to what we have, but if you go that far, then we are still saying that Iowa's individuals can ignore areas, pick up other areas, and there's no law along the river, it's only anybody can attack your title, and we get back to the fact they agreed it was good, they agreed that they wouldn't attack it, I don't know what else, when you agree something's good what it means, it means that you are accepting it as good, and when they attack it in Court they are not accepting it as good.

THE COURT: Well, you have got to show that something's good first.

MR. MOLDENHAUER: Well, that's what they

are saying, but they could have made that determination in '43, they could have said "We're going to find out where the good titles are, and then we'll recognize them."

They said, "No, we're going to recognize them all on this side of the line," because otherwise they had to --

THE COURT: I don't know as we understand each other, Mr. Moldenhauer, at the moment. What I'm trying to get at is I shouldn't recommend to the Court --

MR. MOLDENHAUER: I understand.

THE COURT: (continuing) to issue a judgment on a matter that's really not in dispute, go any further, you know, they never decide things until they have to, see.

MR. MOLDENHAUER: No, I understand that.

THE COURT: And if we have these series of titles, and so on, and which you say are ceded lands, and because they are good Nebraska titles, but there may be, I don't know about this, but there may be other areas that Iowa, that Iowa can assert its common law, right up to the center of the river because nobody else is claiming it; what's wrong with that?

MR. MOLDENHAUER: If we knew where those areas were it would be easy. But, you see, we decided in '43 --

THE COURT: It's pretty well decided now, aren't they, the claims are pretty well filed by now?

MR. MOLDENHAUER: Well, I think, I thought they had listed the areas they were claiming, but they kept the door open to claim anything else in the future.

THE COURT: Well, go ahead.

MR. MOLDENHAUER: But the problem is applying the rule in a fair way, and the problems of applying the rule so that somebody else doesn't have to prove something that we agreed was good back in 1943.

Because now we're saying, "Okay, friend, we recognize your title today, but you're going to have to come in and prove it twenty years from now," and he didn't have to do it back in '43 because he had it. If then he has to prove where the state line is, that's something else. If he could just come in and prove, and show a title in Nebraska.

THE COURT: That's what I'm talking about.

MR. MOLDENHAUER: He might be protected except that he's been subjected to an attack in the Iowa Courts.

And here again we didn't say when we entered into the Compact that you can attack all these titles, they said they were good, and I think it follows that they're not going to attack them because otherwise we don't have any protection to them at all.

THE COURT: Okay, go ahead.

MR. MOLDENHAUER: But that point is much better than the lawless situation that we think exists over there today.

In your question 5 as to whether this case is to be decided giving effect to the general rule that plaintiff must fail unless its case is proved by a fair preponderance of the evidence, relating to Nebraska evidence that the two islands formed on the Nebraska side of the old boundary. First, we contend that the burden has been met, but, secondly, we contend that if the criteria is that that line has to be established before the Compact, Iowa still violated it because they are forcing us to do something that we agreed we didn't have to do. So we say the answer to that question really is, no, that that burden should not have to be met now as to where the boundary was, otherwise we might as well have had original action in 1943 when there

was more evidence available and more witnesses and more documents.

With regard to the Court's proposition about the navigable channel, and the comment that there's no satisfactory evidence of commercial navigation prior to '43, I think we should comment that there is evidence of navigation throughout the years on the Missouri River, but during the '30's and '20's there's every indication that there was very little navigation. There are some commerce reports in the record --

THE COURT: What I meant was, now we are discussing here a little difference between navigability as such, I have held that streams are navigable in various cases between landowners; but what we are talking about whether or not it's navigable to the extent that we can find the thalweg, the boat tracks, the way they do in the lower Mississippi, and all that, you know, Illinois versus Iowa on their argument on their bridges. They fixed the boundary way over on one side, and so on; we don't have that kind of evidence, do we, of that kind of a navigability?

MR. MOLDENHAUER: Well, we have some testimony as to where the boats went, we have some testimony as to where the river was cutting, and the heavy water, and that kind of thing; we don't have navigation charts until after the Compact.

But the Courts have never failed to find a boundary in a dispute between states for lack of evidence.

THE COURT: Because they start out, they say it's navigable, that's why.

MR. MOLDENHAUER: That's right.

THE COURT: They say it's navigable, period.

MR. MOLDENHAUER: And three other cases, Nebraska versus Iowa and Missouri versus Nebraska and Kansas versus Missouri, on the Missouri River where they all found a navigable channel somewhere, through the evidence available. But that gets to this proposition of exercising jurisdiction, long acquiescence, and this sort of thing.

The important thing here we think is the facts pretty clearly show that from our standpoint the length of time could be argued, but the fact is that the states recognized that situation when they entered into the Compact. It was there and they can't say we entered into a Compact in '43 in light of facts which exist in '60 or in '65 or in '69, we have to look back at what they did at the time.

And at the time Iowa wasn't making any claims. And there's no evidence that they were making any claims, there's some references in the Conservation Commission minutes, but they admit that

there was no record of lands they claimed, the Conservation officials admitted that they didn't pay any attention to them, they hadn't raised this issue; and if we go back to '43, if Iowa had been claiming specific areas, we have to look at what the states would have done, whether they ever would have settled it, and they certainly never, Nebraska would never have settled with them in such a way that Iowa at any future date could attack the areas in dispute, or attack titles in the areas in dispute. And they recognized that areas were in dispute all up and down the river, and they didn't want to have to go back and determine where they were. Either that, or they might have entered into the same Compact because the language in this Compact we think still should protect those titles, that's what it was put in there for was to protect the titles.

Iowa's approach depends on so many conclusions. It depends first on the condusion that the land was not ceded, it depends on the conclusion that these were islands in the bed of the stream, it depends on the conclusion that that bed was in Iowa at the time of the Compact, and a conclusion that this is not an accretion to either bank. And somebody is going up and down the river making determinations as to what they are going to attack and what they aren't, and as we pointed out, they can do this to gain a principle of law to go against somebody else, they've got a, it's a

government of men and not laws up and down that river, because they just go after whoever they want to, and the burden they impose on them is tremendous and it's almost insurmountable.

If we have to come back now and make a factual determination of every place that was ceded. Then we say that we have really sold our people down the river when we entered into that Compact.

Your Honor, my colleague, Mr. Moore, points out that this riparian land all along the river, there are no facts showing that there isn't land that is not being claimed by individual people, but that if there is any dispute along that river that that land should belong to the riparian owners, and the riparian owners are on a parity when placed against each other, but they are not, nobody can fight the State of Iowa. They don't have the resources, they don't have the immunities that Iowa claims, and they don't have any presumptions in their favor.

THE COURT: Well, you know, I don't know as the Supreme Court is going to say that, I don't know, I don't know, that's part of my job to say that, whether to make them -- you know, these cases, as you know, these cases go to the Supreme Court on a report, and somewhere in that report the troublesome thing comes when you have to make a recommendation, come to a judgment, make a judgment. John Kennedy says, "Make a judgment." That's what I'm commencing to -- you fellows have

had this case for seven years and I have had it for a year and a half or so, and you are more familiar with it and all that; but now I've got to say, make up my mind what the report is going to be.

You know, in so many of these cases if there's any chance to affirm the report I think the Court usually does it, but I'm loathe to go beyond the, in the recommendation, what I should to settle a dispute between sovereign states, see, to say something there that they're really not arguing about, you see.

MR. MOLDENHAUER: We understand that, Your Honor.

THE COURT: Yes, so I don't know as I should say, maybe I should just say, well, Iowa's riparian rights now are the same as Nebraska's, but I don't know what -- why would I say that?

MR. MOLDENHAUER: Well, we first have the Compact with --

THE COURT: Well, I know, but --

MR. MOLDENHAUER: You have to give meaning to the whole thing, and if we just say that Iowa can come in here and attack all these things, we're only giving meaning to number one, which draws

the line; we're not giving meaning --

THE COURT: In other words, you're saying, as I understand you, to fulfill a complete Compact and all its terms, and so on, there should be a rule that Iowa's common law to the ownership from the high water bank to the center of the river is just abdicated that they have a navigable right, they have the same public right as everybody else does, change the common law of Iowa on that subject, is that right?

MR. MOLDENHAUER: Yes, Your Honor, because that's the only way that you can --

THE COURT: That would give justice to everybody?

MR. MOLDENHAUER: To everybody and all the provisions of the Compact; it's easy to say the land's in Iowa; but the only reason that we can say that is because of the Compact, no other reason. And then we get rid of this problem of stopping the accretions at the state line which they have raised. If they hadn't taken the approach that they have taken we might not have to take this stand; but we get back to how do we keep Iowa --

THE COURT: How do we do that, if we do that doesn't that permit accretion to cross the state

line?

MR. MOLDENHAUER: Yes, sir, and we think that that should be the decision and the holding in this case.

THE COURT: All right.

MR. MOLDENHAUER: We don't think there's any other way that we can give effect to the whole agreement, and in all the early cases on boundary disputes there's talk about settling things.

THE COURT: Oh, I think the Court wants to settle it.

MR. MOLDENHAUER: And this is the only way that we can settle it.

THE COURT: They want to settle it with finality.

MR. MOLDENHAUER: And we thought we settled it with finality in 1943, and this would affirm the fact that we did settle it with finality. And we think it's consistent with all these broad principles, which we won't argue, because they're principles, this is a unique situation, there isn't another case that comes close to it, and there isn't another compact on this type of situation which comes close to it. We think that rule would

settle this and would accomplish its intended purpose.

THE COURT: All right.

MR. MOLDENHAUER: Mr. Moore has raised another point, Your Honor, that we're probably going to be confronted with this question, that there's a super title in Iowa to certain lands, but the fact is that all we've got is the Nebraska riparian owner's title, and we've got to have, there is all along the river where the Nebraska riparian owner owns on the Iowa side, and we've got to have areas all along the river previously undetermined by any Court that the bed of the stream was entirely in Nebraska prior to the Compact.

So if we now let Iowa take advantage of any presumption that this was otherwise, we have deprived that Nebraska owner of his title, and we think the Compact should be read to recognize that title. And the only way we can do it is either have a conclusive presumption or a presumption that the land was ceded, which would put the entire burden on Iowa to prove where the line was.

THE COURT: What about, we know what the law is down river in other states, down the Mississippi, down the Missouri and Kansas, all down through there, what the law is on the river.

MR. MOLDENHAUER: I know in Missouri, because we have been negotiating with them, the state owned the bed, but they turned it over to their school districts or public schools.

THE COURT: Well, that's that St. Louis case.

MR. MOLDENHAUER: There was a case there, but I know that it'sinteresting in State Line Island, which is right on the line between Iowa and Missouri, Iowa's claiming the top half of the state-owned bed, but the bottom half, I think the title has been quieted in Missouri, and the state made no claim to it.

I don't think that they have those problems there, because I don't think that they have been -- I don't know, but I don't think that they have been claiming areas like the State of Iowa has. I don't think that anybody along the Missouri River, has come in and claimed areas as Iowa has because of the Corps of Engineers work.

And, of course, Missouri and Kansas, before they entered into their Compact, determined where the line was, and said "Now we're going to cede you this, and you cede us that, and we know just exactly what we are talking about." But they went through the Supreme Court processes of an original action intentionally before they entered into the Compact, and we, of course, obviously --

THE COURT: They entered into the Compact afterward?

MR. MOLDENHAUER: Yes, afterwards, so they knew what they were referring to; but we didn't do that, we said we're, we don't know what we're referring to as being ceded, but we're going to wrap it up by a new line and recognizing titles.

So just in summary we submit that, a solution which solves the problem, gives the people what we contracted them to have, and gives the State of Nebraska the benefit of its bargain would be to hold that the states have an easement, a public easement, for the right of use of navigation on the Missouri River, and not title, and cannot assert title based on a jurisdictional claim after the Compact.

THE COURT: Now one final thing, as far as I am concerned. Of course, the Supreme Court permitted you to file this complaint, is that right?

MR. MOLDENHAUER: Yes, sir, yes, sir.

THE COURT: And do you think the question of jurisdiction in the Court as to whether it's a proper case for the Court, you know, one of the contentions of Iowa, is that it shouldn't be here anyway, no matter what you say, an argument about title

only.

Do you think that's been met here, do I have to say anything about it, or do you think that the permission by the Supreme Court of the filing of the lawsuit is sufficient, or what?

MR. MOLDENHAUER: Your Honor, when we filed this Iowa resisted it, we had a full argument on the 25th of January of 1965, and as I recall the 1st of February, which was the next Monday, the Court came down with its ruling accepting jurisdiction.

The one mistake we made in this case was not having that argument reported. I think that it is apparent, it's obvious, that when states enter into a Compact one state can try and enforce that Compact against the other state, and I don't think that there's any jurisdictional problem at all, I think the problem only gets to solving the problem, and if we don't have a claim under the Compact, that's one thing, if we do then I think it should be determined, one way or the other.

I don't think that there's any jurisdictional problem at all, because the Court has always recognized jurisdiction in Compact cases. Now there is a distinction, when Iowa talks about that this is the law of Iowa, the Compact, and we mentioned in that Massachusetts, Missouri case, there's a distinction between two states just adopting legislation which is similar, because there they can

construe their own statutes and they can amend them and they can change them and they can repeal them; but that's not the situation here. They entered into a contractual commitment to us, and because we thought that Sections 3 and 4 were important enough to go into the Compact we should be able to enforce them, because we can't say that you can only enforce Section 1 of the Compact and not Sections 3 and 4, it's a total document, and it ought to have total meaning, and it should be enforced in such a way that it will be applied today the same as it was then. The problem is --

THE COURT: You don't think that's a serious issue then, do you?

MR. MOLDENHAUER: I don't think so, I don't think it's a serious issue at all, I think this, if the Court held no jurisdiction it would do serious violence to all the compacts in the United States, and the Supreme Court has often suggested that the parties settle their differences by compact; and nobody is going to settle here, at least, if they can't enforce it in some form.

That completes our argument, Your Honor, I don't want to represent we have covered everything, but with the briefs, and everything.

THE COURT: Well, I'm not critical that you ought to do more, put it that way.

Well, now, lets see, you have your, before Iowa starts, my law clerk is here and we expect to take these matters back to Erie.

I'll say frankly, I'm going to do the work that I have to do in the Erie chambers, I have two chambers so far, I don't know how long I'll have them, one in Erie and one in Pittsburg.

Will you be ready in the morning, do you want to say anything today?

MR. WALKER: Well, it's up to the Court, I don't like to just fill in time on the evidence, when you asked Mr. Brown about these, I am not prepared to talk on the evidence, because we had our exhibits sorted that we were going to use, and they have been intermingled.

THE COURT: Well, no, I think that we ought to have a break so that you can start fresh in the way that you want to start in the morning.

MR. MURRAY: I'd say let's wait, let's work on the exhibits and assemble our exhibits, and we can start in the morning.

THE COURT: That's what I mean, I suggest

that. Will you take two days or one day, sometimes the defense doesn't take quite as long?

MR. WALKER: Your Honor, I have never been able to talk all day even though sometimes I have been accused of talking too much.

THE COURT: Well, in other words, what do you want to do, you think that you'll finish in one day?

MR. WALKER: Probably not a day, and probably not two days either.

THE COURT: Well, maybe we can have a conference among all of us, say, Friday noon or Friday morning, if you finish in time.

MR. MOORE: We might need time for a scorching rebuttal.

THE COURT: I suppose, yes, I suppose. I don't whether you'd think of that or not, but I suppose you would.

We' ll meet again in the morning at 9:30.

(Thereupon, at 2:30 o'clock p.m., the hearing in the above entitled cause was recessed until 9:30 o'clock a.m., the following morning, October 1, 1970.)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 17, ORIGINAL

STATE OF NEBRASKA,
Plaintiff,

vs.

STATE OF IOWA,
Defendant.

TRANSCRIPT OF ORAL ARGUMENTS MADE BEFORE HON. JOSEPH P. WILLSON, SPECIAL MASTER

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rules laid down by our Supreme Court in regard to relationships between states. They followed their statutory and common law, and when I say that I say that advisedly, knowing that all governments are conducted by individuals and those individuals don't always agree from administration to administration and from office to office.

However, by and large, I feel that Iowa has consistently followed the law of Iowa with regard to meandering streams, and I would like to emphasize that the law of Iowa in that regard is the general and more accepted thesis than the Nebraska law, which as far as I can find out is almost unique in the fact that the State of Nebraska after adopting the Iowa law in the first Kinkead case then reversed itself on rehearing and stated that they were going to deny the State of Nebraska any right to claim accretion on the navigable streams.

I would like to point out in that rehearing case the Nebraska Court stated that both theories were acceptable, both were based on sound and sane reasoning, but in their opinion their course of action was better for Nebraska. It so happens that Iowa adopted the other theory. I don't want to repeat too much of this because it's in the brief.

The evidence here, I think the Court will agree, has been very complete, I don't think anything that could aid the Court has been left out by either side. I would like to point out though that there are some basic rules of law which I think the Supreme Court

expects us to follow and their propositions would have to be kept in mind, not only in arguments but in the determination of the final decision -- and, of course, I can't find it. Again, I may have too many of them but I think they, they come up all the way through the briefs.

I think we should keep in mind the law of avulsion and accretion. The Courts for sound and basic reasoning on their part, at least, have held that on the Mississippi River as laid down in Iowa versus Illinois, where Iowa attempted to promote the proposition that they should go to the middle of the river between the banks, and the Court laid down the rule that the thalweg. But in that case they also set out the fact that in Iowa versus, or, Nebraska versus Iowa in 1890 or '92, that there is a presumption that the river moves by accretion. Now Nebraska says that's wrong, that we shouldn't use it. Well, I think we'd be derelict in our duty if we didn't take advantage of legal presumptions laid down by the Courts that are going to decide in a particular case.

But there's another reason for that. In the history of the Missouri River when Lewis and Clark came up the river in their journey the Missouri River ran almost from bluff to bluff. They used to speak about traveling all day when Lewis walked, in fifteen or twenty minutes, walked back to where they left that morning, but the flood of 1881, which from all the arguments indicates that the grand-

daddy of all floods came down the Missouri Valley and almost channelized the river, it shortened it some seventy, eighty, ninety miles, I don't remember just exactly, the mileage on the river. From that day on there were very few avulsions in the legal sense, in the sense that the river avulted around a substantial identifiable piece of ground. There have been thousands and thousands avulsions around sandbars and small formations in the river. There have been thousands and thousands of sandbars and small, small vegetation islands destroyed in the Missouri River, but in a legal sense that's not an avulsion. The typical avulsion, even demonstrated by Dr. Gililland, the expert from Nebraska, who gave us the freshman lecture on geology, the typical avulsion is Carter Lake, a complete loop, McKissick Island; there are very few avulsions until there's almost a circle been completed in the legal sense.

The case that comes to mind is the towhead, I believe between in the case of Arkansas versus Tennessee, and don't hold me to that, but I'm sure it's in the brief, Nebraska cited it and we cited it, where the Court indicated that they were holding that there could be an avulsion in the bed of the stream, and that's about as far as the Courts have ever gone is in that case. But there they emphasize that they felt it was an avulsion because this large substantial, in fact, I think they used the word "massive" towhead had developed in this bend in

the river, and the Corps tried two or three years to cut a canal through it and move it to the base of that arc, but they were ineffective until a flood and then for some reason the river took these canal channel and they held there that there was no argument in which state the towhead developed and in their opinion it was substantial and massive, and they concluded it was an avulsion. But if you'll read that decision you'll also find that it really wasn't below high water mark because the Court said "We hold that this was an avulsion even though the waters (sic) of the river (sic) infrequently overflow it." Well, I suggest that the islands that are in dispute in this case are infrequently inundated even today with the control on the Missouri River, and definitely before 1943.

I point out that both Nottleman and Schemmel are within the flood plain of the Missouri River, they are both riverward of the Army Corps government dikes. For this reason we feel that the presumption in our favor that the river moved by accretion is effective.

Now, the next proposition I think is material to keep in mind is set out in our brief, and that is with regard to the movement of the boundary, and I'm talking now about pre-1943, where the movement of the river by natural, gradual and imperceptible processes of accretion, washing everything in its path, the boundary follows the stream. But you will note in there, in the brief, and without

argument that the authority for the fact that man has something has something to do with that movement, or the Corps of Engineers, doesn't change the rule. If the Corps moves the river gradually, slowly, and imperceptibly it's accretion. If they block up the river and shove it around, a large identifiable piece of ground, and it's identifiable afterwards as the same ground, then it's an avulsion even though it's man-made; and Iowa ascribes to that rule the same as we do all the other rules laid down by the Court, because we feel that they are based on experiences, prior cases.

The proposition which was discussed here between the Court and the counsel for Nebraska about what it means to cede property. When one state cedes territory to another from time immemorial it has never affected private owners, private titles, and we don't think that it was intended that any private title should be affected by the 1943 Compact.

This case is here because Iowa and Nebraska can't agree on what they ceded, and particularly in the two islands where most of the testimony was performed. Simply stated Iowa believes that when they make an investigation, as they did in Nottleman and Schemmel and they find that at some time in history the land involved is not in existence and that the river is to the west of it, and has always been to the west of it, they have no duty and it would be an ineffectual effort to go over and find out what Nebraska did when the evidence is to the effect that

the land was never in Nebraska. And we feel that what the Nebraska courts did is void. We can't take title to the Douglas County Courthouse just because I can get somebody on the street to give me a deed to it and I record it over here in Iowa, and then ten years later go and say "Well, I own this, you're going to have to get the Courthouse off of it." It's as simple as that. The courts and the authority of Iowa shouldn't be allowed to interfere with the titles in Nebraska, and vice versa.

Now when we get to the question of cede, Mr. Moldenhauer said that, up to this point I think that he agrees with me, that you're only giving jurisdiction in dominion and sovereignty, you're not giving the property, and when Nebraska ceded to Iowa they didn't give Iowa title to any land that was owned by Nebraska citizens or owned by Iowa citizens on the Nebraska side of the river, which the law of averages there should have been some, but from that point on we differ. He thinks, he feels -- although I can find no authority for it -- that merely because Iowa was a signatory to the Compact, when she said "cede" that she was giving up her private titles, Iowa's private titles. Now I -- that I can't follow. If Iowa or Mills County or even the City of Glenwood owns some property out on the river I don't believe that the Compact would affect that title, and I don't think it was intended that Iowa should give up any of her privately owned real estate under the term of cessation.

THE COURT: However, let me get that, when you say privately owned, you mean State-owned?

MR. WALKER: State-owned.

THE COURT: State-owned, County-owned, Government-owned.

MR. WALKER: How do you differ between the title in Manning Walker and the title in the State of Iowa? They are both merchantable, they are both transferrable, and I can't, I can't differentiate in my own mind why you can talk about private titles on one hand as it being something different than State-owned titles.

Now we have set out in the brief, and I don't intend to go into it here, but there's, there's authority in there to show that even though one state can prevent another state from owning property within its boundaries, it's quite common for them to allow the other state to do so, and there's cases cited, and they say that they can hold that property and their title there is good as long as the state that the state that the property lies in allows it. Now we feel that under the Compact Iowa had no intentions of giving up any real estate for the simple reason there was no reason to. Nebraska owned no real estate, they had no real estate to give up, and when you're talking about compromise, which I want to avoid, because Mr. Murray is going

to discuss it, compromise presupposes that both sides give up something, and I have yet to find anything in the, in this case where Nebraska has in any way stated that they gave up anything. They say it changes all Iowa laws but it doesn't change Nebraska laws; Iowa gives up all their land but Nebraska doesn't give up any land, so when you talk about compromise I think you have to get a definition of compromise.

THE COURT: Well, when you say that though, Mr. Walker, it seems to me that the contention is that nobody knew who owned what land.

MR. WALKER: Well --

THE COURT: At that time we're talking about now, nobody knew, here we are, we, just a minute ago you talked about the White Plains, and so on -- we didn't know what was Iowa or Nebraska, that's the troublesome part of that.

MR. WALKER: I want to get into that. I disagree in part, there's no fact, there's no point, no point in me sitting here and arguing with the long history --

THE COURT: I mean, that's their contention with respect to that.

MR. WALKER: I know what their contention is, and as a basis of that, they set out the wild, uncontrolled river, and they, they say that it whiplashed here and there and it whiplashed there.

THE COURT: Well, you agree with that, don't you, that that's the characteristics of the river?

MR. WALKER: Well, up to a certain point, but I don't feel that I should overrule Iowa and Nebraska, or Iowa and Illinois.

THE COURT: No, I --

MR. WALKER: Or Arkansas-Tennessee, Virginia, there's any number that says the river generally, as a general rule, the river moves by accretion; avulsion is the exception. I believe that these Courts were introduced with evidence when they laid down those rules that convinced them that that was a reasonable rule. The fact that Mr. Schwob and Mr. Bailey, as Howard testified, said that the Conservation Commission wasn't particularly interested in the Missouri River prior to the '30's and up until 1943, until the river was controlled, for the reason that it wasn't stable enough to expend time and effort to develop. They might go out and develop an area like Nottleman Island for recreational purposes, and two years later the flood come along and cut, the river cut

right down through it and washed, washed the whole island away.

Now I, I'll grant you that; but the fact is nobody ever tried to locate the boundary except Nebraskan riparian owners, and the reason for that was they could acquire that by adverse possession or by accretion to their land, and if it developed sufficiently to get a few crops off of it before it washed away, fine and good.

You didn't have that in Iowa for the simple reason the Iowa riparian owners knew that they didn't own these islands in the river, and they were used for duck hunting and fishing and wild unnatural territories. And we, we didn't have very many Iowans going out and claiming these islands for the simple reason they knew what the law was, they did claim, and there are plenty of cases, the accretion, because it's not, hasn't been very often brought out here in this Court but, in this case, but Iowa allows accretion to the shore lines and they don't claim it as State-owned, they give it to the riparian owner. The only time that Iowa is different than Nebraska is when it accretes to the bed of the stream, the Iowa bed. And when you get into a question of, of Iowa picking and choosing sites, it's ridiculous because Iowa goes in and investigates these areas and if it doesn't, if they can't establish that it forms as an island, they don't claim it, or they shouldn't claim it. I can't sit here and categorically say that they've never claimed some place

they shouldn't have, because they are human too, these officials.

But they talk about Kirk-Bar and they talk about Paine versus Hall. Now they have had Payne, reversed Payne versus Hall, which is the area immediately above one of the disputed areas here, it's west of the Iowa Chute in the Schemmel area, the accretion land that was involved in the Payne versus Hall is immediately west of the Iowa Chute, on the north end above Albert Propp and Givens. I think there was even introduced a survey, or a map fromthe library of the Supreme Court taken from that case. But in that case the Court held that even though there was a chute which they termed the Iowa Chute, and at which times had running water in it, they said that the evidence was not sufficient to even establish that as a chute for the Missouri River, that there was a swamp inland upriver and there was evidence that it drained from there, but they said in any event it accreted away from that bank, and in so doing threw up a rice paddy, leaving the chute. But in their opinion from all the evidence available in 1921 that was accretion.

Now when Nebraska talks about the river moving over to the Iowa Chute and then avulting back, they're asking this Court to reverse Payne versus Hall, that tried the case almost fifty years ago, because it's in that area between the Iowa Chute and Schemmel Island that accretion is identical with the

accretion of Payne versus Hall, just downriver a little bit.

The same situation existed in Kirk Bar, sure, there was a little water channel around there, but Iowa couldn't prove that that had been Missouri River, or that that chute didn't develop after the land had accreted. There is, there are many places that Iowa probably felt, some individuals felt, we could claim this, but I'm not sure that we, we could establish as such. Why they didn't claim it only they will know but you can point out many places. When you get the tri-colored maps there's lake beds on both sides of the river, miles from the river; well, technically somebody could claim that in some instances.

I have my usual talent of getting off my outline, but I think at this point, Your Honor, I'd like to discuss what I think the issue is in this case.

THE COURT: The -- I think the Court will be interested in that.

MR. WALKER: Well, I have tried to characterize the issues from the --

THE COURT: If we can agree on what that issue is, I've been interested in that all the way through.

MR. WALKER: Well, I think we ought to start

with Mr. Moldenhauer's oral statement, or, opening statement in this case last April. You will recall he stated that after making all of these accusations and other arguments Justice Brennan interrupted him, and said, "Are you saying that "Iowa violated the 1943 Compact?" Mr Moldenhauer said, "Yes, we are." And as Mr. Moldenhauertells it, Justice Breannan said, "Well, why don't you say so and sit down."

Now that to me indicated one thing; that in the unusual occasion when the Supreme Court of the United States invokes their original jurisdiction they limit their original jurisdiction for specific controversies. What Mr. Moldenhauer said, I don't know, I wasn't there, I don't know what all the arguments were; but that statement indicates to me that as far as Justice Brennan was concerned Nebraska could invoke the original jurisdiction of the Supreme Court if they could establish that Iowa violated the terms of the 1943 Compact.

Now how would they go about it? Now as far as the boundary dispute, I don't think the Supreme Court would accept this case as a boundary dispute because the evidence shows that although you can't go out there and pinpoint, and although they said the Surveyor Hart used five hundred foot cords and some places used uneven cords, and now whether another surveyor or Mr. Hart could come along and curve that after establishing the cords, I don't know, to pinpoint accurately, I'm not a surveyor.

But I believe with the exception of maybe two thousand feet the boundary between Iowa and Nebraska has now either been surveyed with some degree of accuracy or lies in the running water of the designed channel. It may not be in the center, but it's in the nine-foot channel. For that reason I don't think that there's any boundary problem that requires the attention of the Supreme Court of the United States.

It's not a parens patria theory because there's only four or five Nebraska citizens that are in any way financially hurt by this action brought by Iowa in, up and down the river. I don't know the exact number, there's families involved, but they're very small considered in this, it's not sufficient to require it to invoke the original jurisdiction of the United States, and I think the cases in our pre-trial statement prove that without any question. So from the arguments and from the briefs and everything else the only issue I can determine is that they say we violated the Compact.

Then comes the question; how did we violate the Compact? And as far as I can ascertain from their theories we are supposed to have violated the Compact by claiming Nottleman Island and by claiming Schemmel Island or Otoe Bend Island, and some way I, I don't quite follow this, we also violated the Compact because we didn't claim some places that we should have claimed, and we settled with some people which indicated we were picking

and chossing who we were going to bother. But I think if you go through the evidence you will, it will show in most instances where the titles to this Missouri River land is involved Iowa was sued, they were the defendants.

In some cases they make their investigation and disclaim, and if they felt they didn't have any claim to it I think that's what they should have done. Now maybe that's picking and choosing, I don't know, I don't know the facts upon which those people decided that. Then on other occasions they came in and defended, and the plaintiff said, "All right, if you, you believe that you own that, let's settle it." So they exchanged documents, setting boundaries between the State-owned land and the riparian owner.

THE COURT: Well, the Courts have always favored settlement, I don't think too much of that --

MR. WALKER: Well --

THE COURT: (Continuing) that it adds too much of a weight because they settle cases, I agree with that.

MR. WALKER: I think it's better for everyone --

THE COURT: I was hopeful that maybe we

could settle this case.

MR. WALKER: Well, Your Honor, I feel that you put Nebraska in a very unfair spot yesterday when you suggested that they try to settle it by accepting Nottleman and Schemmel Islands. They can't do that because they admit by doing so that that's the only reason for this lawsuit, which of course we believe would be, isn't an issue in this case. But by doing that they would have to admit that and I can see their point.

THE COURT: Well, do you say, Mr. Walker, this is a contract case then? When we say Compact aren't we saying contract?

MR. WALKER: Well, the same interpretation.

THE COURT: I think so; the old cases say that; Green versus Biddle, there's one.

MR. WALKER: The old cases threaten to get International Law into it, and all that, but they write down basically is what did the parties intend and have they carried out what they intended.

THE COURT: That's right, I think that's this case.

MR. WALKER: And getting back to that point

of the wild river, they go on after that and show great long periods of negotiations between the states, and correspondence between the Governors, appointment of Committees and Commissions and meetings of Commissions, and all of that; and from that they draw the conclusion that this was just a very general Compact, very general terminology, for the simple reason that there was so much, so many problems that they just couldn't solve them all anyway so let's just make a very general agreement.

But that isn't the history of mankind, and that isn't the holdings of the courts of Nebraska or Iowa or the United States, either one. Most courts feel that where there is long detailed arguments, efforts to reach an agreement between two parties, individuals or states, and they finally agree and they finally reach a written instrument, it's presumed by the Court that they put everything in that instrument that they intended to be there.

Even if the Court doesn't buy that argument, what is there in the negotiations, what is there in the river fluctuations, what is there in the Compact itself that says Iowa is going to give up all of their rights, going to change their laws, not change the common law of Iowa, they would have you believe that Iowa intends to change the common law along the Missouri River only, that we're going to have a conglomerated, high-bred, mixed-up title law in Iowa from now on out; that titles on the Missouri

River are not going to be the same as they are fifty miles from the Missouri River, the titles on the Missouri River are going to be different than they are on the Mississippi River, on the Des Moines River, and the Iowa River, and the other navigable streams, and Lake Okoboji and the other lakes.

We say that Iowa had no intentions of changing their common law or if they had of they'd have said so. I don't think that the Legislature would have ever considered a Compact if there was any inclination there. And again, all of these arduous and long, drawn-out meetings, and so forth, not in one of them, no evidence in this case whatever, in all of this stuff that they put in is there any evidence that Iowa said, "We are going to change our common law," or "We're going to give up our land on the Missouri River." Now don't you think that these newspaper reporters and the Commission's reports and legislative committees, and so on, would have made some little indication there?

The only one that I know of that even bears on the subject is in our brief, and that would be Nebraska State Surveyors laid out the approximate acres that each Nebraska county was going to gain or lose, and if you compare that, that establishes Iowa argument that Nottleman and Schemmel were not in Nebraska, because according to his figures they couldn't have been in Nebraska under that computation. But there is no evidence here that

Iowa intended to give up any of its, any of its common law with regard to title business.

And it's been - they talk about the Tyson case -- I don't like to disagree with the Judge when I'm arguing to him, but I believe the Tyson case rather great detail reaffirms Iowa's common law in many of the abstracts, they, they hold there that --

THE COURT: Of course, he didn't discuss the effect of the meaning of the Compact.

MR. WALKER: He discussed the Compact --

THE COURT: Very generally, he didn't say what is meant or a thing --

MR. WALKER: No, but in his opinion he discussed the 1943 Compact.

THE COURT: He said the Compact, this was not a Compact case, that was all that was said about it, that Iowa was, the land was on the Iowa side of the river by the Compact. Then he went on to say, the last sentence almost, I think he said that cases involving the dispute over the Compact were not in this case.

MR. WALKER: Well, if he held - he held that the, as most courts do, that jurisdictions to

try the title is in the state in which the land is located.

THE COURT: Yes, sure, sure.

MR. WALKER: Well, that's been our argument here from the beginning.

He also upheld the Iowa law of accretion to the bed of the stream.

THE COURT: Oh, yes, sure.

MR. WALKER: There isn't any question about that, he didn't change it --

THE COURT: We're discussing now the Compact, see, we're discussing the Compact. No one, no Court that I've seen in, nobody's cited a case where, where this Compact has been interpreted by any authoritative decision, the meaning of it, such as we got here. Nobody's said what is ceded, what "ceded" means, nobody's said what good title means, and all that sort of thing, under the terms of the Compact.

MR. WALKER: Well, I agree with you there, in other words, it's never been brought up as an issue.

THE COURT: No, that's what this Court's got

to do, that's what this Court is going to do, I think.

MR. WALKER: Well, doesn't this Court though have to consider what other judges have done in regard to -- in other words the Compact was the State of Iowa, the law of Iowa, as well as the law of Nebraska in 1960 when Judge Van Oosterhout entered this decision, and, and if he felt the Compact prevented Iowa from claiming beds in the navigable Missouri River, I'm sure he would have said so. Now the question is --

THE COURT: I don't --

MR. WALKER: (Continuing) does he have to decide --

THE COURT: That issue wasn't raised, that question wasn't raised, that issue wasn't raised, wasn't raised by another signatory to the Compact or anybody else who could raise it in that case.

MR. WALKER: No, but Iowa was in the case.

THE COURT: Yes, yes, but you, of course, didn't raise it.

MR. WALKER: Well, when you get, when you get to arguing there again about what the Compact

meant and with regard to private title, what happens.

Of course, there isn't any dispute that the Compact was in 1943, and there isn't any dispute that Nottleman and Schemmel Islands formed and became islands before 1943.

Now is this allegation of Nebraska that the Compact changed the common law of Iowa retroactive? If Iowa owned Nottleman-Schemmel Island they owned it before 1943. If they have any right to them at all that title vested when the island developed as accretions to the bed of the stream. There again I beg the question that they formed an island, but there are six others that I know of, State Line Island, Copeland, Alden Bar, Saint Marys, all of them south of Omaha, four of them, before the Compact, and Wilson Island and Raymond, north of Omaha, formed before the Compact. And the question arises - -

THE COURT: I think it's fair to say at this point, really my impression is that no one knew where the natural boundary was at that time, it hadn't been decided by either State, by the Engineers, or anybody else, at the time of their discussion, prior to 1943, there wasn't any litigation over the boundary then. Now --

MR. WALKER: Isolated cases.

THE COURT: Well, that might be, but there

wasn't any real determination of anything, that's the reason for the Compact. For instance, we talked about this yesterday, these little things come out, the Engineers didn't bother to ask anybody where the line was, they didn't care about the line, I think all the Engineer witnesses testified to that, they paid no attention to it until after the Compact, and then they started going into court and condemning land, when they were satisfied they were on the Iowa or Nebraska side; but before that nobody knew or cared or paid any attention to it so they made, they dug canals, dug ditches, put up their barricades, and all this sort of thing, all up and down wherever they wanted to, wherever they saw fit, engineer-wise.

MR. WALKER: Yes, but I think they testified here that if it was --

THE COURT: So when you say --

MR. WALKER: (Continuing) bar land they didn't condemn --

THE COURT: When you say this was in Iowa or Nebraska, those two islands, at any specific time before 1943, I think that, that's a disputed proposition, and I'm frank to say that the evidence it seems to me is pretty -- I don't know where it is on that subject.

MR. WALKER: Well, that's why we're here, because it is disputed.

THE COURT: I think so, yes.

MR. WALKER: I, I agree with you there, but --

THE COURT: I mean the physical evidence, I'm talking about now, aside from this recognition evidence.

Go ahead.

MR. WALKER: I would like to point out that there is in the evidence, Your Honor, and I don't expect the Court to read them, but I think you'll recall we presented bound copies of the Nebraska-Missouri River land pieces in each county, up and down the river --

THE COURT: Yes.

MR. WALKER: And, I don't remember the exact number, I think there were some forty-three quiet title actions involving accretion and riparian land.

On the Iowa side we have four or five in the same period of time. Now when people say "We didn't know where the boundary was, we didn't

know what the law was," I think that demonstrates that people in both Iowa and Nebraska, riparian owners, knew the law with regard to their riparian rights, both in Nebraska and in Iowa, and I fully believe that the Iowas knew the Nebraska law, and the Nebraskans knew the Iowa law; and that demonstrates that Iowa farmers didn't go out and claim lands or islands in the river because they knew that the state had some rights there. Nebraskans knew that all they had to do was occupy it for ten years against their neighbors and it was theirs. They go into Court and the Court would verify it.

And I can't believe that the people involved in these larger areas didn't get legal advice, I think it's evident in the Nottleman case, they give the attorney a piece of the land, which as far as I'm concerned if I were in their position I'd do the same thing, and that was to get their title clear, where did he go to clear the title? To Nebraska, because he knew he couldn't in Iowa.

THE COURT: That reminds me of a friend of mine, you know, he wound up with a farm down in western Pennsylvania, see, that he got under a client's will, see. And he was talking to the Judge one day about his farm and the cattle he had on it, and what a nice time he was having living on this farm, and he asked the Judge, "Did you ever own a farm, Judge?"

And the Judge says, "Why, I never had a client that owned a farm."

Go ahead.

MR. WALKER: I think if you will bear with me I'd like to go over, I would like to now go to Nottleman Island in the, the evidence --

THE COURT: All right --

MR. WALKER: (Continuing) we feel --

THE COURT: All right, I'd like to hear that.

I want to say before you start there that I todk my law clerk down there yesterda to Rock Bluffs, got a little orientation for him to look at these maps. Mr. Schebe there, the general manager of the elevator, happened to be there. He said, "Do you want to go to the top where you can look over the willows and the cottonwoods and see the land?" So we got in that little wirecage that he has there. We shimmied up the side of the ladder and got to the top, it's a nice view over there. We discussed, of course, the high water mark there I think three years ago, he said the place was covered with water, three years ago, he was worried about a break in the channel, and the, in the west bank of the river where the, where the riprap is in, it apparently held, you see.

MR. WALKER: A terrific flood in '52.

THE COURT: What?

MR. WALKER: A terrific flood in '52.

THE COURT: Well, no, he was talking about a few years ago, I think Mrs. O'Brien, or somebody, Mr. Babbitt, or somebody said they lost their crop, wasn't that --

MR. WALKER: Sixty-seven, I believe.

THE COURT: Yes, '67?

MR. WALKER: Yes.

THE COURT: He was talking about that flood.

MR. WALKER: Didn't anybody try and get him to start practicing law in that old town?

THE COURT: He seemed quite surprised to find out that Iowa was claiming anything more than the taxes on the land, I'll say that.

I said, "Well, Iowa is claiming the whole thing."

He said, "Well, I thought they were just claiming the taxes."

MR. WALKER: He had about the same grasp

of this case that I have.

Well, our first exhibit is the 1879 map. This is again just history. I don't think it has any bearing on where the land formed at the time it was formed. The same way with the 1890. These pink areas were put on here by Mr. Bartleman.

I'm trying to do this chronologically because I feel that it's vital for the Court, if the Court feels it can make any determination on the evidence that this island, and, of course, here again we're not representing that pink area as exact, in fact, our witness demonstrated he wasn't the greatest in the world, but he did the best he could, and that's the general area that the --

THE COURT: Who was that witness again?

MR. WALKER: A young fellow by the name of Bartleman.

THE COURT: Oh, yes, I remember him.

MR. WALKER: We had him insert these just the day before he went on the stand and he didn't have time to do it, he didn't know what we wanted, he had to do some of them over on, after cross-examination, as being too far off.

But that brings us up to the 1890 area. The only other evidence that we believe is competent, for the period of time from 1900 to 1923 are the

photographs that were located by the witnesses Roy Cole, an old gentleman that lived on a farm south of Plattsmouth. He took some pictures on top of King Hill and he took some pictures of his lady friends at the base of the hill. Now Nebraska introduced yesterday those of the ladies in the backwater between King Hill and Queen Hill.

I think here again these pictures, although the Court has even expressed the doubt as to the validity, as to the probative, as to the probative value of this one that looks like Lake Michigan, but I would like to point out that they were taken during the years 1908, 1912, 1916, I believe, possibly some of these in '18, but the records, the brief sets those dates out.

And these, this is the only photographic evidence that I've seen with regard to the river between approximately 1900 and 1923, and it demonstrates the fact that even though there was cutting on the Iowa side, which we had volumes of testimony which I felt narrowed down very much what their expert witness says that flowing water cuts, and that was with regard to my question as to whether or not a chute could cut, and he said, "Yes, flowing water can cut."

But these pictures demonstrate to me that the river between, during the period of time that they were taken, was wide, it was large and it was cutting into in Nebraska as far as it could cut, and when it got to solid old Queen Hill and King Hill it

couldn't cut any farther, but the minute it got to a soft spot between the two hills it cut back, it cut on both sides. And on this testimony of cutting, I think is valueless as far as proving where the thalweg in the main channel is concerned.

And the Court has indicated concern over whether or not there is enough evidence of boats to establish boat tracks. I agree with him, I don't think there's enough boat tracks to establish anything, and they're contradictory, they're on both sides of the island. We do feel that this testimony about by the two gentlemen, that there were boats in the Iowa Chute, and all you have to do is read their testimony, one of them says the boat was thirty by forty and the other one says twenty by thirty, or something like that, but neither one of them of any consequential size and there was water in the Iowa Chute, we don't deny that.

The next exhibit is this 1923 Hydrographic Survey by the Army Corps of Engineers; and on there we have Mr. Huber draw the thalweg. Now we had Mr. Huber because in our opinion -- Nebraska doesn't agree with us -- he's probably the most knowledgeable person living with regard to the Missouri River and its design and as to its natural stage of what the river wants to do when it's not controlled.

I don't think that it takes an expert to draw the thalweg on that if you give credence to the crew that did the sounding. All he did was follow the

deepest soundings. You or I could do that. So that there was a lot of testimony introduced by Nebraska to point out that soundings aren't reliable -- they go down the river too fast, they throw the line ahead of them, and they are more interested in getting the job over with than they are of getting accurate soundings.

But all I can say is a sloppy sounding of that channel is just a hundred percent better than no, than no evidence at all, and until they can establish that this particular crew or this particular sounding was inaccurate I think as a permanent record of the Army Corps of Engineers and the public record, a record on which they relied, that has to be accepted, that in 1923 the area later occupied by the island is basically in Iowa.

There are some there, now I can't see any -- Mr. Moldenhauer said that somewhere up in here Tobacco Island extended down in here someway, and then it was cut off. But this doesn't indicate it. But if it was, Tobacco Island did develop over here, it was developed in Iowa.

Then from that you go to the 1926, '25 or '26, we refer to them as '26 aerials, 692 and 693 are the same, just a little bigger. This one has the island put on it and this one has the island marked, this is the Nottleman (sic) Island area. You can always follow that with that lead design in the center, which evidently is the higher ground. Again Mr. Huber marked the thalweg, and again I think you or I could

have marked the thalweg on there from, just from that photograph.

The east channel is according to the photograph is almost choked with ice up here, so winter reconnaissance and open all the way on the west side, which indicates the deeper water stays open longer.

THE COURT: Is that '26 there, that one you're looking at?

MR. WALKER: These two are '26, both of them.

THE COURT: '26.

MR. WALKER: They are, this is the Army Corps map drawn from these reconnaissance photos, and on that we have the island superimposed, where again the main channel as it appears on there is to the west of all except the northwestern corner.

Here is Rock Bluff Bend has been written in by the cartographer, which you could argue was his impression of where the channel was. That's why we have emphasized the pictures with that because anyone looking at the two could locate the channel and then indicate it on the map.

And then again Mr. Huber, I believe he testified that he started to work for the Corps in Kansas City about 1926 as a young man, and he worked for

them all his working life, that was the only job he ever held, and --

THE COURT: Didn't he open the Omaha office or came up here when the Engineers' office was first opened in Omaha?

MR. WALKER: Well, I think it was Florence, which is now part of Omaha.

THE COURT: Well, I mean, yes, Omaha --

MR. MURRAY: Shortly after.

THE COURT: At the time he came here it wasn't in the District, was it, it was in the Kansas City District?

MR. MURRAY: It was in the Kansas City District, and then they split the river at Rulo.

THE COURT: Yes, and they organized the, what is now called the Omaha District?

MR. WALKER: I believe it was shortly after, I believe it was shortly after it opened, because he was a civilian and the Army opened the office and then they --

THE COURT: Sure, that's what I say.

MR. WALKER: 598, I believe, is underneath here, oh, here it is, a portion of it, of the thalweg. We have that again because that is the same as this, but it has the island mark and the thalweg marked by Mr. Huber again. So these four are really all the same, those are based on the pictures.

Then we have the 19 - yes, that's the 19 that we have, and that's nothing but an enlargement of one of these mosaic pictures, so they are both on there.

THE COURT: Yes.

MR. WALKER: In 1930 we have 595 and 1041. Now that is an enlargement, again a mosaic, two pictures of the island in 1930, and this is the Corps map drafted from these pictures, and the island is superimposed there as well as the Huber opinion as to where the thalweg ran.

And again the only thing west is the small tip.

THE COURT: Well, they didn't have any record, now let's get this, as I understand it, the Engineers didn't make any written record, contemporaneous record, when they drew those maps as to where the thalweg was, did they, this is memory testimony, by looking at the map by a witness, the thalweg?

MR. WALKER: Not directly, no.

THE COURT: What?

MR. WALKER: The only thing that would indicate the thalweg as far as they're concerned and anyone using those maps would be the soundings, the hydrographics that they did for, to locate the water depth for anybody's use, including their own.

THE COURT: They had no reason to say "This is the, this is the boundary," because this is the boat track or this is the deepest water, so this must be the boundary, they didn't make a finding on that?

MR. WALKER: No, they had no intentions to, and wouldn't be caught dead saying where the boundary was. The only reason for it was, as I could see it, would be the possibility of navigation, but even then it wasn't, in the '20's there wasn't any navigation to speak of, commercial navigation.

But I think the reason for these, and as far as we can find out, these were the first, the 1923 were the first aerial photographs. And the reason they did that was, I believe, for preparation of getting the general idea of the river and planning how to control it, which they did seven or eight years later start to work on it, but there was a lot

of planning that went into it, and part of it were these reconnaissance flights and reconnaissance maps and hydrographic maps; and for them to control the river I think everyone will agree that the testimony of the river men, the Army Corps men, they felt that it was easier and less expensive if they could put the river approximately where it wanted to go.

In other words, they didn't want to take all easterly bends and put them all on the west side of the river, they didn't want to change the whole river, they wanted to start from necessary points such as bridges and hard points, and then put the river about where it wanted to go and use the force of the water in the river itself to control it, and I think that what they did demonstrates that.

Only on a rare occasion would they fight the natural flow of the river a hundred percent, and transfer it across the river, if they could develop it into a smaller bend or a larger bend and could work it into the next reach by using the water, it was quicker and easier. And I think they testified that not up until about 1936 that was the only way they controlled it, and then they started using canals in some places where it was feasible.

But in 1930 I think it demonstrates again that the land was forming as an island and was in Iowa. In 1931, I have these two; now the Exhibit 371A is a hydrographic survey by the Army Corps of Engineers where they have sounded the channels,

both channels are sounded.

And again on there we have the island superimposed in the deeper channel or what Mr. Huber considered the main channel, is superimposed by him.

Now the Court can see that this channel is sounded as well as this one, and you can, you can find the deepest channel without being an expert in the field.

This 1044A is this basic map used by the Corps of Engineers as a construction map. But you'll notice that the islands, the sandbars, the channels are here, and they have used this map and convereted it for their construction purposes, and put the designed channel on it, and they have used it to show their construction of dikes and revetments.

In 1937, we have, I believe this is the map, this is the 1937 aerial, and just continues the development of the island.

THE COURT: What's the number of that?

MR. WALKER: 588, a 1937 aerial.

THE COURT: I want to have that on the record.

MR. WALKER: 597 is the 1939 aerial, 599 is the 1941 aerial, which I believe is the last photo-

graph of the area prior to the Compact, and it would be the one nearest to the AP maps which were in 1940-41, although they were adopted in the Compact in '43, see.

THE COURT: Yes.

MR. WALKER: Now we feel that anything prior to 1923 in the Nottleman Island area is, has no probative value because the island was in Iowa as it was forming, and it has always remained there.

Now basically the Court will see that there were some of that area that's now island was in the river and the thalweg was, the deepest part of that river, was east of the northwest edge of the island. But what island had formed was east of the river, east of the main river, as far as the Army Corps recording and as far as Iowa was concerned.

Now you get into the testimony, oral testimony of the witnesses in regard to Nottleman Island, you have complete confusion and contradiction. The plaintiff had Nebraskans and Iowans testifying for them, the defendants had Nebraskans and Iowans testifying for them, and we could go through their testimony one by one. But as far as I'm concerned, and I belive as far as the Court is interested, with the exception of one or two that had definite personal interest and indicated it, as a general rule the wit-

nesses testified just exactly as to what they remembered. I think they were honest and candid with the attorneys and the Court, and I don't fault any of them. If they had agreed on where the island was and how big it was and how big the trees were and where the deepest water was and where the boats went, then I'd be suspect.

But take a look at that area; you have witnesses testifying that they are standing on a hill over in Nebraska, and he sees certain things, and he tells us what he remembers, what he saw. You have another man standing up the river on Queen Hill, and he's testifying to the same river; it doesn't agree with the man that just got off the stand, but it's because they are looking at it, they are looking at that river from a different angle, from different years, from different seasons.

THE COURT: Some of them have girls with them at the time.

MR. WALKER: Yes, they weren't even looking at the river. That's why I'm glad our boys that were popular with the girls took their cameras along.

THE COURT: I see.

MR. WALKER: But I don't think the witnesses could be faulted because they didn't agree, and even

some of our witnesses didn't agree entirely. Whitney Gilliland, Mr. Moldenhauer said that he testified, he did, he wrote letters in which he testified, but in his deposition we get to talking about where, where was he when he saw the river, and he finally concluded that he was quite a ways upstream, maybe it wasn't the same island, and then he finally says "Well, I don't know whether the east channel was the biggest channel or not, but it was of at least equal dignity with any other," and I suppose that there were times in history when there were two channels there of equal dignity, I'm not going to say that just because he was an attorney for the claimants that he in any way said anything that he didn't honestly remember and believe, he has no interest in it now and he wouldn't if he did.

So I realize that the witnesses were put on the spot, Mr. and Mrs. Eyler testified that the river was cutting, but they flatly refused to say it was the main channel of the river. I believe maybe she somewhere in her testimony or deposition said "Well, I assumed it was." And if you see water coming over and cutting out twenty foot slab of dirt, you would naturally assume that it was a substantial river; but at the same moment it might have been cutting out twenty foot of dirt over on the other side of the river which the pictures and the testimony demonstrate.

So from the standpoint of oral testimony I don't

believe that the plaintiff either in its oral testimony or in its documentary testimony has carried the burden in this case. Now I talk about burden advisedly, because my impression of our original meeting with the Court and our original approach to this, it was on the theory that it was a friendly lawsuit, that all we were searching for was the truth, that we weren't trying to pull the wools over anybody's eyes, and come up with anything other than a decision that is just and fair to both parties.

But as the Court indicated yesterday this hasn't developed into the ordinary friendly lawsuit, and Nebraska as the plaintiff filed a reply brief, they have now asked for time to make rebuttal, and I believe that they assumed the position of adversary plaintiff and they have the burden as plaintiff to establish what they have alleged. I think that their briefs also set out the Supreme Court's indication that when one state accuses a sister state of wrongdoing that they not only have the burden normally cast upon the plaintiff, but they have the burden of proving that to the satisfaction of the Court with clear and convincing evidence. So I think that they have that added burden here because they have accused Iowa of violating the solemn agreement.

I don't -- I would like to have a recess.

THE COURT: All right, I would too, I agree with you.

The Court will take fifteen minutes.

(Short recess at 10:40 o'clock a.m.)

THE COURT: All right, gentlemen.

MR. WALKER: Your Honor, my argument so far may not have indicated it, but Mike and I did have a more or less of a format to present this argument. Primarily I was going to in part answer Mr. Moldenhauer's argument insofar as the history was concerned and also as to Nottleman and Schemmel Island, and I was hoping to and will try to answer the Court's inquiries in his September 10th order as to points 1, 2, 5 and 6.

That would leave the general river to be answered by Mr. Murray and also the Court's points 3 and 4 with regard to compromise. I hope that I don't overlap too much, and I'll try to confine myself to what was assigned to me.

But in Mr. Moldenhauer's arguments, and I believe in Nebraska's brief, they quote extensively from the Missouri River Planning Report that was dated I believe and put out for public consideration in 1961.

And yesterday he read this statement: "The past violent fluctuations in river water levels have been so frequent that changes in channels, bank location and bars, et cetera, made it virtually impossible to describe the state boundary or to determine land ownership on the Iowa side. It hasn't been necessary to tie down the line between

state and private ownership because development for recreation was not considered feasible because of constant change."

Now I read that for this reason, that we admit the conditions in the Missouri River in its natural state, but we want to emphasize that there wasn't any real purpose for tying down the state boundary prior to control by the river, and when they say we, and there were State of Iowa officials, no evidence on where they based their opinion, said "You can't locate the state boundaries for control by the Corps."

But I want to point out that in individual areas you just can't categorically say that the State boundary couldn't be located there as between Nebraska and Iowa riparian owners. They and their neighbors can establish where the boundary was, and I think we have the history that game wardens, and in prohibition days the Revenue Department, they found out where the state boundary was when they made arrests, and in case the Court doesn't know it, the Missouri River with its island was a great place for a still, and there was quite a few of them up and down the river, and they always found jurisdiction in any specific area that they needed to.

I have covered the exhibits in regard to Nottleman as far as I'm concerned. Now Mr. Murray will have other exhibits, and I have presented those to the Court which I think document

where the deepest channel without argument was and which we submit to the Court as being the thalweg, based on that proof only, it was the deepest channel.

Now I don't know whether this Court or any other Court would want to say that that is the thalweg, and therefore that is the boundary; but the exhibits that we have picked out demonstrate what we feel was the boundary after the island formed and up to the time of the Compact. Now where that spot under the sky was before that I don't think is material. If the island that we're talking about today formed in the early 1920's in Iowa, remained in Iowa until 1943, it belonged to Iowa, and whether or not the Compact changed Iowa's title laws, it had good title prior to 1943 and it still has it, and the Court says you -- the title doesn't swim out from under it, and I don't believe that the Court will make a retroactive repeal of Iowa's common law.

Now going to Schemmel Island I have done the same thing, I have picked out specific exhibits, not that they are the best exhibits to demonstrate our point, but which I think not only demonstrate a point but have been superimposed with the island and our opinion testimony as to thalweg for the convenience of the Court.

And there again I introduced the 1879, the 1890, and as the Court knows there is quite a blank between that and when the Corps started making rec-

ords again, and we go to 1923.

Now in 1923 the river fits the description of an abraded stream as testified to by Dr. Brush. And we didn't call Dr. Brush to put another issue or another problem in the Court's lap; all we want is to demonstrate primarily and originally was the fact that you can't decide this case as a general proposition because when you talk about a wild and uncontrolled river before the Corps started channelization work the river wasn't of the same characteristics along the Iowa and Nebraska border. We submit that with the influx of the Platte River, the Platte is of such size and volume that it changed the characteristics of the Missouri River.

We do that to point out that each individual island has to be considered separately, each individual area has to be considered when you're trying to determine where was the boundary, whether you're doing that by the boat tracks or whether you're doing it by the deepest water or the widest water or any term you want to use. And we feel that this amply demonstrates what we're talking about, the abraded stream is one that is full of sandbars and small islands, and in addition, now here's underwater bars that are just outlined, which as I understand it indicate it hasn't yet risen above water.

This whole area is interspersed with islands and channels and -- but in 1923, and I don't think anybody can argue the point, assuming that this island imposed on here is with some degree of ac-

curacy is all in the river. But forget the idea of where it was, where the thalweg was, our expert says the thalweg was here. And again merely took the deepest soundings. And that leaves a little slice over here in Nebraska.

But basically the spot under the sky in 1923 according to that document was in the river, these sandbars are not islands. Here it says small willows, sand and mud, no designation here. This says willows, in the center of that big bar.

But basically it's sandbars, underwater bars and water. So we feel that anything prior to 1923 is irrelevant, it doesn't have any bearing on this case. So we go from 1923 to the first Corps photographs. We have a mosaic here with the thalweg superimposed by Raymond Huber, and we have a mosaic of the map, survey map made by the Corps of Engineers from those photographs. And there again it demonstrates that the Corps people indicated sandbars, one spot with willows, and the rest of it is either in the water or shallow sandbars. And they arrived at that from these areas which demonstrates the same thing, that there's channels all through that area; and again in 1926 it didn't matter where the island was, it was in the river, and it wasn't possessable.

And from there you go to 1928 where the channel has started to concentrate, and the thalweg was right down through the island, a third approximately west of it. It does overlap a little bit on accretion-

ary sandbars on the Nebraska side, the rest of it is either in Iowa or in the water.

In 1929 we introduced a map that we acquired from the Otoe County Surveyor that he had on his wall in his office, and we got ourselves a copy. Now there again I don't know whether that map was drawn by an individual that actually surveyed the Missouri River and the Missouri River islands or not, but it's the only '29, it's the only one that fills that void, and on that the island is in Iowa.

From there you go back to the Army Corps records of 1930. I don't believe that photograph is 1930.

MR. MURRAY: Yes, it is, but you missed 1928.

MR. WALKER: Photograph?

MR. MURRAY: No, map.

MR. WALKER: I show this photograph because again the island outline has been superimposed. This is a blow-up of 1092A, and this is the Missouri River map drawn from the 1930 aerials, and these are the two '30 aerials.

Now here again, except for this accretionary mass here on the Nebraska side, the island is either in Iowa or in the river. Now on this particular photograph there's been quite an issue made

of the fact that Mr. Huber drew this thalweg here at one time, and in some other case, and I may be wrong, maybe he drew it here in this case and there in the other case, but he testified two different times, and one time he put on this side with a clump of little sandbars, and the other time he put it over there. I believe in this case it's the green line which he put on the Nebraska side.

THE COURT: I have a small feeling that Nebraska thinks he's pretty partial to Iowa.

MR. WALKER: Well, I know they do, Your Honor.

THE COURT: What?

MR. MURRAY: I know they do, but we're --

THE COURT: How many cases has he testified to for Iowa, do you know?

MR. WALKER: One, if you'll pardon me, he testified in the Tyson case.

MR. MURRAY: No, three.

THE COURT: Did he? Did he ever testify for Nebraska? You know, when you're talking about experts --

MR. WALKER: I don t know whether they ever asked him.

MR. MURRAY: They've never been in the case before.

THE COURT: Oh.

MR. WALKER: This is the first time that Nebraska has been involved. He's a resident of Omaha.

THE COURT: You know, in my experience as a judge, you know, you see witnesses are all one side, it's like people in the Courtroom, they tend to take sides, it's human nature.

MR. WALKER: Well, he's retired, and he enjoys the opportunity --

THE COURT: And the emolument that goes with it.

MR. MURRAY: And the emolument that goes with it.

THE COURT: Sure, I don't blame him.

MR. WALKER: But I think the Court, as an attorney realizes --

THE COURT: But sometimes you know you have to choose between witnesses, experts --

MR. WALKER: Yes.

THE COURT: (Continuing) as to which one you accept, not because they're influenced by anything other than what they think, but what they believe, but you got to look behind their thinking, the basis of it, take one and reject the other, that's the trouble with it.

MR. WALKER: Well, I'd like to point out too, Your Honor, and I think Nebraska will verify this with me, if you attempt to get an active employee of the Corps to testify, you have to go through the Attorney General's office and subpoena, and all that, this man is retired and he's available --

THE COURT: Oh, yes, I know.

MR. WALKER: But I do think that his qualifications are without a doubt the most superior in his field that was presented in this case, because he spent his whole lifetime with this, and actually what he did in this case, as I have pointed out before, and I think that you and I could do it and I'm admittedly not an expert on the Missouri River.

THE COURT: Well, I'll agree with you that

I'm not. I'm learning, I'll put it that way.

MR. WALKER: And then I brought out the '28's, '29's and '30's, which I feel will help the Court, and from there we go to '31, which are over here; and there again it's a hydrographic survey in 1931, and I'm not sure of this but I think it's the soundings and the hydrographic survey are placed on - I may be wrong -- it's dated 1931, but it's the hydrographic survey, which means that the river was sounded and the soundings placed on it for the convenience of the Corps.

This is the construction map that the Corps used this basic map to start their construction plan and design and placed it on the river of what they hoped to do with their - and then of course a lot of these dike lines and revetments and other items that were added over the years. This is the basic map which they started with on the construction of the Corps.

Now there again, there was an accretionary mass over here that was in Nebraska. The --

THE COURT: Do you agree that that work, some of that work along there, moved water from the east to the west, do you agree?

MR. WALKER: Well, Judge, it had to move water from the east to the west --

THE COURT: That's what I mean.

MR. WALKER: Because this is all water. The primary portion of where the island is today was water.

THE COURT: Then?

MR. WALKER: Then, and to put that channel over here as they did, this water had to be blocked and brought over there. This channel is the one that they contend was the main channel, this little narrow one is marked "Shallow" and too shallow to sound, and so --

THE COURT: Well, if that's so, I mean, if there's water on that, on the east side and there's land there in the river rather than being under the water, and you move it across, aren't they, aren't the Engineers making a so-called avulsion or else there is a finding there, should be a finding there that the land, that the island was on the Nebraska side prior to Compact.

MR. WALKER: No, Your Honor --

THE COURT: Why doesn't that follow?

MR. WALKER: No, it wouldn't follow, because if you recall the testimony, the Army Corps of

Engineers when they put in these dikes they put in what they call permeable dikes. They wanted the water to flow through those dikes, they didn't want a blockage, they wanted a slow, gradual build-up downstream from those dikes, and they wanted this east channel to be kept open. They wanted water to pass there to take the pressure away from their structures.

And there are cases in Nebraska that the facts are the same as the, identically as here, where the Corps or other, there are some out-state cases, I think, that were cited in our brief, pre-trial statement, where they say that the movement of that river across there, unless it goes around substantial identifiable land it's accretion, because, and again, and I think the evidence, and to be fair with the Court, they testified that they didn't want to destroy these sandbars, and even under-water bars, because that's what they wanted, they wanted that build-up so they would use water equipment as long as they could, and in most of these bars they cut through, either washed through with the paddle wheel, or they went through it with a short dredge so that they could keep their driver moving, but not wash out the basic sandbar.

Now we feel that when they're talking about an avulsion, you're talking about land that is fully developed, vegetation, and it's substantial. There isn't any of that here, there isn't any substantial lands here, and the pushing of the river over is an

accretionary action and the Nebraska courts have held that, Iowa courts have held that, and I, I'm not sure, but I think the Federal courts have held that. And the mere fact that they cut through a sandbar and try to preserve that base, that bed, or build-up doesn't make it an avulsion.

Now if you were talking about the island today, or even 1943, but it really wasn't too fully developed even then, the -- you had trees on it, you had vegetation, and occupancy, and if the river had been on the east side and the Corps had gone in there and blocked that east channel and moved it around the island, to me there wouldn't be any argument at all.

But they didn't block the east channel in 1934 when they started to work there, they didn't want to block it, and they testified that their dikes were put in permeable intentionally. Now up river today, in those days they were putting willow mats and sinking them with a few rocks. Today they go out there with their dike lines and immediately bring barges in and dump rock on both sides of that dike above water level. But they still say those are permeable, we used big enough rocks, it's a bridge, and the water can flow through and carry the silt and the sediment through there for a number of years so that there won't be a constant stress against those dikes by the flow of the river while the river is channelizing itself around the dikes. So even today with the rock they don't block it.

What I'd like to point out here is that the -- unless the Court determines that these sandbars had the identity of islands, why then we feel that this was a pushing of the river over and that in the movement of the water by the Corps it eroded away the accretionary land on the Nebraska shore up here, and later we want to talk about the canal which as I understand it ran approximately a mile through here.

But unless this land was identifiable it's not Iowa's concern, the Army Corps destroyed it and as the cases have said it's still an avulsion or accretion according to the rules of law, and we feel that in this case it was an accretionary movement and that the island build-up behind that movement, which wasn't very far, if this was the thalweg, it was not, on this there isn't any island west of the thalweg. The only thing that the Corps destroyed was the accretionary bank of the Nebraska shore.

From 1931 we go to 1936, and that this shows further development of the island, and the same for '37, '39, '41, '42 and '45. These demonstrate what I was talking about, I was talking about sandbars, there's none west of the thalweg, or deep water, whatever you want to call it. So actually in this area there wasn't any destruction of Nebraska land, even if they, if there were islands out there, unless, in your Court statement you were concluding that the east channel was the main channel.

But unless you conclude that, why, it's, it isn't an avulsion because there weren't any islands west of the deep water.

Now in both Nottleman and Otoe we have the, we feel, corroborating the evidence from the trees that were cut, that more or less bear out our theory of when and where the islands developed. I don't know why the tree experts differed as much as they did or what, all I know is that we got a third one to get an independent reading and he more or less corroborated Iowa, he said there was possibly one year, to several others, some kind of a ring that he didn't know whether it was a false ring or a true ring, but he, in most cases, and it's in the brief and I'm not going to go over it here, but in the Otoe Bend area, Nebraska has contended that there was an avulsion from the Iowa chute and they have a tree that they, their expert, Mr. Weakley said started to grow in 1895; Dr. McGinnis and Dr. Bensend said in their opinion that it began to grow in 1903.

That, as Howard says, doesn't destroy their theory of the avulsion around that tree, because they say the avulsion occurred sometime between 1895 and 1905, so maybe the avulsion occurred after 1903, but when you are speculating to begin with and you come into Court and say, well, there was an avulsion between 1895 and 1905, they have cut it down, their speculation, from 1903 to 1905. And I don't know what happened in 1905 that estab-

lished the avulsion. To me, the tree didn't because I submit that as Dr. Ruhe said, he accepted Nebraska's evidence when he made his investigation and drew his original report.

He later found out that two other experts said the tree grew in 1903, but in his report he accepted 1895; and he said it could have existed because it was right on the west bank of the right bank of the Iowa chute; and he said it could have started to grow in 1895, and a little sandbar and the river moved from there on over; but in his opinion it didn't because the soil and the contour of the west bank of the river shows a natural levee build-up as all streams will from overflow, and the land there, the location of this tree, indicated that it developed prior to the westward movement, and during the westward movement of the river, the left bank of the river.

Now they -- Howard didn't mention this, but they did have an old gentleman out here by the name of Elmer "Buck" Garrison on the stand, and he talks about the river jumping, but if you'll examine the evidence you'll find that what he is talking about and the only one that he claims to have known, he knew the river was in the Shwake Chute one day, and a week later it was a mile west. Well, a mile west puts it about where it is today from the Shwake Chute.

So he couldn't have been talking about that because we know the river was where the island is to-

day since then, so if there had been an avulsion then, there's been an accretion back. So when you start with an avulsion you have to end up with it, and there's no evidence here -- there could have been an avulsion fifteen times around those various sandbars, there's no evidence to the contrary, how can they pick out the time, say, 1895, 1905, there was an avulsion? I don't think there's credible evidence to establish that.

The Iowa Supreme Court in 1921 on this same land between the Iowa Chute and the present day island said the evidence is clear that it was accretionary development, and it's the same land only farther north, but still west of the Iowa Chute.

Now to establish their theory of avulsion in addition to the tree they have a map prepared by Mr. Brown from the plat books of Otoe County, Nebraska, and I believe they call it the Pierce Survey. The surveyor was a man by the name of Pierce.

But there are no records of any measurements or any actual survey, the only record shows pencil lines across plat books that have a square section laid out, and by putting those together they come up with the 1895 Pierce Survey, which coincides favorably to the Iowa Chute, and if there was anything to corroborate that, maybe the boundary was over in the Iowa Chute, but since it's accreted west, according to the Iowa Supreme Court to the present day Schemmel (sic) Island, and today we are arguing

that this was accretion to the Iowa bed of the stream. There's been no complete avulsion back.

THE COURT: Where do you say the Iowa Chute is anyway, or was, when was it formed?

MR. WALKER: Well, actually, Your Honor--

THE COURT: We've heard a lot about it.

MR. WALKER: (Continuing) in Payne versus Hall the Court says that the origination of the Iowa Chute is uncertain, that there was evidence that it came in from the Missouri River up river and flowed around down there. And of course the question there was did the area between the Iowa Chute and the present day Nottleman Island, and the chute east of Nottleman Island, or not -- Otoe Island, and the chute east of it, did that form as an island or form as accretion to the riparian owners.

Now Payne was a landowner, Hall had various classifications, he, Payne said he was a tenant out on this island, this accretionary land mass, now Hall said that he wasn't, that he was an adverse occupant. And then he also said this didn't develop as accretion, it developed as an island and I have occupied it under some color of title argument against Payne. Well, the Supreme Court said that where the Iowa Chute came from was rather vague

and uncertain, that there was some evidence that it came from a slough inland, and it was originally a drain, I don't even remember the name of the slough -- Mule Slough or something.

And then there was other evidence that it came out of the river and went back in the river. And I think the evidence in this case is it still comes out of the river and goes back in the river, they have tubes at both ends so that when the river comes up it can flow back through there.

Mr. Propp, who lives right on the Iowa Chute, testified in this case that the land was there in 1912, west of the Iowa Chute. I think there was a Lon Baker, we took the deposition, an elderly man from Hamburg, and I believe he testified that he shot some brant off of the Iowa Chute and he hunted west of it around 1900.

Mr. Ruhe's soil samples show, or at least he contends that they show that that land -- I'm not going to try and repeat what his report says, but that land developed west of the Iowa Chute at about the same time land developed as accretion some of the land on the Nebraska side of the present river. Their composition and their ageing are corresponding. That land east of the Iowa Chute is considerable older.

But it's interesting in his report, and Mr. Gililland -- well, strike that, I don't know whether he did or not, but one of the defendant's testimony admitted -- I think it was Mr. Brown -- that they

couldn't find a scarp indicating an eastward movement of the river. Mr. Ruhe says he couldn't. The only scarps that he can find would indicate a westward movment. Now if you can't find a scarp establishing eastward movement, that means that they were destroyed when the river went west. Had there been an avulsion around those scarps they wouldn't have been destroyed.

And when you're talking about a five to six foot channel embankment, there's going to be some slope, there's going to be some evidence of that embankment there, I don't care if they plow it, dig up trees, or what they do, there's going to be some contour there, some indication on the tri-colors of the Corps, or something of that contour because those are contour maps. And for the Judge's information on the '46-'47 tri-colors you can follow the channels that are outlined on many of these pictures on that tri-color, the contour has been placed there.

I think that the evidence in the Otoe Bend area is very preponderantly in favor of the fact that the island was not there prior to 1923, that it was, prior to 1930, '31, and that it was actually built by the Corps of Engineers in Iowa.

THE COURT: Yes.

MR. WALKER: I believe that at this point the only thing that I have left to discuss unless the

Court has some questions, well, would be the Court's inquiries of his September order, and it's a little early, maybe we could take a break now and I could shorten it after lunch.

THE COURT: We're getting so we have too long a lunch hour here.

MR. WALKER: Well --

THE COURT: Yesterday we stopped at ten minutes to 12 and now it's twenty minutes to 12.

MR. WALKER: One of the reasons I --

THE COURT: Say, you know, the trouble with this case it doesn't disappear by itself, I have to keep working at it here.

MR. WALKER: The only trouble is my watch hasn't moved fast enough this morning.

THE COURT: Well, you want -- can you go ahead for a while or not?

MR. WALKER: Well, I --

THE COURT: If you can't, okay, we'll come back at one o'clock.

MR. WALKER: No, I, I'll be glad to. There is one point that I would like to discuss before lunch and it has to do with your inquiries.

I think yesterday you asked Mr. Moldenhauer point blank to characterize this evidence of where the people thought it was, you mentioned adverse possession, and he very quickly says, "No, we're not claiming adverse possession against the State." Well there again it's an unfair question to Howard because if he was claiming adverse possession against the State they lose, because you can't have adverse possession against the State, and you are admitting that it was in Iowa. When you are claiming adverse possession against Iowa you have to first assume the proposition that it was Iowa property. So they are in a peculiar situation, that they can't argue adverse possession without admitting as a foundation premise that the land was in Iowa.

Now they have introduced tax records in the Nottleman Island case, but there isn't any dispute there, I don't believe. We don't think there was any occupancy of the island in '28, but they did introduce a 1939 deed that declared in there that somebody occupied it in 1926.

Anything prior to 1926, I think, is again irrelevant in the Nottleman Island area, and in going through the tax records in Otoe County the Court, I am sure, will be interested in following the taxation of this area from year to year, because

it emphasizes Judge Johnson's statements in his recent case where he said to him "there must be systematic, consistent taxation to establish any claim to acquiescence or estoppel or any other theory which you might get."

Now here again I may be corrected, but from memory it is my understanding that these deeds that Mr. Schemmel obtained from somebody along about 1939 covered part or all of two sections, and some of his neighbors didn't seem to agree with him, they had a couple lawsuits and he ended up, I think, with primarily Section 15 Nebraska records.

But in going through here, these are for the years 1896, and again I don't know what materiality they have to an island that didn't come into existence until about 1934 or sandbars, and actually didn't develop into an island until some time in the late '30's.

But I'm not going to go through these one by one, but if you look through Section 15 the name Dan Hill, et al. comes into it, and Section 30, and they show taxation of 695 acres back here in the late '30's, early '40's of a valuation of $200 of 695 acres. I think in one year the taxes were $1.24, another year they were $1.36 of over a section of land. Now I don't think that would fit Judge Johnson's theory of consistent and systematic taxation. Two hundred dollars wouldn't be -- it would be less than twenty-five cents an acre valua-

tion, a few pennies an acre taxation.

Now that's the taxation that they rely on, and I haven't gone through all of these, I don't know what year they finally came up to realistic system of taxation, but they certainly didn't do it very long before the Compact.

THE COURT: Well, for the record you're talking about Otoe County, Iowa?

MR. WALKER: These are Otoe County, yes, Otoe County, Nebraska.

THE COURT: I mean Nebraska, yes, Nebraska certainly, if somebody reads this they would want to know which state.

MR. WALKER: Well, they are too bulky to try to get into the record of the arguments, but they are interesting, in the years, year after year the property is identified here and show $1.24, $1.25, $1.35 taxes, and over on the right-hand column they are marked unpaid. Now I'm talking in the '30's. And it just demonstrates to me what Judge Johnson was talking about, if you're going to claim title to something by virtue of taxes, it should be a realistic taxation. I just wanted to read you.

THE COURT: Doesn't that, aside from claim-

ing title because of taxation, isn't it some recognition by somebody that that land, whether it was worth a dollar and twenty cents, or whether it was worth two hundred dollars, or what it was worth, was in Nebraska? That's what the argument is, not to show the amount.

What do you say about that?

MR. WALKER: Well, I say that the only reason they have any tax record on these at all is just through the negligence of the Otoe County officers, they had a 1895 plat that showed that Nebraska went clear over to the Iowa Chute and --

THE COURT: Now wait a minute, that's just quibbling the question, that's just quibbling the question.

MR. WALKER: Well, no --

THE COURT: Now listen, the Supreme Court cases are careful in boundary disputes and things of that kind, and take into account, I think what the public, population, the county officials and state officials, where they thought it might be, when the dispute is where it is, and the physical evidence is uncertain, that's all it's indicating, isn't it?

MR. WALKER: Well --

THE COURT: Now, here is some, here is some of my knowledge, what I'm talking about this, what do you say about the fact that Nebraska was taxing the land and Iowa wasn't?

MR. WALKER: Well, my, and over the lunch I'll find it, there's one sheet in there that shows $1.26, $1.34 tax, how are we going --

THE COURT: I don't care about that, I don't care about that.

MR. WALKER: And on the right-hand column they have in there the delinquent taxes and the years, and they go back to 1931, and then it says prior to 1931 they have $1,196 delinquent taxes prior to 1931. Now that indicates to me that they carried those taxes on there with nobody ever intending to pay any taxes on it, and every once in a while they show them unpaid and they show them delinquent.

THE COURT: Sure, sure, still Nebraska is carrying them, how --

MR. WALKER: There wasn't any land there, Your Honor.

THE COURT: Well, I mean that's what you say but at least if it was there and they are assess-

ing it, why, that's in Nebraska, that's what I'm saying, that somebody in Nebraska says it's on the Nebraska side.

Well, go ahead.

MR. WALKER: Well, I'd like --

THE COURT: Well, you want to recess now?

MR. WALKER: Recess now.

THE COURT: Okay, we'll recess. Let's make it 1:15, how about that, then we'll get going, 1:15? All right.

(Thereupon, at 11:50 a.m., the hearing in the above-entitled cause was recessed until 1:15 o'clock p.m. of the same day.)

1:15 O'CLOCK P.M.
THURSDAY
OCTOBER 1, 1970

* * *

MR. WALKER: If it please the Court, I evidently misunderstood your question just before the noon recess; but I'm informed that you in effect asked whether or not we agreed whether the taxation evidence is indicating where the people

thought the land was located, and thus aid the Court in determining which state the land was indicated; is that the substance of your question?

THE COURT: Something along that line.

MR. WALKER: Well, in answer to that question I have to say, yes, because just as Mr. Moore said yesterday when a similar question about recognition evidence, he said that under the Federal rules it's admissible. We're not denying that it doesn't have value as evidence to the Court along with other evidence, but we do want to point out that the weight of that evidence in this instant case shouldn't be very great if you consider the fact that, as we said before, and as Judge Johnson said there wasn't a regular progressive and systematic system of taxation in Nebraska.

THE COURT: I thought that up until it was transferred to Iowa.

MR. WALKER: Well, if you'll recall the testimony, Judge, we called --

THE COURT: And then you let these fellows pay taxes in Iowa on it all these years.

MR. WALKER: Well, do you recall Mrs. Rhoades, the Fremont County Deputy Assessor

testifying?

THE COURT: Yes, sir.

MR. WALKER: She testified that the books, the County books, tax records, were lost prior to 1934 so she doesn't know whether or not the area west of the Chute, Iowa Chute, was taxed or not, but in 1934 it was taxed in Iowa, '35 and '36 it was taxed in Iowa, then the books again were lost until '43, and then it was again taxed in Iowa.

Now some of that same land was taxed all during that period by Nebraska, so where does that get you when you find that both states were taxing it, carrying it on their tax books? I don't think there's any evidence here that taxes were paid in Nebraska, it was assessed, the County officers carried it on the books. But if the Court will bear with me this tax record introduced by Nebraska, and then I have the year 1940, which describes under Section 29, Dan Hill, et al., "entire section accretion," no legal description, there was $1.32 in taxes and there's no showing here except $587.26 for delinquent taxes prior to 1931.

You go on down the same sheet, Dan Hill, et al., accretion, Section 32, value $200, taxes $1.32, delinquent taxes $1,169.01 for the years prior to 1931. Now is that a systematic collection of taxes? I don't believe so; but even so under the evidence

we don't believe that this island came into existence and was possessable until sometime in the late '30's, and when both states carry it on their taxes I don't think it's, helps Iowa or doesn't help Nebraska, to me it's something that the books showed and they just continued to carry it.

Now when I'm talking about the Iowa taxes, and I may be mistaken, but I understood the Court was interested in taking back those exhibits that the parties feel are of value in determining this case, you don't want to take back all the chaff.

THE COURT: Well, especially the ones that we discuss here during the arguments.

MR. WALKER: Yes. For that reason I would like to have the Court take the tri-colors back --

THE COURT: Oh, yes.

MR. WALKER: (Continuing) and on these four tri-colors we had Mr. Bartleman put in red those sections of land that Mrs. Rhoades testified that the Fremont County record shows were taxed.

THE COURT: Well, I understand -- I don't want to keep on the subject forever, but I understand that the plaintiff's contention is, Nebraska's contention is that the recognition testimony is, among other things, among other evidence, this

taxation, assessment, payment of taxes in Nebraska before the Compact, after the Compact, efforts on the part of these landowners, to get it on the tax rolls of Iowa, finally they succeeded, payment of taxes, collection of taxes by the State of Iowa, recognizing, tending to show that it's ceded land, that's the argument.

MR. WALKER: Yes, that's the argument --

THE COURT: That's the argument, it seems to me, that there's some merit to that proposition generally speaking.

MR. WALKER: Well, right now. I'm not discussing all the recognition evidence.

THE COURT: I know, I know, but I'm telling you that's the reason.

MR. WALKER: Well, right now I'd like to discuss the -- I'm concentrating on the taxes --

THE COURT: That's right.

MR. WALKER: If you'll recall--

THE COURT: Well, you can pick every one of these things apart, standing piece-meal, and they don't mean so much, it's the totality, the

cumulative effect of everything that adds the weight, if anything.

MR. WALKER: The, if you will recall, this fisherman that Nebraska relied upon, Medford James, Toots James, he was asked the question and I don't want to get out of the record because as I understand it the depositions that weren't read are not in the record, is that correct?

THE COURT: Well, I don't know if I said that, have I?

MR. WALKER: Well, as I said, I don't want to get out of the record, but in their record of this case he was asked if he claimed land in Iowa, the Iowa side of the river. He said "Yes", but "Where is it?" And he gave a general description, and as I recall about 160 acres. "Where do you pay taxes?" He said, "Otoe County, Nebraska." That was after this lawsuit was started in the middle '60's.

THE COURT: Oh, I suppose it was.

MR. WALKER: And I bring that out to demonstrate what I believe is the fact, that this recognition evidence was premeditated and developed to quiet their title in Nebraska courts because they knew that they couldn't quiet title to it in Iowa.

THE COURT: Well, I don't think that's -- I can't accept that argument.

MR. WALKER: Well, look at the record --

THE COURT: I mean, that's your belief and you may have reached that conclusion, but I don't reach that.

MR. WALKER: What effect does it have that the County collects taxes on land admittedly Iowa from 1943 to 1952, does that have any probative value?

THE COURT: I don't think that Iowa can stand by and allow an individual, no matter where he lives or what state he comes from, to pay taxes under this situation that we have got, for fifteen or twenty years, seventeen years, and then say, why, that's, this was always Iowa, didn't have to pay any attention to it, the Court didn't say that. I think that's unfair on the part of the State of Iowa, that requirement --

MR. WALKER: I still think that the probative value is affected when they continue to pay taxes in Nebraska and -- now we are not talking about the individual plaintiffs themselves, you, in your question you posed the thought that the officials in Nebraska counties thought the land was in Iowa

and that's why they were assessing taxes against it.

Now they didn't think the land was in Iowa or in Nebraska after 1943, and they continued to collect taxes until Mr. Peck wrote them a letter and said "Take it off, that's been in Iowa since '43," because he said he decided this case in '52 when he told them to take it off the rolls.

THE COURT: Didn't you continue to assess it to the same people that Nebraska did in Iowa, from '43 until '61, at least?

MR. WALKER: No, I don't think Iowa put it on the tax rolls until they processed Strand versus Watts case against the County officials.

THE COURT: Well, how long did Babbitt and you fellows pay taxes in Iowa, maybe they're still paying them?

MR. MOLDENHAUER: That case will be in the '46, I think '47 was the first year, '46, it was '46 on up in Babbitt, and I think Schemmel was '49 on up.

THE COURT: Until when?

MR. MOLDENHAUER: Until the present day.

THE COURT: Until now?

MR. MOLDENHAUER: Yes, the testimony was that this year they were taxing them, assessed.

MR. WALKER: That's what I'm pointing out.

THE COURT: Don't you see any inconsistency there or not?

MR. WALKER: No, not when they have to bring an action to get it on the tax rolls, the county officials don't want to put it on the tax rolls, we say they didn't want to because it was State-owned property.

THE COURT: All right, go ahead.

MR. WALKER: Now in regard to this recognition evidence I'd like to point out that Nebraska in an early case, Hickman versus Jones, 230 NW 95, didn't have anything to do with the river, but evidence of common repute of the location of the boundary or boundary lines was considered, and they said that reputation evidence is admissible, for the sake of argument it has to be admitted as sound, until it is proven that it is wrong. And in this case all of the local people said that a certain section corner, which was marked was the section

corner of, say, Section 15.

The truth of the matter was it was the corner of Section 16, and the Court says competent evidence shows it was 16, and therefore they were wrong and their evidence loses all its probative value. And we say that any evidence prior to 1923 in the Nottleman Island area and about 1939 in the Otoe Island area has no probative value because the land wasn't there. They couldn't say something was in Nebraska when it wasn't in existence, that's our point on this.

Now we get to your, the Court's questions, and it is indicated that the question of adverse possession has been touched on, but in that you also say prescription, and I suppose you could include in that the theory of estoppel and acquiescence, and the word you used yesterday was recognition.

THE COURT: I think that's a better word.

MR. WALKER: I think the cases will establish that there couldn't be any adverse possession against Iowa, they did bring an action in Nebraska to quiet title on the theory of adverse possession against the riparian owners, and there again I think the Court should consider the fact that none of these claimants are riparian owners.

THE COURT: Now if you want to -- I think you're losing sight of the fact that when you say that

there is no adverse possession against Iowa you're talking about a private person against the State of Iowa; but we're talking here about two sovereign states, where is the boundary and what has been recognition by the officials of both states and the inhabitants and residents of the area and the County officials all the way up as to where the boundary is, that is what we are interested in, where that boundary is.

MR. WALKER: That's right.

THE COURT: Where that boundary is, and what they did and how they acted and how they proceeded, and the Court has said that in any number of these Supreme Court decisions, and I was just looking during the recess at the one of New Mexico versus Texas, or, yes, Texas and New Mexico. And the Court seemed so clear in that case, that this inhabitant testimony, and all that sort of thing, that recognition is persuasive, almost compelling.

And they talk here, they say this conclusion is reinforced by the tacit and long continued acquiescence of the United States, the government stood by, while New Mexico was a territory; no question said that the government at that time owned the territory, the United States Government as such, the people do, the nation. In the claims of those holding land in controversy under Texas surveys and -- Texas has gradually expanded, and

the government stood by and let them do it, but when they come to them afterward the test of where the boundary was, why, they said, "Here, the people think it's here," and they abided by that for all these years, and this is where it's going to be.

We have that problem in this case, that's a real problem in this case, as I see it.

MR. WALKER: Well --

THE COURT: Because I'm convinced, and I don't say this, I'm terribly convinced, pretty strongly that there's no way that this Court after forty years and after thirty-five and twenty-seven years can with any satisfactory result based upon persuasive credible evidence can tell, that I can tell the Supreme Court and the Supreme Court can find where that boundary was, the natural boundary, the old boundary, that at any one moment or any one year or 1943, and I'm satisfied from all this evidence that the states weren't worried about it, they wanted to fix a boundary and then they went into Texas Supreme Court. I think that's the thing we ought to talk about, because I don't, I'm not sure whether it was, whether the credible evidence favors Nebraska or Iowa on this thing we've been talking about here on the formation and the thalweg at the time of the Compact.

But I don't think -- I have to agree with Nebraska --

I don't think I have to, I don't think I will make a finding of that kind. If one side insists that a finding be made, okay, I'll attempt to do it, and it seems to me that we passed that point, we have got, you have persuasive evidence, I don't say that you don't, that you're correct. But even this morning, part of that, suppose part of that river bisects even a portion of Schemmel's Island and about this area you're talking about, and the Engineers got ahold of it and they put it on the other side, isn't that some reason for asking why it's assessed in there gives recognition to the fact that Nebraska took it and accepted it, the owners, the people that occupied it -- you can't get away from the fact that these people occupied it, spent money on it -- you might say, "Well, they got it for nothing, didn't do much to it," and all that, but there they are, and now it's worth so much money, it was.

MR. WALKER: Well, of course when you say that the channel --

THE COURT: So I don't --

MR. WALKER: (Continuing) bisected the island, if you study those --

THE COURT: Well, why do you want to come back to that? See, I'm just saying supposing that,

I don't know, I don't think you have to find that, I think it's impossible, you look at --

MR. WALKER: Well, do you agree with me, Your Honor, that the issue here is whether Iowa violated the Compact?

THE COURT: Absolutely, absolutely.

MR. WALKER: And that is the --

THE COURT: Because it is a Compact case, it's a Compact case and not a boundary case, and I think you're trying to make me find the boundary before the Compact.

MR. WALKER: Well, no --

THE COURT: I don't think you have to.

MR. WALKER: (Continuing) only in regard to that issue, only in regard to that issue.

What I'm trying to demonstrate is this, that when Iowa under their law and their rights to the beds in the streams brought an action against these people on the theory that this island accreted to the bed of the stream in Iowa. Now I don't believe that the Court can find that on the theory of violation of the Compact, that Iowa, if that's true, that Iowa was wrong in bringing this action. Now if

the Court would find that the claimants to these two islands had occupied them and you feel that Iowa is estopped after this period of time, that's a different thing, all Iowa wants is a fair determination, we don't know --

THE COURT: There's no use talking that way because --

MR. WALKER: Well, I know, but here --

THE COURT: Listen, all the Court wants is a settlement of a long-standing dispute and somebody will no doubt suffer, that is, in the State and in the general sense, somebody may lose something from it, somewhere some state, one state may lose jurisdiction over something, I don't know, but the Court in these boundary cases, the Court is always seeking to settle something, that hasn't been settled, now that is what they want to do here, isn't it? I think that I have to take it that way, Nebraska's proposition that this, all this mass of evidence that we discussed this morning, and yesterday most of the day, relates to the situation of the stream and the location of the thalweg, and all that business. What it proved to me is that they didn't know where it was and they really didn't care, either one of them, you didn't know whether you were going to lose anything or gain anything, you didn't worry about that, but you did say a mort-

gage good in that state will be good in my state, and you said a title is good in Nebraska will be good here, and all that sort of thing. And I think you have got to look at it as Marshall said, Justice Marshall, in general terms, not with the niceties you might -- with a contract between two people. He said that very clearly and I like this language you said on page 78 of their brief, they quote it, and you're looking to resolve something, it seems to me the only way I'm coming out of, where I'm probably, you think I'm deciding the case against you, and maybe I will.

MR. WALKER: Well, I realized that at the beginning that there was a possibility of that, but I, what I'm trying to do, and I --

THE COURT: Now I have listened and the point of that is this I have let both sides now offer everything they wished to because I think the Court has, that's my job and I, of course, would want to follow it out anyway because I think all of this evidence that is going before the Court, they disagree with what I think, you know, they can, they can -- you know what they'll do, don't you?

MR. WALKER: Well, yes, and I think --

THE COURT: We're not worrying about that, we're not worrying about that, but after all we all

try to try the case on the basis of some finality to it if we can, and make it as easy as we can, for the United States Supreme Court is busy, but they want to get a settlement here, I think.

MR. WALKER: Well, I think what Iowa --

THE COURT: Hopefully, anyway.

MR. WALKER: Iowa wants to get a settlement, but --

THE COURT: Sure.

MR. WALKER: But what I --

THE COURT: But if you lose Nottleman Island, if you lose on that, that isn't going to break the State of Iowa; it isn't going to help the State of Nebraska, see.

MR. WALKER: It might break my heart, but it won't break the State of Iowa.

And really that isn't the concern of Iowa, the concern of Iowa is the accusation here that we violated the Compact. Now if there is a --

THE COURT: Well, don't worry about that.

MR. WALKER: Well, we worry about it this

way, because they brought the case, they brought the accusation and we don't feel that they have established that.

THE COURT: Listen, all it is, is a difference in the interpretation of a contract, and I'm eighteen years on the bench, and I've seen many a difference in interpretation of contracts, and language, see, and really when you come down to this, the nub of this thing that's what we're talking about. And of course you get to everything that has some bearing on it, how did the people act, you know, before they were, before the lawsuit came up, and that is very important, I feel, how did Iowa act, Nebraska act, during the intervening years until this thing came out, this Planning Report.

MR. WALKER: All right, Your Honor. Then I'm going to a different proposition.

THE COURT: Now, you fellows know as what I'm saying is this, I don't see any more point in that today, now I'll listen to you, but if you, today there's no use of us discussing any longer for one thing where this thalweg is, because I've got to again review this evidence, what you say in your briefs and what you say in your evidence, to find the facts there. I think Nebraska, I tried to get them to say yesterday that they didn't care whe-

ther I did or not, but I guess they want me to, is that right?

MR. MOLDENHAUER: I have found very little you said that I disagreed with, Your Honor.

THE COURT: Well, I mean -- don't try to butter up the Judge.

MR. MOLDENHAUER: I mean as far as propositions.

THE COURT: I think this, you know, I'll say this now, you sit here in Court and listen, and I like to try non-jury cases, I used to think they were the hardest cases to try but I find they are the easiest, and they're not so hard to decide either. It's a peculiar thing, on the facts, and I thought when Iowa put in their case in the first instance it was -- I didn't see how you fellows could come back.

MR. WALKER: Nebraska.

THE COURT: Nebraska, yes. And then when you put it in, I see, I thought, well, you made out a good case, too, see; but the persuasive part of that to me is just what we call a recognition testimony. Now it seems to me that Iowa is in wrong in the legal sense now, only, in standing by from

'43 on.

MR. WALKER: Well, don't you think --

THE COURT: When you knew there was something there, when you knew there was something there. I don't criticize anybody what you did up until '43 but then you knew where your line was, and, of course, I, you're not to be criticized anyway until '61 because you didn't -- it wasn't worth anything then either time, but gradually as the land settled, that is, in the sense the wildness departed, the stability occurred on the valley, in the valley and on the river, and then it became apparent that there was going to be some valuable land, but then you're still stuck with the fact that you laid by all those years too, see, now you can't get away from that.

MR. WALKER: Well, I agree with you, Judge, I'm not saying that the Iowa officials were diligent in protecting these trust lands.

THE COURT: There was a reason, there was a good reason, nobody knew about it.

MR. WALKER: That's what we tried to demonstrate to you, that there was a good reason, but now when you talk about what occurred after 1943, if you get away from the main issue of our violating

the Compact by bringing these actions, there was no acquiescence as between Iowa and Nebraska, because it was always in Iowa after '43, there is no argument about that, the theory of prescription and estoppel and acquiescence is all, all goes out the window after 1943 as far as I'm concerned, because there's no question where the boundary was.

Now we're not saying that Mr. Babbitt and Watts and the other owners on Nottleman Island can't raise that question in the State Court, nor Schemmel in the State Court; but I don't think that that proposition is what the Supreme Court of the United States is interested in.

THE COURT: No, no, no, I think you misunderstand that part; what I was saying there, what I think is the issue on that phase of the case is, there wasn't any title, good title, that anybody had to recognize, either State, until after Compact. Good title must be recognized; and these fellows had established good title, what they say is a good title, and, in Nebraska. Now it troubles me that as a Judge to say which is a good title, because in our state you got to go a long past what they've done here, but it's only ten years out here, but nevertheless it's the decision of a cumulative proposition, it's good there, it's good in Nebraska, and they say, "Well, you didn't recognize it in Iowa after the Compact, which you should have," that's where

they say your violation is, that's all, that's all.

MR. WALKER: That's true.

THE COURT: That's all.

MR. WALKER: And the only answer we have to that is this evidence on where the land was.

THE COURT: Well, I say, I --

MR. WALKER: If it was in Iowa then I don't care what Nebraska did, they didn't have any jurisdiction over it, and they can't establish a good title in another state.

THE COURT: That's right.

MR. WALKER: Now if the land is in Nebraska, then we're wrong, and Iowa shouldn't --

THE COURT: Now wait a minute, the testimony is you didn't know where it was, and I don't think anybody can really with reliability, as the Court now, can say it was here, there or the other where, or any other place in the years, in the 1930's, because therewas such a constant shifting in this thing.

MR. WALKER: Well, not after the --

THE COURT: Now the Engineers -- what, not after what?

MR. WALKER: Not after 1934, it was under the control of the Corps of Engineers and it's recorded daily.

THE COURT: I know, but they didn't have to pay any attention to any boundary, they didn't have to pay any attention to any boundary, they moved it where they wanted to, so I think the recognition there was, if there was, as soon as it grew up, that didn't start overnight, you know, that's a gradual proposition. But going to school, being born, and dying, and everything in Nebraska, nothing in Iowa, nothing in Iowa, until after Compact. And there's where the Court is concerned, I don't mind saying that I'm concerned with that type of testimony, I think that I'm going to have to say that that recognition tips the scale, you have argued cases to the jury, you know that scale up there -- that tips the scale, you see.

MR. WALKER: Well, if that tips the scale in placing the land in Nebraska, then I think the Court --

THE COURT: The boundary, where the people thought the boundary was at that point.

MR. WALKER: I understand.

THE COURT: Where they thought the boundary was at that point.

MR. WALKER: I understand.

THE COURT: And I'm not saying it was that way all up and down the river, but people thought there was the boundary at that point.

MR. WALKER: At that point.

THE COURT: Yes. We don't care where it was, if so, and they had a good title then you must recognize it, that's the situation.

MR. WALKER: Well, if the Court would find that the boundary was west of Nottleman Island in 1928 when Mr. Shipley first occupied it, and from there on up to the point of the Compact. Iowa has no objection to that if the Court actually believes that is the true facts and will recite those facts. That isn't going to hurt Iowa too much.

THE COURT: What, if I find what?

MR. WALKER: If you find that the boundary was west of Nottleman in 1943, even if you base it upon this recognition --

THE COURT: You mean west or east?

MR. WALKER: West, or, east -- east, east.

THE COURT: Yes, east.

MR. WALKER: In Nebraska. If you base it on that recognition testimony in corroboration with the other --

THE COURT: Listen, I'm only human in some respects.

MR. WALKER: No --

THE COURT: No, wait a minute, I'm just saying this, and it seems to me, you know, the easiest way to decide a case fairly is sometimes the correct and legal way and the way that a case should be decided.

It seems to me here that the proposition is going to resolve itself as to whether -- now I'm not an engineer or surveyor and the Lord knows, I understand you're not either, see.

MR. WALKER: No, I'm not.

THE COURT: But, and it's hard for me to read those maps, I'll say that, but I've listened to people all my life, and lawyers and judges,

and so on, and what they say about them.

People can take maps as well as they can everything else and make a lot out of them, see, they can make drawings and lines and photographs and all that stuff, and all that sort of thing, and it seems to me there's almost an equal division among you, between you, on this business of where the physical boundary is now on the river, you know what I mean, as distinct from memory and testimony, and all of that, see, we look at the maps, and it's pretty hard to say it was there, because it might have been right there that one year and the next year, the next spring, it might have been somewhere's else. So I'm inclined to view this testimony as having great weight on what occurred before and after 1943 on the recognition part of it. If that decides the case, okay, and that's as far as I want to go. That's what I'm trying to say, I'm not going to accuse Iowa of not going to church when they should go to church, put it that way.

MR. WALKER: Well, what I was saying is that that wouldn't bother counsel for Iowa, it might bother our bosses a little bit, but you can't take Nottleman Island and base your decision on all the rest of the area, because the facts even between Nottleman Island and Schemmel Island are --

THE COURT: No, no, I don't say that, but we only have recognition testimony, the greater weight of it is on those two islands, is that right?

MR. WALKER: Well, there really isn't too much recognition on Schemmel, he didn't start, by their own testimony, they didn't start until '56, they started to clear it in '53, '39 was the earliest evidence of any ownership either in Nebraska or Iowa as to that, and in '39 there wasn't anything there but water, and I, you take that evidence and then jump to '56 to occupancy, and the case was started in, before my time, '63 or '64, I got in it in '65, I think, and so it was before that, that it started.

So you only have eight years and there isn't too much recognition evidence other than their own personal acts with regard to that, so I don't think you can compare Nottleman with Schemmel, but --

THE COURT: Well, let's go at it this way --

MR. WALKER: (Continuing) what I don't want the Court to do if it can be avoided, and the Court agrees with it, to decide because Iowa may have made a mistake on Nottleman Island and then just carte blanche say "Your common law was thrown out by the Compact and you're off the river all the way up and down the Missouri River, and

when you agreed to do that you changed your property title laws and "all" --

THE COURT: Now I don't say that, I don't think the Court can say that, I think this, that my view is that it's like any other land case, if the case is tried in the Iowa court and tried in the Nebraska court between private property owners or between private property owners and the State of Iowa on another piece of land that you haven't talked about here, and somebody shows a title which has gone to final judgment in Nebraska, unappealed from, and is therefore a final judgment that takes in a piece of property that is recognized in Nebraska in one of these type of things, then when it gets into that Court, the only thing is that the Court will say, "Well, we can't apply that common law any more, that's out," and that fellow may prevail unless there's some evidence, you see, that contradicts him there --

MR. WALKER: That's true, but of course in this case if you found the island formed in Nebraska, Iowa was wrong in bringing the action, it still wouldn't have to affect their common law.

Of course, I'm getting into Mr. Murray's argument on whether or not this was a compromise; we feel that it wasn't, but --

THE COURT: Well, let's get on with the

argument here, we're spending time.

MR. WALKER: Of course, we've been discussing this question of whether it was acquiescence that the Court inquires about. We just feel that the theory of acquiescence is not here because no court has found acquiescence, even in the Nottleman case, giving them the benefit of all of their testimony, 1926 is the first evidence of occupancy, and up to 1943 would be about eighteen, nineteen years.

Now there can't be any claim by the State of Nebraska that their jurisdiction was acquiesced in by Iowa after 1943 because we all agree it was in Iowa after that.

THE COURT: Well, I don't know but what you fellows still misunderstand my theory of that on Nebraska's position, that is, that the only reason that the acquiescence is to show what the -- the place of the boundary, the point of the boundary, that's all, acquiescence, people thought here's the boundary, at that time.

MR. WALKER: Well, under the theory --

THE COURT: It isn't that -- we're not talking about the title to the land, but here's a guy on it, everybody, nobody's bothered him, everybody said this is Nebraska land, people say that's Nebraska,

that's Nebraska, well, that's what they call that acquiescence, what we've been calling recognition testimony of the boundary, that's all.

MR. WALKER: But if acquiescence is a theory that's been developed between states' jurisdiction --

THE COURT: Yes.

MR. WALKER: (Continuing) and there's no evidence here of long acquiescence, you give them the benefit of all the doubt, and there isn't sufficient length of time here to acquiesce by Iowa in their claim of jurisdiction over Iowa property. Now if you're getting at it to prove --

THE COURT: That's true.

MR. WALKER: (Continuing) the boundary, to me that isn't the theory of acquiescence, that's what you term recognition testimony to establish the boundary.

I'm not -- maybe I'm confused, but acquiescence to me is when one state exercises dominion and jurisdiction over the territory of another state, and that state allows it until the people assume that that is the new boundary.

THE COURT: The Court in 1924 said this conclusion is reinforced by the tacit and long con-

tinued acquiescence of the United States while the State did something.

MR. WALKER: Yes.

THE COURT: Didn't kick, didn't complain.

MR. WALKER: Long.

THE COURT: What?

MR. WALKER: Long and tacit.

THE COURT: All right, sure, it's long, but I say when you're talking about the boundary and recognition and title, and so on, you're talking about, from there you're talking from perhaps 1930 up until you make a claim against Babbitt.

MR. WALKER: No, because, because the Compact of 1943 placed it in Iowa without a question.

THE COURT: Oh --

MR. WALKER: Nebraska never exercised dominion over it after that. They shouldn't have, but they did collect taxes --

THE COURT: That has, of course that has

two facets, the first part of it was that nobody cared where it was, and Nebraska was taxing it, the people were going to school and all that sort of testimony afterward; all the claim there is that they had a title good in Nebraska and you wouldn't recognize it, and when you should have, but you did really recognize that title all the time because you continued to tax it and accepted the taxes, and you made no claim for it.

MR. WALKER: In '46, in 1946.

THE COURT: Yes.

MR. WALKER: From 1946 until '64.

THE COURT: That's right. There's a period, there was a hiatus there from '43 until '46, I guess, that nobody knew what to do.

MR. WALKER: The Nebraska Treasurer's duties are to accept all taxes that were offered to them --

THE COURT: Oh, yes.

MR. WALKER: (Continuing) and do until this day on Iowa land, and that's what to me weakens their whole proposition. But there again that doesn't --

THE COURT: It turns into a , to a Section 3 case after 1943, there's no question about it.

MR. WALKER: And I think the Court will agree when I say I think that in the state court in Nottleman Island that this evidence after 1943 is certainly admissible to establish their title to the land against the claim of Iowa from the theory of estoppel, even though there is an adverse possession and the state courts of Iowa have held estoppel. Right over here in the Carr case right cross the river in Council Bluffs.

Of course, there the people expended hundreds of thousands of dollars in developing the area and paid taxes on that valuation, and the Supreme Court said "You can't come in and claim that, after allowing that to go on." Now maybe the District Court and the Iowa Court would hold that in the Nottleman Island case, I don't know, that case was never determined.

The theory that they bring to this Court away from the state court is the great expense that it put these landowners to, and yet Mr. Moldenhauer said the other day that in the one case they started, I believe it was the Babbitt case that was tried, Schemmel case was tried, or started to be tried and it was stopped, the only evidence they put in was Mr. Huber and Mr Jauron and then they relied upon the presumptions.

Now that doesn't sound like a very expensive

case to try if that was all the evidence that Iowa submitted; but there again that goes just to my proposition of did Iowa violate the Compact, did Iowa do something. Now if Iowa had sent the National Guard down there and kicked these people off the island and set up sentry duty and kept them off, I can see where that would be wrong; but they didn't, they never even interfered with their possession, they went to Court to see whether or not it belonged to Iowa, they took the proper, I think, the proper attitude. Sure, they are going to be wrong in cases and the decisions show that Iowa has been wrong and been defeated in some of these cases. But the mere fact that they inquired into title in the proper forum to me is not a violation of the Compact unless as Nebraska says we agreed to change our common law as to a part of our territory and were estopped from ever claiming any land on the Missouri River. Now that is in effect what they said yesterday when you asked them if they would be satisfied with Nottleman and Schemmel; they said, "No, they've got to leave the river," or words to that effect.

Now I don't think that there's anything in that Compact or in the history leading up to it that requires a ruling of that drastic nature in this case, and I think that Iowa is perfectly proper when they challenge the Schemmel claim because I think the evidence there is strong in favor of the State of

Iowa, and with the exception of this recognition testimony which the Court feels is of more value than I do, and which is not unusual, Courts have disagreed with me before. I can see the Court's position there. But I don't think there's any ruling in relation to that that goes to the drastic extent that Nebraska is setting forth.

THE COURT: Well, you know, I notice Judge Pope in his comments there when he had the case, he thought perhaps that Nebraska might have in their prayers for relief overlapped their prayers and claims for relief a bit hoping they would get some of them, you know; that isn't unusual, I think, to ask for everything.

MR. WALKER: Well, and I think that the Court will agree that, to the extent that a state comes in and sues an individual, they should be cautious and they should be careful and not to take something to court that isn't, in their opinion, proper and provable, but --

THE COURT: Well, you see, Mr. Walker, they're critical of you, I think, I don't always go along, I'll sustain Iowa on that business of quiet title, let's quiet title, and they say that shows an inconsistency, and so on, shows that you didn't have the title, you were going to get a title, but seems to me it shows this; that they didn't know

whether they had the title or where the land was or whether it was good, bad or indifferent, you see, and I think that goes along with my idea, nobody knew what the situation was until after the Compact when the land started to appear and become valuable, except in these few instances.

MR. WALKER: Well, that --

THE COURT: The mere fact that the planning commission said, "Let's look into Nottleman, let's look into Schemmel," let's look into this California Bend, let's look into all these things, it doesn't mean anything, it doesn't mean of course that they didn't have a right to do it, I think certainly they had a right to do it, it was part of their duty to do it, but they, I don't think they paid much attention to Sections, the other sections of the Compact other than where the channel was, where the boundary was, the new boundary was, that they had to look at a title good in one state, now that was for -- but during those years where titles ripened in Nebraska, that's the thing that Nebraska complains about now, you didn't recognize them, as I understand it, that's the violation.

Is that right or not?

MR. WALKER: Well, there's no question about those two, but I don't know of any others. Nottleman and Schemmel, that's what they said we

did and they do have some indicia of title over there. We say it isn't good; they say it is; well, the Court is going to make that decision, but I don't believe they have shown that any place else.

THE COURT: Well, they argue, they show that there's some land there in those other places that Iowa shouldn't be claiming as --

MR. WALKER: But that's with reference --

THE COURT: In other words asserting the common law against landowners You see, what's needed here, and you know, after all, as judges, we all look to the Supreme Court. What's needed here is a rule, some kind of a rule that the state courts on both sides of the river and the District Court can apply, and the Circuit Court, and everybody else, isn't that right?

MR. WALKER: Well, that's right.

THE COURT: Sure, that's what we need. Then we would leave it afterwards to the private property owners to battle out their problem, we don't care about that because if they have a diversity of cases they'll bring it into District Court, and then they may think, "Well, we get a better shake there because the Supreme Court decided it," but if they can't get it there they will bring

it to the best place they can, and the Court and judges will follow it, judges like to follow the law when they know what it is.

MR. WALKER: That's right.

THE COURT: And that's what's needed here, some statement, and what bothers me is that Nebraska seems to want me to go further than I want to go, and I think I should go, the Court, rather, the Court won't go any farther than it wants to go, I don't mean, don't misunderstand me, don't be bound by what I suggest, but they may be, they may accept it if I suggest something reasonable because I think they're looking for help and assistance in a final settlement. I'd like to get this thing in shape so that the report will set up criteria and standards where both states can live with it, that's all, so the people on the river will understand that.

MR. WALKER: Well, along that line, I don't believe that the Supreme Court of the United States wants to decide or have you recommend to decide private titles.

THE COURT: I know --

MR. WALKER: They want you to lay down a rule that Iowa courts can follow in these cases, and

I agree with you there; but I think that when you lay down such a rule that it should be applicable to both states and it shouldn't penalize Iowa and destroy their law and not affect the Nebraska law.

THE COURT: Destroy what -- their law?

MR. WALKER: Destroy what we consider to be our law today, that's what they're asking you to do.

THE COURT: I don't think there's any question about it, that a title good in Nebraska and we are assuming that in all its aspects, that a certain person has got a good title in Nebraska, and it goes to the other side of the river, you got to recognize it --

MR. WALKER: Absolutely.

THE COURT: (Continuing) in spite of the fact that it doesn't tend for your common law to give way.

MR. WALKER: That's right.

THE COURT: That that's what --

MR. WALKER: No, no, it doesn't affect our common --

THE COURT: Well, listen, you've, you claim then that you own the bed of that river, and he says no.

MR. WALKER: No, not to those titles that were good in Nebraska.

THE COURT: All right, that's all that was said.

MR. WALKER: We have never made that claim. No, we'd love to --

THE COURT: If you'd agreed with that on Nottleman, Nottleman wouldn't have been there, he'd been back in California there, and still there.

MR. WALKER: Your Honor, we suggest that our proposition in our pre-trial statement, that land, good title in Nebraska ceded to Iowa, that Iowa would recognize it, and vice versa.

THE COURT: But you coupled that with the proposition that it had to be formed in Iowa.

MR. WALKER: No, that it had to be ceded is all, that's what the Compact says, we tried to follow the Compact.

THE COURT: Well, of course, we'll come to

that, I suppose, of course, -- well, go ahead, we'll argue here all day and won't get anywhere.

MR. WALKER: Well, I think that this is what oral argument is for, is to give the Judge our ideas on his concern, but I really don't have much more to say, I think we've argued the question of acquiescence and --

THE COURT: Or one phase of it, you argued taxes.

MR. WALKER: Well, I don't think you'll agree with me when I give you an argument on the rest. You talk about birth certificates --

THE COURT: A few, but --

MR. WALKER: And school records and register of death, I believe, on Nottleman Island. They had some equipment out there that was taxed in Nebraska.

THE COURT: Mr. Walker, I don't recall, I maybe could be wrong, but I don't recall any individual who testified as to the location of Nottleman's Island ever put it in Iowa when they asked about it, or knew about, and were concerned with it, it was always in Nebraska, people thought it was in Nebraska; is that right?

MR. WALKER: Oh, no; there was numerous Nebraskans, Nebraskans that said it was in Iowa, if you'd read the record. Now I may be wrong on this that they were asked point blank which state was it in, now that I don't know, but we asked which side of the river was it in --

THE COURT: Now, all right. listen, I imagine -- but which state was it in I'm talking about, which side of the river, I'm saying how was that regarded, Nebraska land or Iowa land? I don't recall anybody that ever said it was Iowa. Now, of course, they said now which side of the channel, and all that sort of thing. I'm talking now on the recognition business.

MR. WALKER: Well, on Nottleman, I think you're right, I don't recall any either, but there was on Schemmel, Propp, Givens. If you remember the witness Givens, he said if it didn't belong to Iowa that it had to belong to his family, it was accretion to their land; if it wasn't an island, it certainly didn't belong to anybody in Nebraska, and he said that on the witness stand.

THE COURT: He wasn't going to admit that it was Schemmel's.

MR. WALKER: No, because if Iowa failed he'd be there waiting, and, again, I don't blame

him, it had some value, if I owned the land adjavent to it I'd be in there trying to establish that that was the law too.

THE COURT: Well, listen, is Mr. Schemmel -- I don't know whether he's still here or not, but if he is -- he may still have a lawsuit with another private party who owns that land for all I know.

MR. WALKER: I think it's on file already, I'm not sure.

THE COURT: Well, I'm not going to try that case, thank the Lord.

MR. WALKER: I thought the witness said the Givens family had filed, but I'm not sure of that either.

But I think you can't lump Schemmel with Nottleman together, I don't believe the evidence substantiates any claim to the Schemmel area at all.

But to get back now to your proposition, is the Nebraska evidence of adverse possession a prescription on which, sufficient on which to base a decision under these circumstances. Now --

THE COURT: Well, that related to the top part there where I couldn't find where the boundary was, the old boundary was.

MR. WALKER: Well, that's right, but the evidence of adverse possession, what you term recognition evidence, I don't think the recognition evidence alone would entitle any Court, the recognition evidence in here to find that. I think with other documentary --

THE COURT: Oh, yes, sure.

MR. WALKER: You might develop a sound case, but without that, why, as I said, I'm getting into Mr. Murray's part of this argument, and I don't think I'm getting too far with the Court, so I'm going to --

THE COURT: Well now, wait a minute -- you come to the time in the case when you've got to talk about what the possibilities may be, don't you know that?

MR. WALKER: That's right, but I just want to mention in here that these were placed on here by Mr. Bartleman and there was some argument with Nebraska counsel that it wasn't accurate because it showed the complete section areas, and that part of it's true, but it does show the Iowa Chute and it shows the accretionary area considered in Payne versus Hall, and then the arrows he has there, little arrows, means that the description in the tax books showed plus accretions, and

he put the arrows in there not knowing where the accretions were. We would like the Court to see those.

There is one other thing that I would like to talk about in the Otoe Bend canal, and that is, the Otoe Bend area, and that is the canal they talked about, and especially what Mr. Moldenhauer discussed in regard to one of the trees that was supposed to be up near the center of the west side of the island near Dike No. 601.9A. Now that was a long dike that came down a lateral and parallel or fairly parallel with the river, onwhich he says there are trees growing out near the end of that dike. Now Nebraska introduced this book of ground level photos, and I would like to have the Court, when he has an opportunity, to look at the pictures with relation to 601.9A, and it shows the beginning of the dike well out into the river, and I fail to see any trees there or any land of any consequence ahead of that dike as it goes through.

Now if the Court will interpret that for itself, but I don't believe that this substantiates his comment in regard to the trees growing there.

We get down to the canal, there's no question the canal was dug, but that canal was dug through Nebraska accretionary land that was built up by the work of the Corps of Engineers, they ran the dikes out from Nebraska, they drove dikes out from Nebraska to where the design channel was to be, and the accretion continued on beyond the dikes,

and a couple years later, in '38, they decided to cut this canal, to push it back over against the design, the west side of the design channel, where they wanted it, and they cut through accretionary land and the river, and there were scrub willows on both sides, and there are pictures to substantiate that.

But the testimony by the witnesses that worked on it said it was a hundred foot wide, and after the river was forced over to it, it widened out to the design, to the established dike lines to the designed channel.

It is our contention that that canal destroyed, when it widened, destroyed any land that was attached to the Nebraska shore. And that is verified by Mr. Schemmel's own testimony when they asked him how did he get out to the island, and he said, "I walked across dike lines because the dikes were attached out," and he walked across water.

Well, they said, "That's on the Iowa side."

And he said, "No, that's on the Nebraska side."

And they said, "Well, we want to know how did you get to the land on the Iowa side." But preliminary to that he testified he walked across water on these dike lines, and from the two witnesses by, of Nebraska's, it established, we think, that the canal by widening out washed away what land there was there.

Now, there are some trees down in that end of the island near where that canal was dug, of

substantial age, we don't think that they go back to the date of the canal. Their witness evidently did. But we'd point out to the Court that even though we haven't established that there was Nebraska land included in what is now Schemmel (sic) Island that these tri-colors show the old contours and the areas that was involved in that canal building and it shows the dikes that were built out from the Nebraska side.

And that's another reason why we'd like to have the Court take these tri-colors.

THE COURT: Yes, I want to take those back. At the conclusion tomorrow, why, the things that we have talked about here, we get some men up from GSA and have them help Jack get them loaded. My boy is going to take those things back if he can get them in one station wagon.

All right.

MR. WALKER: Well, I thank you; that concludes my argument.

THE COURT: All right, we'll take a fifteen minute recess.

(Short recess at 2:10 o'clock p. m.)

THE COURT: I just want to say that some time ago my attention was called by one of my

brother Judges who wrote a couple of books on the Constitution, Judge Dunbaugh, to a work by James Scott Bond -- no -- James Bond Scott, never heard of the guy until about a month ago. But he wrote three volumes on all the controversies which the Supreme Court had heard between the states of the Union up until 1918, and when we got here the other day, my secretary called the public library. Now they didn't have that work in Pittsburg, but much to my surprise they had it here, the three volumes.

And the surprising thing is that they got it in 1920, and I was the first fellow to take them out of the library. So I had to put a ten dollar deposit on them.

But you'll notice here it says Carnegie Endowment for International Peace. It was a project to promote peaceful settlements in controversies between states, and all the decisions are in those volumes, but the best part of it is, this one, this first volume, this Analysis, he has one volume on Analysis.

And you know, for instance, Rhode Island versus Massachusetts is a hard case to read. You pick up that volume and it's like Green versus -- what is the name of that other one?

MR. MOLDENHAUER: Biddle.

THE COURT: Yes. That's another hard one,

because you pore through about sixty of seventy-five pages before you get to the opinion. But this fellow here analyzed each case. He tells what the facts are and what the intentions were, and it makes it a little easier to read. I just point that out to you. And one of the cases that he, that we've been looking at is this case of Maryland versus West Virginia, where they discuss a lot on this recognition testimony, I think. It's a quite helpful volume.

I tried to buy it and I called New York City where they published it, and it's out of print. So it's pretty hard to get ahold of. I'm going to turn this book back, because I had to put that deposit on it and I'm going to get my money back.

All right, go ahead.

Do you use that work, Howard?

MR. MOLDENHAUER: I wish you would give us the title, Your Honor, I haven't seen it.

THE COURT: It's "Judicial Settlement of Controversy between States of the American Union," edited by James Scott, or James Bond Scott, and it's got all the three volumes, one, two and three, in the third volume is the Analysis, see. I don't think that -- there's nothing new in the cases, the cases are still there, but he discusses them in a little bit of detail, and it was easier for my law clerk to pick up that Analysis and find those cases than it was to go through all the books.

Go ahead.

MR. MURRAY: May it please the Court, I was just going to say that I wish I was one of those smart young fellows that could pick up a book like that, that would have avoided me from reading through Green versus Biddle about a dozen times, trying to find out what I think it means. Green versus Biddle has always been a very hard case for me to read and understand, also Rhode Island-Massachusetts, some of those old cases, as you say, you just wade through page after page, and after you get through you don't know what you've read, at least I don't. And I wish I had known about that volume sooner.

By way of introduction or farewll to Manning, I also want to say that the Court has probably heard the last argument by Manning Walker as an Iowa laywer, not just as a lawyer for the State of Iowa, but as a member of our Bar. Day after tomorrow he is going to Phoenix, he feels he must get out of this rugged climate and into a better one and you have been favored with his farewell argument to any court, I believe, as an Iowa lawyer, unless as we hope his health can improve down in Arizona and perhaps he can come back.

THE COURT: Mr. Walker, let me say now while it's appropriate and timely that I wish you good health, continued health, and good luck, and

all that sort of thing.

MR. WALKER: Thank you.

THE COURT: It's nice to have all you fellows in front of me, all of you I think you have good minds, and you've handled the cases very fairly, I think, from your viewpoint, I want to say that. And I would only hope that I could present you with a victory before you go, but I'm not going to decide this case tonight.

MR. WALKER: I hope Mr. Murray didn't make that eulogy for that purpose.

MR. MOLDENHAUER: The Counsel for Nebraska would like to join in those best wishes.

MR. MURRAY: Manning and I discussed for some time how we could divide up this argument between us. And we were interested in the remark you made from the bench, I think it was Monday, or Tuesday, to the effect that you thought there was a natural division of this case really into two segments, because that is the precise way that Manning and I had already decided to divide up our time.

Roughly, his topic was to be the islands that were in existence, or the areas that were in existence, before 1943. We think that is one separate

part of the case. And then my topic was to be the areas that had formed since 1943. That's an entirely different subject matter to us.

We believe that the law controlling those areas which were in existence when the Compact came into effect controlling who would become the owner of them was the law which was in effect when they came into existence. The Compact would have no retroactive effect to change that law which existed in either state to determine who became the owner of those areas.

But the areas which have come into existence since would certainly be controlled by the law of either state, as modified, if any, by the Compact, there isn't any question at all -- well, I retreat for a moment.

Really your questions or suggestions number 3 and 4 in your order of September 10th are the ones which to our thinking related to the areas which have come into existence since. Your number 3 was the Compact was a compromise, and Nebraska contends that this supersedes Iowa's common law and changed the rights which the State of Iowa had in and to the beds or abandoned beds of the Missouri River. Then you ask is this a proper interpretation of the Compact.

Well, first I would point out that really in the quoted phrase from Nebraska's argument there are two statements; one statement, the first statement, is that the Compact is a compromise. Cer-

tainly, it was a compromise, there isn't any question about that.

Both states certainly knew when they adopted that Compact that they were surrendering sovereignty over some territory in exchange for obtaining some sovereignty over some other territory, which they have never exercised sovereignty over before. In that sense it was certainly a compromise, and that gets us back to your question of what does the word "cede" mean in the Compact?

I will not cite the cases which we cited in our brief because they are there, and we blieve that the word "cede" in the Compact had reference only to sovereignty. In fact, any thought that the word "cede" as used in the Compact to our mind was negated by Sections 3 and 4, or is it 2 and 3, I can't remember -- 3 and 4.

Sections 3 and 4 to our mind, in effect, said no land was to be conveyed by the Compact. Those sections to our mind were saying titles to land as they existed before the Compact won't be changed, to any of it, and therefore the very -- any thought that the word "cede" used in the Compact would also mean convey, we feel, is negated within the Compact itself.

So it was an exchange as far as we are concerned of sovereignty for sovereignty, and certainly not an exchange of land for land, titles to land for titles to land. There is a further reason

why to our mind the Compact, the word "cede" in the Compact can't mean convey, and that's because Nebraska had nothing to convey, under their law (sic) they owned no river bed. Under their law the State owns no accretion to beds; so in the sense of compromise, you couldn't hardly say that the word "cede" meant convey, because that would have been just a one-way street. Only one of the states owned anything that could possibly have been conveyed, so we don't feel that --

THE COURT: Was that discussed in the negotiations, was any record of that --

MR. MURRAY: Not that I know of.

THE COURT: (Continuing) mentioned by anybody?

MR. MURRAY: Not that we know of.

THE COURT: The difference in the law?

MR. MURRAY: No, sir.

THE COURT: All right.

MR. MURRAY: Which brings me to this, that we feel that the only reasonable interpretation of the Compact is that the two states were

going to draw a new line, it was admittedly a new line, and that henceforth Nebraska would have sovereignty of and jurisdiction over the land west of that line, and Iowa would have sovereignty and jurisdiction over the land east of it; and never the twain would get in each other's hair again. But here we are -- in each other's hair again, I guess.

But we really feel that that was the nub of the Compact, that the courts of Iowa under Iowa law would henceforth determine the titles to everything in Iowa east of the agreed line, and that the courts of Nebraska would determine the titles to everything in Nebraska west of that line.

We believe that this is borne out by the evidence in this case. Iowa proceeded, and there have been numerous cases in the State Courts of Iowa to determine titles east of the line, and there have been numerous cases likewise in Nebraska to determine titles west (sic) of the line.

Now my count of the exhibits is that there have been, that back in '66 or '67, when the compilation was made there had been forty-three cases in Nebraska where they had, in the words of Nebraska, made unilateral determination concerning ownership of land west of the agreed line, without any interference from Iowa or without Iowa being a party to any of those cases, they simply settled what was on their side of the line and for years we thought that was all right, no interference.

THE COURT: Nebraska, the State of Nebraska on any of those cases?

MR. MURRAY: Not that I know of.

THE COURT: Private property.

MR. MURRAY: Private property. But once again we get back to the point that Nebraska really has no river lands, never did. The only river lands they had are lands they have purchased for some reason or another, and wherever a school section happens to be on the river, I have forgotten, I think originally Sections 12 and 36 in each section in Nebraska was designated as state-owned land for school purposes, and the State still owns some of these school sections, and the only places where they owned land on the river is where those sections happened to lap, or where some purchases have subsequently been made.

So we don't feel that the Compact can be determined to be a give-away by Iowa of its state-owned land for one reason because there could be no reciprocal give-away by Nebraska.

The second reason why we feel that it can't be interpreted that way, is that if the Compact be interpreted as a conveyance by Iowa of its state-owned river beds, state-owned lands, whatever they were when the Compact became effective, you then run into the problem of, well, who were the

grantees, who were the beneficiaries of this give-away?

THE COURT: I don't think anybody contends that it was a grant, I don't think that it is, I agree with you.

MR. MURRAY: Well, they do, they frankly say in their brief they want you to hold and Mr. Moldenhauer said it a couple times, they want you to hold that Iowa no longer owns the bed of the Missouri River in Iowa, that we only have an easement on it. Now if that isn't a claim on their behalf at least that they, that Iowa has lost its state-owned river bed by operation of the Compact, I don't know what it is. Now they --

THE COURT: Well, I look at that, I'm frank to say, as going too far.

MR. MURRAY: Well, we do too.

THE COURT: Well now, what I think that word means, one plain meaning of the word "cede" is yield. That word, we just looked at it in the new Black Law dictionary, it says that's usually used in terminology between sovereign states, yield territory, yield jurisdiction, sovereignty, and so on. And I think all, I think your point there is well taken, except this, that a good

title, you got to get down to the rest of it, you got to get down to the next section, you see.

MR. MURRAY: Yes.

THE COURT: Where you must yield when there's a good title coming to it, that's all it means, very simple statement, I can say that's very simplified.

MR. MURRAY: I agree with the Court's statement there, that we must yield when there's a good title coming to us.

THE COURT: Okay, that's the way it looks.

MR. MURRAY: The only place that you and I, Judge, disagree at the moment on that point is I utterly and completely am unable to see how there can be good title in Nebraska to a piece of ground which was never in Nebraska.

THE COURT: Well, I agree with that, too, I agree with that, but you didn't know where it was, you didn't care where it was.

MR. MURRAY: But that's away from my subject, of course, for the moment. I agree with you that we agreed to yield to good titles coming to us from Nebraska; and our only dispute is, what is a

good title coming to us from Nebraska? They say it is a title recognized in Nebraska. Now we don't think a title recognized in Nebraska is necessarily a good title in Nebraska, and particularly because it just -- I've lost my train, so I'll shift to another subject.

THE COURT: Well, maybe, I maybe threw you off a little bit.

MR. MURRAY: No, I welcome that, Judge.

THE COURT: Well, the point is here that I think we're agreed on that, I don't know whether Nebraska still wants the Court to insist on that all the way up and down, but I have considerable reluctance because it seems to me that it goes further than what is necessary to do to decide the case, the controversy, you see.

I think all the courts need, as I have said before, all the local courts need -- by that I mean the high courts of both states -- is an expression from the Supreme Court that Iowa common law can't be used against a good title, that's all.

Go ahead.

MR. MURRAY: Well, you gave Mr. Moldenhauer an opportunity yesterday to withdraw from that position but he didn't. So that's still their position.

THE COURT: That may be.

MR. MURRAY: And I feel necessary, I feel called upon --

THE COURT: Well, go ahead.

MR. MURRAY: (Continuing) that I must make my argument against that proposition.

THE COURT: Go ahead, go ahead.

MR. MURRAY: Because they still insist upon it.

We feel that if by any stretch of the imagination it be considered that Compact was a give-away by Iowa of its state-owned lands and river beds along the river, that then it must follow the give-away wasn't to Nebraskans but it must have been to Iowans.

Now once again we think that is simple but Nebraska's claim in this case doesn't stop there. They want this Court to say that the conveyance by Iowa of its formerly state-owned river beds and lands was to Nebraskans. We think that is an extreme position which they cannot sustain, and which is not a proper position to be derived from the Compact.

The real principal reason why we feel that that can't be it is just because the Compact doesn't say

so. In that respect we feel they are asking the Court to write a Compact, or change a Compact which we believe the courts have never been willing to do, and the Court shouldn't be willing to here. The rule against implied repeals is against them on this proposition. The rule that Compacts will not ever be construed to derogate the rights of the public is against them on that proposition. The rules against them on that proposition are so numerous that it's almost futile to start out on it.

Now, I have taken a look at these upstream areas, areas other than Nottleman and Schemmel, as you have evidence concerning them in this case. I believe there are six areas below Council Bluffs-Omaha which formed before 1943, and maybe there are only five. In my quick review I am unable to answer for Copeland Bend, but certainly State-line Island, Schemmel Island, Saint Mary's Bend, Alden Bar and Nottleman Island were formed before the Compact and not affected by the Compact except the Compact to our mind says whoever owned them before still owns them.

There are two areas above Council Bluffs listed in our list of areas which we claim to own which formed before the Compact. One is Wilson Island; I don't know whether they feel that we are violating the Compact by claiming and occupying and in improving Wilson Island or not, but it's an area which formed before the Compact. And the other one above Omaha is Deer Island, which was involved in

the case of Iowa versus Raymond in the Iowa Supreme Court.

That brings me to this. Why does Iowa claim Schemmel Island? To our mind factually Schemmel Island formed at the same time and in precisely the same manner that Deer Island, which was involved in the case of State versus Raymond, was formed. We had at Little Sioux Bend in the Raymond case a wide river, as the wild river was, usually a mile wide, sometimes a mile and a half wide, sometimes two miles wide when the Corps came to Deer Island in the middle '30's and went to work.

It's our position as Mr. Walker has told you, that it doesn't make any difference whether the thalweg was anyplace within that channel; it could have been anyplace. The Corps design at Deer Island was to put a designed channel and confine the river in a curve like that. Their method for doing it was to drive pilings and build dikes out from the Iowa shore -- does that look familiar -- just like down at Schemmel Island.

The only difference up at Deer Island was that after they built these dikes the river went into this designed channel without any further effort on their part, went where they wanted it to go, without a canal.

The difference down at Schemmel Island is that after they got these dikes built and after they got another long dike built clear across the island

with its trail off here, the river insisted on coming back like this; so they dug the canal and moved the river from here to here. And that's the only difference in our mind as between the island that was involved in the case of State versus Raymond and Schemmel Island.

They are alike even in this, that after they built these dikes water continued to flow, back here, and they had to come back and build what they call a chute closure, or a dam, back in here to shut off this water from escaping from their designed channel.

The law of State versus Raymond as far as we are concerned, Judge, if applied to Schemmel Island would say we own it. Now, and, that's one of the explanations at least of why we claim to own it.

THE COURT: What states were parties in that case, any states?

MR. MURRAY: No states. The case of State versus Raymond was Iowa against the Iowa riparian owners, about four or five of them who claimed that this island didn't form as an island, but that it had formed as an accretion to their Iowa shore. The only way the Nebraskans over here got into the case --

THE COURT: They -- Iowa wouldn't stand for that, would they, Iowa wouldn't stand for that

whether the facts were so or not, would it? I mean, Iowa couldn't go along with that theory no matter what the facts were, could it?

MR. MURRAY: I don't follow you.

THE COURT: Well, Iowa wouldn't permit any of its citizens to claim accretion outward from the west bank of the river, or, the east bank of the river, would it?

MR. MURRAY: Oh, yes, they would.

THE COURT: They would?

MR. MURRAY: Yes, sir. And that brings me sooner than I wanted to get to another subject that I was going to talk about. Nebraska is critical of Iowa about being inconsistent where we claim and where we don't claim.

They seem to feel that we are inconsistent if we don't claim to own every place and any place that the river ever was. We do not claim to own every place and any place that the river ever was. We -- it's clearly the law of Iowa in numerous cases that when somebody else's accretions, honest-to-god accretions, building up gradually and imperceptibly from their riparian shore come out here and cover our formerly state-owned river bed, those accretions belong to the riparian owner,

and we don't deny it, never have. The question in Raymond case was whether or not that happened there, and the Court said that it didn't. This island did not form as a gradual and imperceptible accretion to the Iowa shore.

If the fact had been that it had done so, and if the fact had been at Schemmel Island that it grew as a gradual and imperceptible accretion from the Iowa shore, we wouldn't be claiming it either. The only way we could claim either island is on the basis of island formation, separate from the shore, separated, surrounded by flowing waters, and we think both islands.

THE COURT: Well, that's what the Court held in the Tyson case, wasn't it, he found the island in the river?

MR. MURRAY: Yes, sir.

THE COURT: The Tyson case.

MR. MURRAY: Yes, sir.

THE COURT: And gave it to you?

MR. MURRAY: Yes, sir. Found it in the Raymond case too, that one case was the Iowa Supreme Court and the other case was the Circuit Court after the District Court here in Council

Bluffs had held it.

Two areas above Council Bluffs-Omaha, along the river, which Iowa claims to own, we only claim to own by deed, no other theory; so those areas I pencilled off my list, I don't think that they have anything to do with this case.

THE COURT: Which ones are they?

MR. MURRAY: Rand Bar and Rand Access. They were never claimed by Iowa under any theory of sovereignty, of state ownership of the river bed. Actually they were acquired in a trade with Miss Rand. Iowa owned some abandoned river bed in the area, she owned Rand Bar and Rand Access, the abandoned river bed was usable to her, the two other areas were usable to us so we traded them, just that simple.

I can't see that those two areas, Rand Bar and Rand Access, have anything to do with this case. And that leaves, according to my count, eighteen -- correction -- twenty-one areas above Omaha and Council Bluffs which have formed since 1943, and which we claim to own in whole or in part under our Iowa doctrine that the State owns the beds, abandoned beds, and any islands that have formed in the river.

Just night before last after Mr. Moldenhauer had made his argument of Tuesday I had never counted the areas above Omaha-Council Bluffs where

the river since 1943 escaped into Nebraska. Now these twenty-one areas which Iowa claims to own above Omaha-Council Bluffs are generally all areas where since 1943 the river escaped the designed channel in the direction of Iowa. I made a count just a night before last, and this will be mentioned later, I find at least seventeen areas above Omaha-Council Bluffs where the river escaped the other way, which we have never claimed, these are places now in Nebraska, of course, which we have never claimed and there are about seventeen areas like that.

This gets us down to the Court's question, which was, if you followed the theory which they propose that the Compact changed the Iowa common law, I think your words were, "How does this aid Nebraska?"

First of all, my answer to that would be it doesn't aid the State of Nebraska one way or the other, all it can possibly aid might be some Nebraskans, but they have no titles, they have no river beds, they have no lands out there. The only aid any interpretation could be would be to some Nebraskans.

THE COURT: Under the system in this lawsuit, all right.

MR. MURRAY: It's almost impossible, Your Honor, to talk about that proposition without a picture. I must draw another picture.

THE COURT: Okay.

MR. MURRAY: Tyson Bend -- have you ever heard of that?

THE COURT: I've heard of it.

MR. MURRAY: Tyson Bend, in Tyson Bend the river was flowing in its designed channel in 1943. My picture is going to look very much like Mr. Moldenhauer's, he wasn't far off.

What happened at Tyson Bend was that during the late '40's, early '50's, and during the time that the Corps had no money or manpower to maintain their works along the river, the river began to destroy the left bank in that area. So that by 1948 the river was running in a channel over here about a mile or a mile and a half wide. This channel is only seven hundred feet, but this was a mile to a mile and a half wide over here. The state boundary was in the old designed channel, and, of course, remained there even though the river left that channel.

After the river had passed over this area, first, a small island and then larger islands, and then ultimately pretty fair sized island, came to exist in Iowa right about there. I think the evidence was that in 1948 this island existed, water continued to flow through this channel, however, until the '52 flood brought in a load of sand and plugged the old

channel about there.

Nebraska insists that this island belonged to Mr. Tyson. They -- Mr. Moldenhauer still says, and they in their reply brief and they say in their first brief that the Tyson case is wrong. Why do they say the Tyson case is wrong? Their theory is that the thalweg of the stream was always on the outside of the bends and that this thalweg was the private property line between Tyson and whoever owned land on the Iowa side, and I don't know who it was, even though the State line moved from the thalweg to the center. So they say that Mr. Tyson continued after the Compact to own this land in Iowa.

The trouble is, I'll just say, I don't know whether he did or whether he didn't, saying that much doesn't do him any good, doesn't do Mr. Tyson any good, and it doesn't do Nebraska any good. They have to progress from that statement, in otherwords, this is ceded land, and even though it was under the water, and we had to recognize that Tyson was the owner of that river bed.

They have to progress from that statement, and say, this continued to be a moving line, the private boundary line between Tyson and the Iowans continued to be a moving line, even though the State line was fixed in this area, and when the thalweg bulged out here and ultimately came over into here, that Tyson's ownership followed it, and that therefore Tyson owned this spot when an is-

land formed over it, and not the State of Iowa. That's why they say that the Tyson case is wrong.

Now the Court asked this morning whether or not the Tyson case is a compact interpretation case. I agree with this, that the Compact is barely mentioned as such in the opinion or in the Federal District Court decree, which is also in evidence in this case, the Compact was hardly mentioned; but the fact remains that the decision in that case is an interpretation of the Compact. The decision in that case is that even though the thalweg crossed across this place where the island formed, the State of Iowa remained the owner of that spot under the spot in the sky where the island did form under Iowa law.

THE COURT: Go get that Jack, it was more or less a decision from Judge Ley, 283 Fed. 2nd 802.

Is that your interpretation of that, without interrupting the other side?

MR. MOLDENHAUER: I think the factual description that, when they moved it back from here to here, they did not restore that --

THE COURT: Yes, I think that's right.

MR. MURRAY: Yes, I forgot to tell part of the story. In 1957 or '58, somewhere in there, the

Corps had redesigned the river above Omaha, in this particular location it happened that their redesign called for the channel to go back right almost exactly where it had been, not quite, but practically where it had been. And they came back in '58 or thereabouts, and dredged the canal, right up through here, in the designed channel where the river had been, and thus put the river back over here without destroying the island.

I simply say that even though the Tyson and the Tyson opinion mentions the Compact very little, it does interpret the Compact.

THE COURT: Well, all it says was, all he said about that was, in the Tyson case as far as I know, you know, it isn't well for a District Judge to criticize the Chief Judge of the Circuit, don't you know that?

MR. MURRAY: Well, we want you to go with the Tyson case, Judge, we don't want you to criticize the Tyson decision.

THE COURT: I think -- the decision is okay as far as I see it. Moreover, the entire river bed is located in Iowa and that State owns the entire river bed at the point of controversy. In a Compact boundary situation, now he's talking about, the boundary is fixed, as you say in this case by the Compact. The general rule established in the

State of Nebraska, and so on, that case, 143 U.S.; that the thread of the stream the boundary does not apply, that's all he's saying, as far as the boundary is concerned, he don't -- he says just below, it's east of that, as I read that decision. He says that the land formed in the river in Iowa after the boundary, and that's what it's all about, that's really all it amounts to.

MR. MURRAY: Well, of course --

THE COURT: After the Compact, after the Compact.

MR. MURRAY: What that decision does is reject the claim of Tyson.

THE COURT: Oh, yes, sure, sure.

MR. MURRAY: Now Tyson was claiming that that island --

THE COURT: Didn't Tyson claim accretion across the boundary line?

MR. MURRAY: Yes, he did.

THE COURT: Into Iowa?

MR. MURRAY: Yes, he did.

THE COURT: And they say, well, they say, well - they don't decide whether he could do it or not, have land, because they say that in any event the island was formed on the Iowa side of the river.

MR. MURRAY: That's right.

THE COURT: So that they don't have to decide that question.

MR. MURRAY: What they left open, Judge, in that last paragraph of the opinion, to my mind, is this. They left open what would happen in a factual situation which they found didn't exist here.

THE COURT: I think so.

MR. MURRAY: What they left open was the question of what if Tyson's land had accreted above the water, land accreted above the water, out over the State line. And I think what he's saying is that if that had been what happened perhaps we would not say that Tyson couldn't accrete across the State line.

I don't believe, as I review these areas which are involved in this case, that there is a case like this case which the Circuit Court refused to decide in the Tyson opinion. I don't know of a case among our numerous areas above Council Bluffs where

accretions did form above the water, gradually and imperceptibly to either shore, Iowa into Nebraska or Nebraska into Iowa.

THE COURT: Isn't there an area up there where the line is much west of where the new channel of the river is, isn't there an area up there where the boundary line, the Compact line, is west of the present channel of the river so that there's an area in between?

MR. MURRAY: Yes; I believe there are several of them.

THE COURT: Yes.

MR. MURRAY: The one I can think of right off the bat is Omadi Bend, and I plan to talk about Omadi Bend later in my argument, because I think what happened at Omadi Bend is a beautiful demonstration of the complications you can have arising out of the way Nebraska wants you to interpret the Compact as it would relate to these areas that have formed since the Compact.

But the Court said in the Tyson case that Tyson can't accrete over to here under the Compact -- after the Compact, under water. The only way he can accrete beyond the State line according to the Tyson case would be for honest-to-god accretions to form to his riparian shore above water,

and those accretions come across the State line.

When the Circuit Court said this spot where the island first formed was owned by Iowa when it formed, they were rejecting Tyson's claim, and the claim which Nebraska is now making, that the Nebraska riparian owner could accrete across the State line, under water.

THE COURT: Why don't you answer that while Mr. Murray is thinking.

MR. MOLDENHAUER: Your Honor, the reason of course that this is in Iowa is it is in Iowa, but the only reason is because of the State line. We still have a movable line, the State line, we still would have a movable line over here, so they moved it back around the boundary and we had an avulsion, but Nebraska owned it, still owned the land, so we say, and the Nebraska owner accretes to the bed, not the bank, it doesn't have to be to the bank, he accretes to the bed, and his title to the bed is as good as his title to the high bank land, to the thalweg, absent the Compact, so what we say is that you can t say that the Compact has no effect upon private titles and still hold as Tyson did, because it did have effect on private titles. The result of the case was to terminate his title to any rights to the bed and accretions to the bed -- when it hit the state line.

THE COURT: You mean your bed collar of he water or the bare bed?

MR. MOLDENHAUER: Either one. We have title to the bed, yes, we have title in Nebraska to the bed or any accretions to the bed to the thread of the stream, and if land forms in that bed it belongs to Nebraska riparian owner, we say that is a part of his vested riparian right, that's his right to accretion, and so the Compact has changed the result, and I think we might -- that's correct -- the Compact changed the result of this situation of what would be the common law without the Compact.

MR. MURRAY: Yes, sir, I agree to that, if it had not been for the Compact, the result of Tyson, well, in the first place Tyson wouldn't have been tried. If it were not for the Compact land when the State boundary -- or when the river went from its designed channel over to here, the State line would have gone with it, and this area would have formed in Nebraska, over Tyson's river bed, and we would have had no claim for it -- to it; that's why I say the Tyson case is an interpretation of the Compact, it has to be, and the interpretation of the Tyson case is that even though the thalweg came over here, this river bed under the Iowa doctrine remained Iowa's, and therefore the island which formed in it was Iowa's.

Nebraska's argument would have the effect of

saying this. To my knowledge this spot where the island formed was never in Nebraska, ever; but what they contend for is that even though that be true, ownership of the island that grew up in it must be determined by Nebraska law. They want the effect of Nebraska law to go with the thalweg, wherever the thalweg went, after the Compact and to govern in Iowa to that extent, and that's the interpretation that they almost have to have in order to aid themselves in these upstream areas which have formed since the Compact.

You know, there's a certain similarity about all these areas, they are all different and yet they are all similar. We believe that California Bend is determined by the Tyson case. They say in the first place "No, it isn't determined by the Tyson case because the Tyson case is wrong."

The facts that California Bend were that they put in the California Bend canal in 1938, I believe, to cut off this great ox bow of the river which, in which the river was then running into Iowa. After the Compact we admit, we admitted, we still admit, that this, out to the thalweg, wherever it was -- I forgot what I was saying, but what I mean to say is that we admit that that was Nebraska after the cutoff, and then in 1943 it was ceded to Iowa, and to the best of my knowledge the Iowa authorities who are in charge of that recognized that this was ceded from Nebraska and it was still owned by the Nebraskans who owned it in Nebraska.

After '43 -- the state line is here - after '43 again, similar to Tyson, the river attacked this bank up in here and escaped out -- well, my scale is off -- escaped out to about like that, leaving this which was formerly Nebraska, not washing it away, but washing all of this which had been in Nebraska away.

In our view the only difference between California Bend and Tyson Bend is that at Tyson Bend an island grew and in California Bend none did. Before an island could grow the Corps decided again to put the river back where it had been, so they built a new left bank and they dredged a new canal and they dumped all the spoil from the dredge operation into a half-moon shaped area about like that (indicating), and created an island. They just shut this off with the revetment, shut this off with a revetment, except they left a small hole in it for the hunters and fishermen to get up in there.

In the intervening years, most of this upper part of it has dried up, substantial water remains down in this part of it. We say that under the doctrine of the Tyson case that river bed became river bed in Iowa, and under the Iowa doctrine it became state-owned. And when the Corps took the river out of that river bed and made it an abandoned river bed it remains Iowa property, it's that simple.

We do not claim this former Nebraska land which was never washed away, we still recognized

that Nebraska titles to it are good, but we are utterly unable to understand how this land that washed away can still be governed by Nebraska law when it washed away in Iowa and is in Iowa, it once was in Nebraska, but we don't think that their law has arms that are that long that even after the Compact their law still comes over here and dictates who owns that abandoned river bed.

THE COURT: Doesn't that bring up reliction?

MR. MURRAY: Yes, sir. This land that's being made, being exposed, you might say, up in here, is being exposed principally by a process of reliction.

THE COURT: What's going on in there now, what's going on in there, cultivation, or what is it, swamp land?

MR. MURRAY: Tomorrow morning, Saturday morning, it will be full of duck hunters. Our duck season starts Saturday morning, and, well, I'd hate to guess how many blinds there will be in that area.

Ever since the river, since the Corps took the river out of there, up until a year ago it was operated by the State Conservation Commission of Iowa as a refuge. Last year it was made a public shooting ground and it will be a public shooting

ground this year.

Now you say what's going on in the area.

THE COURT: What about the land in Nebraska, you can see in Nebraska what's going on there, to the private property?

MR. MURRAY: It's farm land, some of the best farm land outdoors.

THE COURT: The farmers are farming it, is that it, are you contesting that with that farmer, or anything like that?

MR. MURRAY: No, sir, as a matter of fact, they seem to think this is awful on my part, but I represent Mr. G. William Coulthard, who is a lawyer out in Las Vegas and a law school classmate of mine, who owns a large farm -- my scale's haywire again -- southerly from this bed.

THE COURT: I think he's got a good client there, and he's got a good lawyer.

MR. MURRAY: This lot 5, which Mr. Moldenhauer mentioned in argument is partly south of this old high bank of where the river came to in the early '50's, the edge of this water. And I represent him in litigation with Mr. and Mrs. Simmons concerning about twenty-one acres, right in that

location.

Mr. Coulthard claims that it's either deep, it is either accretion to the land which he bought from the railroad company in this location, or that it is original Nebraska land owned over in Nebraska by a man named Menke, and he has a deed from Menke for it.

The Simmonses on the other hand claim that piece of land as a part of a purchase from Harrison County, Iowa.

This lot 5, Mr. Moldenhauer said he didn't know whether that was an Iowa description or a Nebraska description -- that's an Iowa description, old original government lot 5, from 1852. The Simmonses claim lot 5 by a purchase back in 1954 of a quit claim deed from the County conveying this so-called lot 5. The issue between them is whether or not lot 5 exists any more. It's my position as Mr. Coulthard's attorney that it does not, that she didn't acquire anything by her deed, that this is either accretion to what Coulthard bought from the railroad or what he bought from Menke, and that in either event it belongs to Mr. Coulthard.

Really, your question was does Iowa claim outside this place where the river went to since 1943 -- no, we don't, we just claim to that high bank of where it went in about, oh, 1955, 1956.

THE COURT: Part of the land was obliterated

by the flood?

MR. MURRAY: Yes, sir, it was obliterated in this entire area, became first river bed in Iowa, then it became abandoned river bed in Iowa, and that therefore the State owns it.

I mentioned when I started out, Your Honor, that I wanted ultimately to talk about Omadi, or Omadi, I guess it's pronounced interchangeably, I don't know which is correct, because in my mind what happened in Omadi or Omadi, is illustrative of what happened after 1943 on both sides of the river, and what the consequences of the Compact interpretation that Nebraska contends for would be if applied in Omadi Bend.

I took the liberty of drawing my picutres at home before coming to Court, and with the Court's permission I hope you'll permit me to use them.

THE COURT: Well, go ahead.

MR. MURRAY: I did this because I'm not a very good artist on the blackboard, and working in the quiet of my workroom at home I thought I could get a better scale and a better picture and better representation of Omadi Bend that way.

That's my rough sketch of Omadi Bend, designed channel as of 1943 of the river as it was in 1943. I believe the Court will recognize that Omadi Bend is up about five to seven miles south of Sioux

City, perhaps two miles, two miles southwesterly from the Sioux City airport. That's the way the river looked.

In 1943 the two Legislatures came along in '43, and said that that center line will be the State boundary, permanently fixed. After 1943 the river really escaped from Omadi Bend in two directions; first up in this area it attacked its right bank, and ultimately moved out to here, whereas, the old design channel was here.

After having moved out to here that had a tendency to throw the water against the left bank, in the lower part of the bend, and it attacked its left bank in the lower part of the bend and ultimately moved out into Iowa, in that part of the bend, so you have in one bend an escape in both directions.

The Corps came back in 1959 and designed a new river at Omadi Bend. In the upper part of the river they put the back east even of where it had been before. It had escaped to the west, but they put it back farther to the east.

In the lower part of the bend they more or less adopted the old channel, but not quite. This removal of the channel from here to here in the upper part of the bend was accomplished by canal. This removal of the channel from here back down to here in the lower part of the bend was accomplished by driving pile dikes out from the Iowa shore and pushing the river ahead of it until they got it down to where they wanted it here, in the lower part of

the bend.

I think you were asking if there are any places up and down the river where the river now runs entirely in Iowa. Yes, this is one of them, and there are several more like it although they do not come to mind at the moment.

As a result of these natural movements and then man-made movements to my mind you have three pieces of land, or maybe I should say two pieces of land came into existence, are still coming into existence in Omadi Bend. First there is land coming into existence between these dikes in the lower part of the bend which, by which the Corps moved the river southwesterly to get it to its design channel.

Up in here you have this crescent shaped piece of land which came into existence when the river moved out into Nebraska and then came into existence in Iowa, because this is the fixed state line, and then which was cut off from Iowa when they dug the canal.

Then you have this piece of ground over here, most of which is lake yet, which has come into existence and exists today in Nebraska. Two pieces of land, or something, come into existence since the Compact in Iowa, and one has come into existence in Nebraska.

I don't know just when it was, but two or three years ago the Iowa riparian owners who had joined this bend along in there sued the State of

Iowa to quiet their titles to this. They say that the land which has formed and is forming in that area is accretion to their riparian shore. We are defending in the case; we feel that this land is not accretion to their riparian shore and that it is coming into existence, some of it has come into existence, but it is coming into existence more and more, separate from their riparian shore. It's coming into existence out here between the dikes in the manner in which the river usually acts, that it left a channel here along their high bank, just like Deer Island, just like Schemmel Island, that this remained a flowing channel for some time after this land started to appear. And that therefore these are islands and owned by the State, they are coming into existence in Iowa.

With relation to this piece of land the State of Iowa was sued by the Iowa riparian owners back, I think, in the early '60's. The case of Krogh versus Christensen, which is in evidence in this case, involves a part of this green area. The deeds from Krogh and Christensen involve the upper and lower ends of this area above and below the land which was involved in the case.

The evidence in this case tells you that Krogh versus Christensen was settled, was not tried, actually the case involved more land back in here, and it was settled on the basis that if Mr. Krogh and Mr. Christensen would relinquish any claim

they had to the green area the State would in turn relinquish any claim it had to this area back.

Therefore we believe the green area is now owned by the State of Iowa by reason of that settlement, if nothing else, by reason of the way it formed also, but by reason of the settlement, if nothing else.

I believe the Nebraska State Game Commission now claims to own the orange area, I believe, by purchase. As I say, there's a nice lake right in here, and because there was a nice lake there I believe the Game Commission over here in Nebraska purchased it and claims to own it. They built some valuable improvements down here along the shore line of the lake.

Now those are the positions that the parties have taken with regard to Omadi Bend and that's what's happened up to today. Take a look at what would happen at Omadi Bend if you would apply the rule Nebraska contends for here.

Nebraska would say, interpret the Compact, please, so as to say that it does not effect private boundaries; interpret the Compact so as to say that the boundary between the Iowa part of the river bed when it was in its design channel and the Nebraska riparian owners remained a fluid line to shift back and forth as the thalweg might shift. Okay, follow that.

Then when the river came over into this general area Iowa's title would go with the thalweg, and

would come somewhere near out to the outer edge of the bend.

THE COURT: I don't think that under that one decision, New Mexico case, Texas, that the State of Iowa could cross the state line, I think that's very clear.

MR. MURRAY: All right, take the State of Iowa out of it and say --

THE COURT: Private people.

MR. MURRAY: And say private people, the same thing. But in any event, either Iowa or the State of Iowa, either Iowa or the Iowa riparian owners, would have bulged out into Nebraska as far as the thalweg went under their theory.

Likewise, the Nebraska riparian owners down in here -- I don't even know who they are -- under their theory would have bulged out into here. So you would have to my mind the complete anomaly, or, I don't know whether that's the right word or not, of under their theory you'd have the Iowa riparian owners acquiring land in Nebraska as a result of these river movements since 1943, and you'd have Nebraska riparian owners acquiring land in Iowa as a result of these river movements since 1943.

THE COURT: What's wrong with that, they have been doing that for a thousand years, haven't they?

MR. MURRAY: We don't think that was the intent of the Compact.

THE COURT: All that it said in the Compact was it fixed the boundary.

MR. MURRAY: That's right, that's right.

THE COURT: I mean, we didn't affect the state title that we have been talking about, the private title to people.

MR. MURRAY: That's right.

THE COURT: Or their rights, or anything of that kind, I think it restricted Iowa in crossing any state boundary for any reason at all, the State I'm talking about, the sovereign State of Iowa. The Court very clearly told New Mexico that, and a couple other states that, where, when you join the Union they defined that line, that's your line for all purposes, but they were not talking about private title, not talking about private people.

And there, there, when you're talking about the end here is, the boundary is still there, the boundary is still there, it doesn't affect it at all,

the Compact line.

MR. MURRAY: Well, this is one of the reasons, Judge, why in our mind the Tyson case is what the Tyson case is.

THE COURT: Well, I don't, I don't think -- well, I don't want to argue that Tyson case any more, in fact, I think I got enough to do to try to find a solution to this case.

MR. MURRAY: Well --

MR. WALKER: Could I interrupt?

THE COURT: Sure.

MR. WALKER: I think Mike is -- the Court in your questions, Mike's argument, or, at least I think Iowa's theory is, that when that thalweg moves, and it moves across the state line, then it becomes under, then it comes under Iowa law, and vice versa, when that private owner's title follows the thalweg into Nebraska, when it crosses the boundary, to me it's elementary and basic, that when you cross that state line in Nebraska you're under Nebraska law and sovereignty, and you're under Iowa law when you cross that boundary into Iowa.

I don't think that it affects the title except that

title has to be detemined under the law of the state in which it is formed.

THE COURT: I don't question that, I don't question that, as long as we're talking about after the Compact, sure.

MR. MURRAY: Well, that's what we're talking about at this point in the argument.

THE COURT: No question at all about that, I think that's all right.

MR. MURRAY: We're just talking about, really, somewhere around forty areas that had formed in Iowa, and since the Compact and somewhere around twenty areas have formed in Nebraska since the Compact. This is the subject matter that we're talking about right now.

THE COURT: I'm frank to say that I have sort of indicated yesterday, I don't see the problem up there as I did down below.

MR. MURRAY: It is an entirely different problem.

THE COURT: It is an entirely different problem, but I'd like to leave a great deal of that up north to the state courts and to the private per-

sons; but the State of Iowa, you can't cross the line, you can't apply the law of New Mexico, and Texas to Iowa, and leave it go at that, let it go at that, see, that's what they -- that's what I think, don't you read that case that way, the New Mexico case?

MR. MURRAY: Yes, sir.

THE COURT: That you can t cross any state, now I'm talking about state-owned property, and that takes in your common law, you can't cross a state line with your common law, your bed law.

MR. MURRAY: We don't want to, Judge.

THE COURT: Well, of course.

MR. MURRAY: Well, but the place that becomes material is this, there is no reciprocity, there is no equity, if they're going to cross our state line with their law, then ours would go the other way just as -

THE COURT: Private persons could cross it, that's all, private persons on both sides could cross it, if they've got, if they can prove a real honest-to-god accretion they can cross back and forth, yes.

Both states are the same on accretion; between

private parties there's no different law there.

MR. MURRAY: I think so, generally there's a little difference.

THE COURT: I mean, substantial, you know what the law is.

MR. MURRAY: Yes, sir.

THE COURT: Sure, let them litigate, put the money in the hands of their counsel, that's good, that makes business.

But you have to do that, we kid about that, but that's the way things are in this country, see; and I think that you can leave that to them. We have to, we still talk, we are always talking in this case yet, Section 2, 3, 4 of this Compact.

MR. MURRAY: Yes, sir.

THE COURT: That you won't recognize, you won't recognize certain Nebraska titles, that's the point of it, that you must yield. I look at that, read that word "cede" as yield, give up, grant, it's sovereign jurisdiction, we have done that all over this country, we recognize that we have purchased title, we recognize governments have always done that. I guess Texas recognized them, titles in New Mexico when Texas took it over, they

had to, they recognized borders, but the Indian titles, the government recognized all titles but the Indian titles, and I guess that makes good reasoning in both cases.

MR. MURRAY: I guess that's why in Texas they have a very substantial body of Mexican title law.

THE COURT: Sure, that's right, the titles are good. That's why I say, frankly, that Nebraska, I'm disinclined, unless I don't know, I'm trying to avoid really getting into that, those subjects up there, except in general proposition, except as a general proposition, a general statement of law.

MR. MURRAY: Well, this is a very difficult subject to make up a general statement of law about.

THE COURT: Oh, I know, I don't say it's easy, Justice Marshal, the great man that he was, he said "This is not an easy problem."

MR. MURRAY: I don't, I don't know, I'm presently thinking, I don't know how you would make up a general statement of law to cover what should happen in these numerous areas which have formed above, since 1943, maybe it's possible.

THE COURT: Sure.

MR. MURRAY: There are some things that can be stated, but then the question always comes, well, where do you stop?

THE COURT: Well, that's why in a case of this kind I don't think that you can find, like in the first Nebraska versus Iowa, the Court, the judges didn't say anything there, they just made a natural boundary, that's all they said, didn't they, and then when they suggested a survey around a certain part of it, when it was surveyed around Carter Lake, that was put here, wasn't that the one that I understood yesterday?

MR. MURRAY: Yes, sir.

THE COURT: In view of this Compact.

MR. MURRAY: Yes.

THE COURT: And the states again here used a general proposition, this road map. Now what's called for is another little bit more definite statement of what the rights of both states are, and hopefully that will eventually settle it case after case, you see.

MR. MURRAY: Well, we think, Your Honor,

if you're not inclined to go this far with us, but we think that the simplest, plainest statement that could be made by the Court to be helpful in settling for all time these disputes about somewhere in the neighborhood of forty areas that have formed since 1943 would simply be a single statement that the common law of Iowa applies in Iowa, and the the common law of Nebraska applies in Nebraska.

THE COURT: Well, that's what you have been saying.

MR. MURRAY: And that's really the simplest statement and the most settling statement you could make about it, and we don't see anything unfair about it, not a thing.

Once you delve into the problem of saying, well, these two sets of common laws, or just one of them, was changed by the Compact you run into complication to my mind that are almost insolvable. And I hope to take those up somewhat in detail tomorrow; at the moment, Judge, I have about run down.

THE COURT: Why, I had, I had, you know, you move along, I don't say with finality now at all, I don't mean to say that, but it seems to me that a decision here at this point, I'm talking now based upon recognition testimony and inability testimony, inability of under all the evidence to,

in any exactitude find the old boundary in these areas, that Iowa should have recognized those two titles, Schemmel's and Babbitt's, and Nottleman.

MR. MURRAY: We're slowly beginning to get it, Judge.

THE COURT: No, just a minute, that you should recognize those two titles; but under this section of the Compact where you were to recognize those titles good in Nebraska, but under that same situation when there was a title, when a private person could show now title good in Nebraska, at the time of the Compact, on that day of that Compact, 1943, that under Nebraska law he had a good title, you must recognize him and your common law must give way. You don't have any presumptions against him, you don't have anything against him, unless you've got, unless you've got a paper title better than his title, now, you can litigate that title, but not based on your common law, you see, and then what does that do?

Well, you say anybody that brings a case based on his title to quiet his title must show his title. I don't think that it's too unfair to say to some other owner, prove your title, and if you prove that you got a title in Nebraska based on a deed, it's, that's good there in Nebraska, have been recognized in Nebraska, good title there, maybe it had to be adjudicated someplace, why, that's good

enough for Iowa to say that's all right, you back away, you would yield. That's my point, that's the point there, and the same way up and down the river, if they can prove it, it seems to me that that settles it, I don't know why it doesn't settle it, and it gives you your common law where, up here where you want it.

MR. MURRAY: The only place that you and I can have any possible disagreement about these older areas is, for instance, south of Omaha, would be in our definition of good title.

THE COURT: Well, that's a hard --

MR. MURRAY: I agree.

THE COURT: I say that's a hard question, but it seems to me that under the Nebraska law, for instance, you know that they have done this from time immemorial, we used to do it in Pennsylvania seventy-five years ago, if you found a piece of land somewhere, see, and it wasn't assessed and you had it assessed, didn't you, see, and not in your name because that wasn't good, you had it assessed in somebody's name, and when it was assessed a few times then you bought it at tax sale, and you did that four or five times and you had a pretty good title, see.

Now maybe that's what they do in Nebraska;

if so, it's all right, it's been done all over the country, I think, and when these bars appeared and land appeared out of the river someplace, and sooner or later somebody is going to get title to it, it's a good title.

Now I don't mean to say by that good title business that -- it has to be reasonable, some kind of a reasonable interpretation that it's good title, but when it is that and somebody's been there ten or twelve years, I think that you people have been letting that person in Iowa pay taxes on that property, based upon his, based upon his Nebraska title, you ought to recognize it and yield it. That's what happened in both and Babbitt and Nottleman.

That's my speech for tonight. Would you like to quit now?

MR. MURRAY: Yes.

THE COURT: Until 9:30 in the morning.

(Thereupon, the hearing in the above entitled cause was recessed until 9:30 o'clock a.m. the following morning, October 2, 1970).

10 O'CLOCK A.M.
FRIDAY
OCTOBER 2, 1970

* * *

THE COURT: Gentlemen, good morning.

All right, Mr. Murray, when you're ready. Let me say this before we start. Do you know, discussion, so-called, and so on, repartee and colloquy between counsel and the Court sometimes bring up matters, points that we consider afterwards; and when I say in my view now, mind you, this is my view, when we say a title good in Nebraska must be recognized good in Iowa, I'm not talking, I don't mean to convey the impression there that it's necessarily a title that would have to be held good between two private property owners, see, that's a different incident, I take it, maybe, I'm not closing the door to anything.

I think that what the title ought to mean there is the title as between that title in Nebraska, and the State of Iowa should recognize that under the Compact as being a property over which Nebraska had jurisdiction. And then on a transfer Iowa should accept that in the same fashion as Nebraska had, sovereignty only, that's all.

Now when the same two people maybe in Nebraska can argue that point, somebody else can wind up with that title, the same way on the Iowa side, you see what I mean, I mean there's a distinction there that I think that you have to make.

And what I'm saying here, these people back in this audience, they find out that I said that Schemmel and the Nottleman were in Nebraska, I don't mean to say that they got a good title under

Nebraska law, you understand the distinction, that there's a title there that Iowa should recognize as having jurisdictional basis in the State of Nebraska prior to the Compact and passing now the same way in Iowa, you see, all right.

MR. MURRAY: Well, in pursuance of that same subject while we're on it, I had planned to discuss that somewhat again this morning.

THE COURT: All right, go ahead.

MR. MURRAY: And this is a good time.

The record in this case shows that there once was a title to at least about the east half of Nottleman Island in Iowa. About the east half of Nottleman Island was originally surveyed and patented as Iowa land.

Now we don't claim anything for that, because that land which was patented in Iowa originally we feel has been washed away, and it's different land now existing in that same spot under the sky.

Some part of Schemmel Island also was originally patented and granted to somebody in Iowa, because it was within the original government survey of Iowa, but we claim nothing for that because it isn't the same land. We think the evidence in this case clearly shows that it's different land now in that same spot under the sky.

Now that brings you to, right down to the ques-

tion of what titles from Nebraska do we agree to recognize. Certainly not just any title to that spot under the sky to any land whichever existed in that spot.

THE COURT: May I raise a point that I started to talk about?

MR. MURRAY: Yes.

THE COURT: I think all you have to recognize is what Nebraska recognizes as a good title, they didn't disturb these people, the county people, and all that sort of thing, they let them battle all they wanted to. But as far as all incidences of jurisdiction and sovereignty are concerned those two places now were Nebraska property in that sense.

MR. MURRAY: Well --

THE COURT: And now that being so under the Compact I think now Iowa is bound by the terms of the Compact, and when you say it's washed away that's part of my proposition, I think, because it was different land, and so on, it wasn't the same land, it didn't make any difference anyway, but for twenty years, ten years before and ten years after you didn't disturb it, and Iowa possessed it under Nebraska law, good, bad or indifferent, they got tax title and recognized it all.

MR. MURRAY: Well, that brings me to another point which I had in mind to discuss with the Court today.

THE COURT: All right.

MR. MURRAY: We think, Judge, that Nottleman and Schemmel Islands are markedly different on their facts as in evidence in this case.

THE COURT: I agree with you.

MR. MURRAY: We don't think that those two islands can be lumped off under one decision because they are, there are different facts at the two islands.

Now we think that we were there at Schemmel Island, suing Mr. Schemmel before ten years of his peaceable possession had elapsed. It's the evidence in this case, as I see it, that, and this is Mr. Schemmel's evidence himself, that he platted a garden on that island in 1954, he took a crop off of it for the first time in 1955, and we were suing him, I have forgotten it, in 1963 or '64. We think that even under Nebraska's liberal adverse possession law, if that's applicable to the case, that we were there in time. Now that's our position about Schemmel, now we don't think that even estoppel or recognition or laches or anything else runs against us at Schemmel because we were

there within ten years after he was.

Now, sure, we know that it's his testimony that he was out there in '39, he says he sowed some Reed's canary grass out there and that his boys put up some No Trespassing signs on the pile dikes in '39. That testimony is utterly uncorroborated, nobody ever saw the signs, I don't know whether they were there or not.

But the point is that really his possession and occupancy of that island didn't start until '54 or '55. We were there after him within ten years.

We don't think there are any cases of adverse possession, recognition or anything else that decrees you can be bound to have recognized or acquiesced or estopped yourself in that short a period of time. That's the difference between the two islands in my mind, and I think it's a valid difference.

THE COURT: Well, there may be something in that, I'm not, I'm not foreclosing that, I've got to put it together for discussion purposes, you see, and it may be that I'll notice the difference; some balance it seems to me in the Compact situation, the Court wants to settle it, and I'm frank to say that in that situation I think there shouldn't be too much of an argument between states. We don't like that, we don't like that and it ought to be amity in settlement, that's what they want in this case. And it seems to me that it's more amicable and a

better result for all concerned, really, Iowa, too, in those two instances, and a balance in the decision, mind you, the Court looks at that too in this case, see.

MR. MURRAY: Yes.

THE COURT: To say that here, these two are, must recognize, jurisdictional-wise, between Nebraska; then when you get up north there, the principle you talked of yesterday, I think we're talking about the same thing, that if it's a real, what you call, I think, or somebody called an honest-to-god accretion, you're going to recognize it, aren't you?

MR. MURRAY: Yes, sir.

THE COURT: And from Nebraska, as against your title, against your common law, if it moves over across the bay?

MR. MURRAY: We agree we lose our bed when somebody else's accretions cover it.

THE COURT: All right, okay. They have been in some doubt about that, Nebraska has.

MR. MURRAY: Well, we're not in doubt about it.

THE COURT: Well, I don't know, if you lay down rules like that and the local courts then say well, this land was washed away and it's not an accretion, you see, like you said in that, it's not an accretion, is it, so they give it to you, is that right?

MR. MURRAY: Yes, sir.

THE COURT: There's nothing wrong with that as I see it. But Nebraska seems to have the idea that you are applying that law up there where you pick and choose, and I'm not so sure about that, and I don't know that I have to decide about that all the way along at all. That's what I'd like to do, it would make it easier for me to have the Court say, well, that's the way it ought to be.

MR. MURRAY: Well, that's the purpose of us lawyers is to try to point out what we think is the way --

THE COURT: Yes, now, in other words --

MR. MURRAY: That's --

THE COURT: (Continuing) to have as few specifics in my recommendation as I can, and yet come up with something here that the Court's going to say that the states are ultimately going to be

satisfied, it's working, and that's why I want to discuss it with you, maybe afterwards, when we get all through.

MR. MURRAY: I --

THE COURT: You may think that I have decided the case.

MR. MURRAY: No, I, I -- from your remarks I gather that you have not decided the case.

THE COURT: That's right, but we are leaning that way, you can't sit here and hear a case without coming to some tentative conclusion.

MR. MURRAY: No, no, I certainly gather from your remarks that your mind is open about this subject matter --

THE COURT: Yes.

MR. MURRAY: (Continuing) which has been divided off to me as between Mr. Walker and me.

THE COURT: That's right, sure.

MR. MURRAY: Perhaps your mind is somewhat made up concerning Nottleman and Schemmel, but I --

THE COURT: Well, if I had any question about the so-called preponderance, I think, if anywhere, it would be with Nebraska, but on the other hand they started out and I don't think that I have to make that finding. I'd rather not make a finding there, to avoid it, but I'll probably have to make it, see.

MR. MURRAY: That's Nottleman and Schemmel.

THE COURT: Yes, that's right, probably have to make some finding there as to where it was at the time of the Compact and under which state the jurisdiction now, that's all, which takes jurisdiction, which state was the senior in the old term, you know, the signatory and all that sort of thing. If I use one word, and then you add that adverse possession to it then, you fellows pick it up and argue about it, I don't mean it in that sense.

MR. MURRAY: Well, Nottleman and Schemmel as you know aren't my subject matter, but I did want -- I thought you might be interested in my views.

THE COURT: You go ahead.

MR. MURRAY: There are two cases --

THE COURT: Take an hour.

MR. MURRAY: They are different.

THE COURT: What?

MR. MURRAY: Nottleman and Schemmel are different.

THE COURT: All right.

MR. MURRAY: And I say to you, frankly, that I can't disagree with you too much about Nottleman.

THE COURT: All right.

MR. MURRAY: The State was slow, too slow getting to Nottleman; but I don t think we were too slow getting to Schemmel, we were there within ten years after he was, and under the law of almost any state I know of to be there within ten years is fast enough.

But be that as it may, that's off of my subject.

THE COURT: All right, well, we'll look at that too.

Yesterday we were talking about the general subject matter of Nebraska's desires and askings with regard to how it wants this Court to say that the Iowa law was changed by the Compact, and I spent most of my time yesterday on the proposition

that the changes that they asked this Court to decree as resulting from the Compact should not be granted because they lead to a bad result. I'd like to pursue that subject for just a little farther.

MR. MURRAY: All right. And, by the way I thought the Court asked Mr. Moldenhauer this, some questions about this same subject matter I'm talking about.

THE COURT: Yes, I did.

MR. MURRAY: And I thought he didn't answer you, I thought the only answer he gave you was that, Judge, "We want you to decree these changes to have taken place in the Iowa law because that's the only way you can settle everything up and down the river." That's about the only answer I thought he gave you.

THE COURT: He wanted the whole loaf, he wanted it all up and down the river, no question about that.

MR. MURRAY: Yes.

THE COURT: I sort of disagreed with him on that.

MR. MURRAY: Well, I was interested in

your remark concerning Judge Pope's remark, his remark, as I recall was to the effect that he thought perhaps that Nebraska was asking more than they really expected to get. I can't assume that, I have to assume that they want, seriously want everything that they have asked for, and I have to assume during this argument at least that there's some possibility that they might get just exactly what they want.

THE COURT: No, I'm sort of looking for a compromise, you know, the way that people, the way the states did when they entered into the Compact.

MR. MURRAY: Well, we think there is compromise available to the Court here. Mr. Moldenhauer says "You have to go all the way with us in order to settle everything." We say that's not true, in fact, we say to go all the way with Nebraska's askings doesn't settle anything, in fact, it creates more problems, and that's what I was trying to demonstrate yesterday, that going all the way with their theory it just creates more problems instead of settling anything.

It seems to us, and what I'm really arguing for is that the only way the Court can really settle things as regards these forty or so areas which have come into existence, have been changed since 1943, is to leave Nebraska law in effect in Nebraska

and leave Iowa law in effect in Iowa. Now that's the way to settle things with regard to those areas.

We don't feel that the Court can seriously contemplate taking away from the people of Iowa its state-owned river beds, swamps, lands, whatever they were, and its right to have future river beds, swamps and lands which might form after 1943.

We think that construction of the Compact would be diametrically opposed to what the Compact says. The Compact says that as far as we're concerned land ownership shall remain the same, and really Iowa as a party to the Compact was wearing two hats, it was a sovereign dealing with another sovereign, it was also a landowner, and those words were inserted into the Compact, "title shall be recognized" not only for the protection of individuals but also for the protection of the people of Iowa.

THE COURT: Now wait a minute. Is there anything in the, now you know, when, when the Federal Courts like the State Courts, legislative act of Congress, go back to the debates in the Senate and the House in the committee reports, is there anything in there, anywhere there where it says that Iowa was talking about its own land, state-owned, property right, or, proprietary lands, I mean, this is a good argument, you understand?

MR. MURRAY: I understand.

THE COURT: But is there anything in there, you're construing it that way now, see, but we don't know whether the Senators and Governor paid any attention to that or whether they didn't.

MR. MURRAY: I don't know.

THE COURT: If they would have, they would have said something about that, there would be something in their negotiations, correspondence, letters, do you find anything like that in there?

MR. MURRAY: No.

MR. WALKER: I think the term "good" affects the Iowa titles as well as the private ownership, if Iowa had a good title doesn't Nebraska have to recognize it? It didn't say private good titles or individual good titles, it says just "titles".

THE COURT: I agree, I have to agree that there's no question about it, but I'm talking about jurisdiction-wise. If Iowa says these are our trust lands, we had good titles to them, we always had good titles to them, that's an abstract proposition, it didn't know what it had or what it had titles to at the time, that's why he was asking. You had swamp land, you had twenty miles wide one year ten years ago, and then you had two miles, and all that, so we're talking about jurisdictional-

wise again, you see, that kind of a title. Certainly, of course, you have your title, there's no question about it.

MR. MURRAY: We think, Your Honor, that after forty years of negotiations certainly the negotiators knew that the law of Nebraska was the law of Nebraska, and that the law of Iowa was the law of Iowa, whether they mentioned it or not.

THE COURT: But you know as a fact, I think, look at those last sheets there that Howard put in, what do you call that, showing the scarpments, and all the records there, all up and down the valley for the last hundred years.

MR. MURRAY: Yes.

THE COURT: A lot of that land is Iowa land under that theory, isn't it?

MR. MURRAY: Yes, sir.

THE COURT: You never claimed it, you didn't know where it was, you lost it, you had land way up around De Sota Bend there where they found that ship last year, maybe that was your land, you see, and that same argument holds good. You might have had land five miles east, that Mr. Pope lives on, that all might have been your land, but, you

see, you never claimed that and now you're claiming this title up next to the river, that's the point of that, isn't it, doesn't that hold water or not, Mr. Murray, that there must be by that same argument, there must be land that Iowa owned and it's lost or abandoned or paid no attention to it?

MR. MURRAY: I don't doubt that.

THE COURT: Sure.

MR. MURRAY: I don't doubt that. There isn't any question but what prior to 1943, prior to the Corps coming to the river, when the river was wild there were lands forming, washing away.

THE COURT: That's right.

MR. MURRAY: Forming and washing away out there with such frequency that nobody paid any attention to them, they were considered worthless.

THE COURT: That's right.

MR. MURRAY: It's only since the Corps has stabilized the river that anybody has considered these lands really worth fighting about.

THE COURT: I think we're all agreed, just so the record shows it, that the Corps paid no

attention to any boundary line either until '43, the general properties, they did what they had to do and they didn't ask any property owner in Iowa or any property owner in Nebraska about who owned what bar or island.

MR. MURRAY: Even since '43 they haven't paid any attention, Judge.

THE COURT: I'll leave that to the Court, I'll not take on that proposition.

MR. MURRAY: The fact of the matter is, in passing, that the redesign above Wilson Island, you might say, by the Corps in the '50's has placed approximately thirty-one miles of the river, of today's river, entirely in Nebraska. Iowa nor Iowans have any access to it or any interest for thirty-one miles. That's why I say that they aren't paying attention to the equities of the states in their interest in the river even since the Compact.

THE COURT: Maybe so.

MR. MURRAY: We just feel, Your Honor, that the result of the adoption of all the changes which Nebraska contends for would be absolutely unfair, inequitable and unjust.

It would be particularly unfair, we feel, now

for the Court to say that those changes came about after, to my mind, everybody has acted on the proposition that the Tyson case is right. For ten years we have been, we have been acting, and I think everybody's been acting, on the basis that the Tyson case is right. They now say it was wrong.

THE COURT: Now wait a minute, a Federal Judge trying a case here, a District Judge trying a case and neither Iowa or Nebraska would follow it in this circuit.

MR. MURRAY: Would you say that again, I didn't --

THE COURT: I say that a judge, a District Judge trying a case in either Iowa or Nebraska, in this circuit would certainly follow it, I think, don't you, he'd have to follow that.

MR. MURRAY: Not if you upset it, or not if the Supreme Court in Washington upsets it, and we don't want you to upset it, but they want you to upset it.

THE COURT: I don't think that they're going to upset it as such, they might make a rule there that it's a little bit inconsistent, but they're not going to overrule it.

Again, what I'd like to do, see, is divide the rule, you can write it if you wish, and Howard can write it, that would satisfy this proposition north of Omaha, whereby your accretions, the accretions of two honest-to-god accretions on the Nebraska riparian owners and on his land, passing across the state line between titles, but you have no right to accretion beyond your state line because of your Compact. But necessarily your private people are not bound by that, leave those rights, then the Court can settle all these arguments. I think that they can settle it, and that satisfies, I think, the lawsuit in this instance by saying, well, here, you know, your common law of Iowa must give way when a Nebraska property owner has a true accretion, that is, Nebraska's, I mean, Iowa's common law right to the bed of the river.

You agree with that anyway, as I understand it.

MR. MURRAY: Yes, sir.

THE COURT: But, you see, that hasn't been delineated in any authoritative decision that satisfies Nebraska, is that right or not?

MR. MOLDENHAUER: Yes, sir. Can I make one comment?

THE COURT: All right, we're discussing this now, with a result maybe.

MR. MOLDENHAUER: We don't contend that Tyson ought to be reversed, that case is decided, the parties were in Court and I think res adjudicata, that doesn't mean that we agree with the principle or that the decision is right, and we think that we agree on the fact situation, that's purely a question of law as to the effect of the Compact in a fact situation.

It's sort of like when somebody is convicted of a crime and in prison ten years later he proves that he didn't commit it, they let him out, they can't return the ten years to him; and if Tyson was wrong they could go to the Legislature and say we were wronged, but we're not asking that that case be reversed. What we're saying is that principle is not correct and not applicable.

THE COURT: What's wrong with the rule laid down by the Court and approved by the Court that these lands since '43 we're talking about --

MR. MURRAY: Yes.

THE COURT: (Continuing) 1943, that Iowa recognizes the inherent right of Nebraska property owner against your common law right to the bed of the river as valid and true accretion, found on a factual

situation by a court?

MR. WALKER: Your Honor, I think you're misstating our common law, there isn't anything in our common law that says that you can't accrete across the bed of the stream, you wouldn't have to --

THE COURT: Nebraska has said that you haven't accepted that proposition yet.

MR. WALKER: Oh, we -- I don't know where they get that idea.

THE COURT: I'm glad to hear you say that, because I --

MR. WALKER: No, I think, the only thing I think, I disagree with, on your statement, I think under proper circumstances true accretion, I don't think the boundary makes any difference there, the only thing I'm saying is that when that land passes across the boundary accreting, it comes under Iowa law and the Nebraska law doesn't follow it and doesn't change the jurisdictional boundary, that's all we're saying, and under Iowa law true accretion is true accretion.

But they want to go farther than that, they want to say when that land accretes across the state line the Nebraska riparian owner's title precedes

that accretion to the thalweg, which is contrary to Iowa law. We don't feel that that boundary can be shoved back by a private owner and force Nebraska law to follow his boundary into Iowa. That's all we're saying, that anything within the boundaries of Iowa should certainly be under the control of Iowa sovereignty and jurisdiction, that's basically what we're saying.

When he comes into Iowa as a property owner he should be treated like every other citizen and property owner in Iowa under Iowa law.

MR. MURRAY: I'll attempt to redraw the first picture Mr. Moldenhauer drew during his oral argument, it may look something like it.

Design channel 1943. State boundary fixed in the middle of it by Compact in 1943. Generally the thalweg in 1943 running on the outside of the bends and then crossing over to the outside of the bends. The thalweg and the state line are almost never the same except at these points of crossing.

Number one proposition of Nebraska is that prior to the Compact Mr. Nebraskan over here owned to the thalweg. They say even after the Compact he should still own to the thalweg. It follows from their saying that prior to the Compact Iowa owned to the thalweg and they don't say it, but it would follow that Iowa continued to own to the thalweg after the Compact.

THE COURT: Private property owner?

MR. MURRAY: No.

THE COURT: The state?

MR. MURRAY: The state.

THE COURT: Both, both, the state?

MR. MURRAY: The state owns the bed of the river.

THE COURT: Yes, all right.

MR. MURRAY: To the thalweg.

Now if you construe the Compact as taking the state out of it then we certainly think you should put the Iowan in the state shoes, not the Nebraskan, and that the Iowan would stand in the shoes where the state formerly stood, although really we see no reason for the Court to say that. Why the Compact should be construed as a gratuity from the people of Iowa to these few or many select Iowans we can't understand. We feel that really Iowa would continue under their theory to own to the thalweg.

Now I was attempting to say yesterday that going that far with Nebraska with their theory is relatively harmless. If you would say that then the

private boundaries become fixed wherever the thalweg was in 1943 and that they no longer moved like they used to move. I say relatively harmless because these half moon shaped things are never over about 350 feet wide, most of them are still in the bed of the river, still under the water, and really as a practical matter right now what's the difference who owns them?

One of the defects with that is that it's messy how do you determine, that still leaves you to determine where the 1943 thalweg was.

THE COURT: You can't do it.

MR. MURRAY: And you can't do it.

THE COURT: No, I can't do it, nobody can.

MR. MURRAY: In everyone of these cases the possibility would remain that somebody someday might have to determine where that 1943 thalweg was, and as you found out in this case it's almost impossible.

You can assume that it was on the outside of the bend, but it wasn't all on the outside of the bends. If it were always on the outside of the bends there would never have been a steamboat get stuck, and the record here is that steamboats by the hundreds got stuck, and by the thousands got stuck, so the thalweg wasn't always where they thought

it would be and they still get stuck occasionally, not very often any more with the narrow channel and deep channel.

Now what we object to is Nebraska's proposition that this private boundary after the Compact remained a fluid moving boundary, so that if the river escaped in this bend and the thalweg moved gradually over to here, that the Nebraskans would move out with it.

Now assuming for the moment that the Nebraskans' bank stays right there, and that's usually what happened after '43. The river usually simply bulged out when it escaped from the design channel. It didn't entirely move over to here and create real accretions to the Nebraskans' shore, in fact, I don't know of any place in evidence in this case where that happened that the Nebraskans' shore line move out into Iowa.

What we object to is their proposition that as the thalweg moved out under water his boundary would move out under the water so that when an island may be formed over here in Iowa it would be the property of the Nebraska riparian owner. We don't object to his ownership into Iowa if there was an accretion to his shore line; what we object to is his becoming the owner of an island in Iowa on some theory that his boundary moved out here under the water.

THE COURT: Well, is that a statement or a

principle, say that the Iowa property owner, or Nebraska property owner would be entitled to accretion to his shore line, is that it, you are satisfied with that?

MR. MURRAY: Yes, sir. I feel --

THE COURT: That does away with any necessity or need to find any thalweg at any time, doesn't it, at this point?

MR. MURRAY: I feel, Your Honor, that the question of whether or not a Nebraskan can accrete to his high bank over into Iowa is not really in this case, because I don't feel there is a factual situation in this case where one has.

Now if you want to take it on and --

THE COURT: I'm not taking anything on.

MR. MURRAY: And render a decision on the point, so be it, but I don't feel it's in the case. It didn't happen that way at California Bend, it didn't happen that way at Winnebago Bend, it didn't happen that way at Omadi Bend, it didn't happen that way at any place that I know of.

So I just feel that that question isn't in the case, maybe you want to settle the question anyway, and if so, go ahead, but I don't believe the Court here is called upon for it. Just as the Cir-

cuit Court in the Tyson case didn't feel called upon to decide that question because it wasn't in the case.

THE COURT: Well, if it's not in this dispute between you, between the states, I certainly don't have to settle it, if it's not a violation, if you're not violating the Compact in that situation I don't have to decide it, you have to decide it. The allegation is that the reason the Court took jurisdiction is because Nebraska allegation that you're violating the Compact. Of course, your answer to that is negative all the way.

MR. MURRAY: Yes.

THE COURT: But I don't know how -- what Howard is going to say about that proposition.

MR. MURRAY: We filed a cross-petition in this case, or, a counter-claim as it's called, one purpose only; the counterclaim in this case filed by Iowa was only filed for the purpose of opening up the other side of the river to compensating changes if the Court elects to open up the Iowa side of the river and make some changes there. Now we feel --

THE COURT: What happened to the counterclaim, did we try that?

MR. MOORE: I think they lost that.

MR. MURRAY: The Krimlovsky case is in evidence, the forty-three cases, decided by Nebraska since the Compact without interference from Iowa is in evidence. The evidence as to what Nebraska has been doing over on their side of the boundary is in evidence.

THE COURT: In your brief have you claimed any relief on your counterclaim?

MR. MOORE: I believe there was some sort of a pre-trial determination that Iowa's claim would not be tried until Nebraska's claim was determined, am I in error on this?

MR. MOLDENHAUER: Your Honor, Judge Pope suggested that, and that was my understanding, that we were to try this and take up the counterclaim up separately afterwards.

MR. WALKER: I thought that in the conference with Judge Willson we decided to try the whole thing at one time, and that's why we submitted evidence of the west side.

MR. MURRAY: Well, we're in this anomalous situation, I'll tell you frankly, and I think that I have told you before, that we don't want our counter-

claim.

THE COURT: I think that's what you told me before.

MR. MURRAY: We only want it conditionally.

THE COURT: Yes.

MR. MURRAY: If the Court is going to make some changes in the Iowa law then we think that some changes, some compensating changes and some changes which naturally flow must be made in the Nebraska law.

But when I argued this, I'm really not arguing what I feel should be the decision in this case, because I feel that the decision in this case should be that the law of neither state was changed in the manner they seek to have you change it.

We feel that certainly if a rule is to come out of this case to the effect that the Nebraskan can accrete into Iowa, certainly the same rule ought to be put into effect going the other way.

And the counterclaim was for the purpose of raising the issue at least so that if these radical changes, what really we think are radical changes, that Nebraska is contending for in the Iowa law, the Court has the power and jurisdiction at least to make compensating changes on the other bank. We think that the same rule ought to apply in every

bend, not just the ones that go this way.

But once again, basically we feel the Court's decision is to say that Iowa did remain the owner of its river bed in Iowa; Nebraskans did remain the owners of their river bed in Nebraska, and so be it.

Now they say, yes, but, Judge, when you do that you're taking the Nebraskan's title away from him to this ceded river bed. And we say if you feel that you don't want to do that, all right, give him that ceded river bed, but also give us this ceded river bed and stop the process there, don't let it meander out into Iowa again and then meander out into Nebraska again, because that's just creating problems which were, which we thought were being settled.

THE COURT: You're talking about high water shore mark lines, aren't you, you're talking about high water shore lines, high bank lines on each side?

MR. MURRAY: Yes, sir.

THE COURT: But that doesn't sound too bad.

MR. MURRAY: Now if the Court wants to go this one further step, if you feel that you must let the Nebraskan remain the owner of that and you must let the Iowan remain the owner of this, the

process should be stopped as of 1943, and one exception perhaps should be recognized, and that is if shore line accretion occurs in either direction those shore line accretions could extend across the state line.

It's my genuine feeling that you don't have to decide that because I don't believe it's in the case; but if you feel it is we wouldn't be greatly adverse to that kind of a decision.

What we really object to is Nebraska's proposition the Nebraskan can accrete it over into Iowa under the water, we just don't feel that that's possible, because as a practical matter, for one thing, it works out badly, it creates problems which we thought were laid to rest. And the other thing about it is that to go to that extent would in our mind overrule or reverse the Tyson case under which we have all acted for some ten years now, and it would change the rule of the Tyson case to go to this extent.

They propose more changes in the common law that they want you to decree as flowing from the Compact. For instance, they want you to say that any movement of the thalweg caused by the Corps of Engineers should be treated as an avulsive movement. In other words, the boundary -- the private boundaries should never move with the thalweg when the thalweg is moved by the Corps. The effect of this would be to say that when the thalweg moved out to here by a natural escape of

the river from the design channel regardless of how the Corps might restore the river to the design channel this boundary would stay over here. We can't see the justice or equity in that kind of a position, and we said in our brief that it's contrary to all the cases with the possible exception of one criminal case down in Georgia, all the cases other than that, State versus Smith, hold that movements of the thalweg are avulsionary or accretionary, depending on how the thalweg moved and without regard to whether the Corps had anything to do with it or not.

We think that should still be the law, it's been the law of Nebraska, it's been the law of Iowa, it's the law of everyplace, as I say, except in that one case, State versus Smith, down in Georgia, and I'm not sure about that case. The statement of facts in that case are brief and I'm not sure what the facts are, but we see no reason for that.

They want the Court to say that the Compact repealed the presumption in favor of accretion and against avulsion. In the first place we say where in the Compact does it say that? It doesn't say that or anything like it. No such result can possibly flow from any of the language used in the Compact as we read the Compact. You asked them why they think the Compact should be construed as having that effect, and they say, "Well, just because it's unfair, because the State of Iowa is using it." Well, we admit we use it, I never heard

of a party barred somehow from using a presumption in his favor. I think they would use all the presumptions in their favor in any particular situation, and anybody does, that doesn't make it unfair.

THE COURT: Well, again, of course, we're seeking, what I'm seeking is a reasonable result, to be a guide to both the Courts of both states and the states in this matter, without trying to decide a specific instance, property.

MR. MURRAY: Well, what I'm proposing, Your Honor, is that you should not say that the presumption of accretion as against avulsion was repealed, it's just that simple.

THE COURT: You're saying there, you're saying there that in that illustration, as I understand it, that the center of the boundary is still where you first put it, it isn't you're not moving your boundary, but, of course, the state line is still there, and you are letting, you are permitting Nebraska to cross the state line and to the east bank of the river, is that right, with its principle of accretion, is that right, you're willing to go that far?

MR. MURRAY: I don't precisely understand you, Judge.

THE COURT: All right, I understood you to

say that, here is the state line, isn't it?

MR. MURRAY: Yes, sir.

THE COURT: I understood you to say that you don't see too much wrong with permitting this private owner to cross here and cross here, up to this bank, by the principle of accretion, but stopping there (indicating), is that it?

MR. MURRAY: Yes, sir -- no.

MR. WALKER: No.

MR. MURRAY: I don't say that.

THE COURT: How much further are you going to let him go?

MR. MURRAY: As far as his honest-to-god accretions above the water line may go.

THE COURT: I see, all right, not under water.

MR. MURRAY: Not under water.

THE COURT: Where do you stop him under water?

MR. WALKER: At the state line.

MR. MURRAY: At the state line. I say that unless his above water honest-to-god accretions go out beyond the state line he should stop at the state line.

THE COURT: And if they do, if they're above ground, you'll let him go --

MR. MURRAY: As far as his accretions go.

THE COURT: We're talking about a possible decision on that point, Mr. Moldenhauer, what do you think of that, what's wrong with that, tell me that now rather than when I forget all about it and we come back to it, or, Mr. Moore.

MR. MOORE: If the Court please, this, of course, is a completely new position taken by the State of Iowa.

THE COURT: That's a pretty good one though, isn't it?

MR. MOORE: Well, the first part of it is a good one, that's what we have been saying right along, that you can accrete across state line.

I will remind the Court that Mr. Murray in his letter to the United States District Attorney

in regard to the Riley J. Williams case, where the State of Iowa took the position that you cannot accrete across the state lines, he wrote in his letter "The State claims that if Riley J. and Norma Jean Williams claims the land as accretion to their Nebraska holdings such claim is invalid because as a matter of law there can be no accretion across a fixed state boundary line from Nebraska into Iowa." Now that's the position that they took in the Riley Williams case, and that is the basis upon which they sued in the Riley Williams case or claimed the money in the Riley Williams case.

THE COURT: Justice Stewart said here about six months ago where the Court retracted from its previous position "Just because you realize your error is no reason why you should persist in it."

MR. MOORE: Well, I wonder how many other times the State of Iowa has been in error.

THE COURT: You know, we don't have to count them, we don't have to count them, Joe.

MR. MOORE: And I think we've almost reached the conclusion that they maybe were wroing in Nottleman and Schemmel, but they did take that position.

Now they are taking an inconsistent position which illustrates the way they change their posi-

tion as the facts warrant. But Mr. Murray keeps talking about this phrase "accrete across the state line under water." This is absolutely a meaningless phrase. Now this is either a movable property line or it's not a movable property line.

If it is a movable property line the Nebraska owner owns to the line whether it's above water or below water, and if anything accretes to - -

THE COURT: Well now, is that the definition of a true accretion, above water and below water, it isn't, is it?

MR. MOORE: No, we don't, we don't even have to talk about accretion because we're now talking about what happens between the Nebraska owner's shore and his property boundary which is out in the river, and we don't have to worry about whether it's accretion to the shore or to the bed unless there is the contrary claimant who also comes to the thalweg from the other side, that's when that problem arises.

If that boundary moves the ownership moves and it doesn't make any difference whether it's under water or not under Nebraska law; so accreting across the state line under water doesn't have any meaning.

THE COURT: I understand though, from Mr. Murray here now, that he wants to change that to

some extent, that proposition.

MR. MURRAY: Well, I don't want the Nebraska law to be applied in Iowa.

MR. WALKER: That's all we're asking, they're asking to extend Iowa law just as far as that thalweg goes.

MR. MOORE: But we have preserved that man's title and the title carries with it the right to the bed and --

THE COURT: Now wait a minute, his title is only a riparian title, isn't it, it doesn't mean a thing to him as long as there's water over it, does it?

MR. MOORE: Suppose an island pops up, it means quite a bit to him.

THE COURT: Well, suppose it does, suppose it does, but somebody from Nebraska's side, it seems to me that they ought to have some rights, it seems to me, it's not too inconsistent as I see it to say to them when the land is above water if you can show an accretion all the way across you can have it.

MR. MOORE: Well, we have this other shift

in position by Iowa. They say, they now admit that it is conceivable and proper that this Court find that you can accrete to your land across the state line and follow it right into Iowa, you may have to go into Iowa to --

THE COURT: Even against the State, that's where the State common law gives way to the principle of accretion and private property?

MR. MOORE: What we're saying is that there isn't a bit of evidence that the man's right to his accretion was no greater than his right to ownership of the bed at the time he acquired the title to the high land, and that's what was preserved in the Compact, with all that, that whole bundle of rights, all the hereditaments and everything that go along with it.

MR. MOLDENHAUER: You see, Your Honor, if the Nebraska owner owns the bed even though it's under water it's just as important to him as the fact that Iowa claims it owns the bed. Iowa seems to think that because it's out in the water it makes a difference, but if it weren't out in the water Iowa wouldn't have any claim at all. Their only claim is based on the fact that it's in the water as a sovereign claim, but the riparian owner on the Nebraska side has a title, and we say that his riparian rights which attach to that title which

carry to the movable boundary to the thread of the stream were vested property rights which were protected and included within the phrasing of the Compact that his title would be recognized in Iowa.

THE COURT: I don't believe, I don't believe that he ever had the right prior to the Compact, I don't know whether he had that right prior to the Compact under Iowa law, did they?

MR. MURRAY: Your Honor, I had my own thoughts going while he was talking --

MR. WALKER: You see, the thalweg was the boundary before, and the Nebraska riparian owner owned out to the thalweg, and Iowa owned from the thalweg to the high shore line. Now the Legislatures --

THE COURT: We're moving the thalweg all the time so that we're accretioning his land. I'm trying to get a solution there, a compromise somewhere that will work.

MR. WALKER: Well, it's briefed, Your Honor, and I think you'll find the cases say that a man's riparian rights isn't a vested title the same as his high land, and they use those terms, and I think when the Congress of the United States and the Iowa Legislature and the Nebraska Legis-

lature changed that boundary from the thalweg to the center of the stream, which is the law in many states, is the center of the stream instead of the thalweg, that the riparian owner's property rights are altered to that extent.

Now when we say he can accrete across a state line, he can accrete across the state line because it conforms with Iowa law, but the thalweg doesn't conform with Iowa law and therefore we feel that it shouldn't be allowed to extend into Iowa.

THE COURT: All right, go ahead.

MR. MURRAY: Your Honor, I have been trying to make my position clear.

THE COURT: I think you made it quite clear now.

MR. MURRAY: Well, apparently Mr. Moore didn't understand it.

THE COURT: Well, he don't agree with it.

MR. MURRAY: He not only doesn t agree with it, he says we're changing our position, we're changing our position in this lawsuit -- we aren't doing any such thing, Judge.

Basically, it's our position --

THE COURT: Listen, we don't have to prove whether you changed your position, we want to know what your position is now. I don't care what your religion was ten years ago.

MR. MURRAY: It's still our position that the simple, clear way to put the things at rest up above Omaha and to Sioux City is for the Court to say that Nebraska law and the Nebraska titles now end at the fixed boundary and that Iowa and Iowa titles now end at the fixed boundary, that's still pur position.

What I have been trying to say is if the Court feels that such a decision would deprive this Nebraskan of this crescent shaped piece of river bed and that therefore we're wrong about that, such a decision giving him that crescent shaped piece of river bed would not be abhorrent to us.

THE COURT: Now what you're saying to make that clear in case somebody else ever reads that is that you're saying the east half of the river, aren't you, you're giving them the east half of the river?

MR. MURRAY: It's not the east half of the river, it's this crescent shaped piece over at the thalweg. The thalweg doesn't go over to the Iowa shore, it's somewhere out here.

THE COURT: Well, you're not taking it to the

Iowa shore, you're not taking it over to the Iowa shore.

MR. MURRAY: They don't want to go to the Iowa shore, as I understand it, they want to go to the thalweg, which is in most cases on the outside of the bend somewhere out in the river from the Iowa shore in a bend like this.

I'm also saying that if the Court feels that the Nebraskan or the Iowan should be able to accrete from his high bank by the slow and gradual process of grain upon grain of sand, of laying in against high bank, across the fixed state line, that would not be abhorrent to us.

But what I have been trying to say is that really we feel the simplest solution for the Court to settle things above Omaha is to just say that Nebraska ends at the line and Iowa ends at the line.

THE COURT: That's as to the both states and as to the private property, is that it?

MR. MURRAY: Yes, sir.

THE COURT: No accretion across the state line.

MR. WALKER: Under Iowa law.

THE COURT: Under Iowa.

MR. WALKER: I, I think it would be a legal accretion if a person accreted up to the state line and then he accreted to that accretion over into Iowa, I think that Iowa would have to recognize that as a true accretion to his property. I don't care if he is a Nebraskan, but that's Iowa law, that's not Nebraska law coming into Iowa.

THE COURT: Well, you recognize that principle then of accretion then that you're talking about, that Iowa does it and then you don't hold up your common law against that principle, as I understand it.

MR. WALKER: Well, we think that's our common law of accretion.

THE COURT: I see, all right.

MR. MURRAY: Might I have ten minutes?

THE COURT: You bet, ten minutes, fifteen minutes.

(Short recess at 11:10 o'clock a.m.)

MR. MURRAY: Nebraska counsel and I were just musing about this fact, Judge, that it's our recollection that when you first came out here to sit down and hear this case, you made the remark

that you thought that probably your function would be just to determine some facts, and that there wouldn't be no substantial legal dispute between us.

It would seem that it hasn't turned out that way, has it?

THE COURT: Well, you get that from the idea, you know, that the Supreme Court doesn't try the facts, they send me out to try the facts. The trouble is that they want a recommendation too, you see what I mean.

MR. MURRAY: Well, this case really, this phase of the case is almost purely legal.

THE COURT: Yes.

MR. MURRAY: Almost no factual dispute, it's entirely a legal dispute.

THE COURT: I would hope, I would hope that we could, among all of us, prepare some language, see, that would, I don't mean to say satisfy everybody, but that we can submit and say, here, there would be no great objection to that if that's the ruling, see, and that's in the nature of --

MR. MURRAY: Well, I would hope so too.

THE COURT: And that would satisfy the Supreme Court.

MR. MURRAY: I'm sure that I speak for all of us, that we are perfectly willing and able as officers of this Court to assist you in any way we can, but still representing our clients.

THE COURT: Yes.

MR. MURRAY: A few things occurred to me about what I said yesterday with regard to the Tyson case. I didn't completely make my exposition of the Tyson case.

I completely forgot to tell the Court that the Tyson case was really a three-party case. The State of Iowa was claiming the island as a new formation, island formation, in Iowa. Mr. Tyson was claiming it as an accretion to his Nebraska riparian bed, bank or shore.

THE COURT: That, I at least understood that much of it.

MR. MURRAY: There was a third party in the case, Mr. Harrop, and other people associated with him. You may remember Mr. Harrop, he appeared before you.

THE COURT: Yes.

MR. MURRAY: In the early days of this case. His position was that he held a chain of title in Iowa to this spot under the sky running from the time when that spot under the sky where the island arose from the government down to him.

The Court has been reading the Tyson case, but I just wish to read this one short paragraph where they disposed of Mr. Harrop. "The Harrop claimants further argued that a presumption of ownership arises from their record title to the land. The answer to that contention is that any presumption of ownership is completely overcome by the finding that the land was completely destroyed and washed away." I mention that feature of the Tyson case because we believe that it has a bearing on the Schemmel situation.

Ninety percent of the muniments of title by which Mr. Schemmel claimed to own this spot under the sky in our view were muniments of title before the present Schemmel Island began to form; and what the Court says to our mind in this case was that those muniments of title having to do with some land that existed in that spot under the sky at some other previous time are, create, no presumption of ownership, and when the land was washed away those titles were washed away.

I mention that also because I feel that the Court has indicated that a, that you're thinking about making a finding maybe that the Compact shall recognize, that the Compact requires Iowa to

recognize good titles in Nebraska. And we submit that your decision, if it's in that vein, should certainly be proscribed carefully, carefully proscribed, so that it doesn't make us recognize titles that have been washed away.

This is the law of Iowa and Nebraska and everyplace, that when your land is washed away and new land reappears in the same location, then you have a new title start to the newly formed land, and who owned that spot under the sky before its washing away is utterly immaterial then.

THE COURT: Oh, I think that's all right, that's a good suggestion. I'm talking about a title that Nebraska under its sovereign, under its sovereignty as a state, is recognizing a deed in these landowners, that's all, at that time. It may not be appropriate between two property owners, but as far as Nebraska was concerned she wasn't disturbing it, and they were accepting the taxes and all the muniments of possession and all that sort of thing, and if she had to, was doing that under the Compact, I think you could, you couldn't assert your state rights against that title. And if you are restricted to that, why, it doesn't hurt anybody, is that right, as I see it.

MR. MURRAY: Well, as I see it, Judge, please don't open the door again for Mr. Harrop to get in.

THE COURT: Oh, he'd be in too?

MR. MURRAY: He'd be in, and he'd be up and down the river picking up these ancient titles.

THE COURT: All right, all right.

MR. MURRAY: And that's been his business for fifty years!

THE COURT: All right, we're going to try and take care of that.

MR. MURRAY: And he'll be in it again.

THE COURT: We'll try and take care of that.

MR. MURRAY: And we certainly beseech you not to do something that he can latch onto and start claiming land, wherever it might be.

The next miscellaneous thing that I had noted that I wanted to mention was this.

Mr. Moldenhauer talked about Winnebago Bend; I don't want to talk about Winnebago Bend in detail because in my own judgment that bend is the most confusing situation along the entire river. The river has been wilder there than it has been anyplace; there has been judicial determination which has a bearing on that bend, that judicial determination being binding at least on the

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Winnebago tribe.

THE COURT: That was a Federal Court case?

MR. MURRAY: Yes, sir, right here in Omaha. But the Winnebago Bend by discussing it nothing comes clear because the situation there is just about totally confused.

Of course, neither party came to this trial prepared to try out Winnebago Bend, prepared to try out California Bend, prepared to try out any of those upstream bends, only enough evidence has been introduced here concerning those upstream bends to give you a general picture.

The general picture which we put in evidence enough to show is that in those places where we claim, we think we put in enough evidence to show that there's some reason for us to be there. It just isn't purely a luck of the draw that we claim those places and don't claim others. What I would like to point out about Winnebago Bend is this.

In Winnebago Bend the State of Iowa is not only claiming under our theory of sovereign ownership, but in Winnebago Bend we purchased the riparian land adjacent to the disputed area from Mr. Grosvenor. The deed from Mr. Grosvenor is in evidence. Our purpose in purchasing that riparian Iowa shore line to this disputed area from Mr. Grosvenor was two-fold.

First, we wanted that land, it was a nice timber

where a possible nice recreational development can be made, but even perhaps more important than that, we bought the private Iowan's claim to the disputed area. So at Winnebago Bend since the Compact we are not only claiming under the sovereign's claims, but we are also claiming under the private Iowan's claims, whatever they may be. That's a difference in Winnebago Bend that I wanted to point out to the Court, I believe it's the only place where we have acquired some property to which we had no claim for the purpose of firming up our claim to a disputed area in that manner.

Back to the Court's question concerning how does all this aid Nebraska? I wanted to just say that I hope I have made it clear that anything you do in this case does not aid Nebraska. I think anything that you do with regard to changing the Iowa law would aid some Nebraskans and it would grievously injure some others. I can't personally see how they can take the position they do and feel that they are contending for all the people of Nebraska, because it seems to me that their position if followed necessarily does injury to some Nebraskans who happen to be riparian on this sort of a bend, where the river perhaps escaped into Nebraska since 1943.

And my last remark about that would be "where does the doctrine of parens patriae come then when they are really seeking to aid some Nebraskans

and the only result could be grievous injury to some others?"

THE COURT: How many places in Nebraska did you say that you, that is in the river now in Nebraska entirely that is west of the Compact line, there is some points, isn't there, several of them or not?

MR. MURRAY: I haven't counted the places, I said thirty-one miles.

THE COURT: Yes.

MR. MURRAY: Thirty-one miles altogether.

THE COURT: Yes.

MR. MURRAY: The river is now entirely in Nebraska like this. On the other hand I think there are fourteen miles where the present river is entirely in Iowa like this, by the redesign created by the Corps of Engineers in the 1950's.

THE COURT: Now in the New Mexico case, Texas-New Mexico, the Court held it does affirm the Congressional act in the laying out of the boundary of a state, and so on, as I understand that case, New Mexico couldn't cross, couldn't accrete across that line.

What do you say about that up there where you have drawn that on the, on the east side of it there, the river now is three miles away from the boundary line in the State of Nebraska, what do you say about your abandonment, your bed, going into Nebraska, for the State of Iowa now, aside from the property owner?

MR. MURRAY: You mean this segment?

THE COURT: Yes.

MR. MURRAY: Of the river bed where it now runs entirely in Nebraska?

THE COURT: From the east half of the river, from the old - from the new channel, this part here, did you pick that up or not, did the State of Iowa pick up any land going west under that situation, by accretion?

MR. WALKER: West of the '43 boundary, you're asking?

THE COURT: Yes. The river now has gone west into Iowa.

MR. MURRAY: Into Nebraska.

THE COURT: Nebraska, and now do you see

the '43 boundary?

MR. MURRAY: The 43 boundary is here.

THE COURT: It's all bare land in there now, it's all bare land in there between the high banks. What land did you pick up, did the State of Iowa pick up, if any? There's a bed there, in other words, you have got your abandoned bed.

MR. MURRAY: We don't claim to have picked up any.

THE COURT: Well, that's good, that's good.

MR. MURRAY: We don't claim to have picked up any. We feel that this bed of the river entirely in Nebraska is owned by some Nebraskans. We do feel down here that we own all this river bed, which is entirely in Iowa, that's the Iowa law, all of that, none of that (indicating).

THE COURT: What I'm getting at, you don't, as I understand the New Mexico case you can't come across the state line into Nebraska, the State of Iowa can't under any circumstances, that's what that case holds.

MR. WALKER: Well, I never felt that we could under Nebraska law, because the Nebraska law

governs over there and that gives it to the Nebraska riparian owners.

THE COURT: Well, that's all right, under both, under both laws.

MR. WALKER: Well, I think Mike misspoke, I think that Iowa under the proper circumstances would have picked up that east abandoned channel.

MR. MURRAY: It all depends.

MR. WALKER: Yes.

MR. MURRAY: It all depends on how the Corps took the river from wherever it was to here. I can't answer just as a general statement whether Iowa would own this piece of ground or not without knowing --

THE COURT: Which piece?

MR. MURRAY: This piece of ground in here.

THE COURT: Well, I don't -- I can answer that, I think under that New Mexico case you can't, that's what I'm getting at, under any circumstances. You have agreed now --

MR. MURRAY: Well, we don't want to --

THE COURT: You have agreed to your state boundary, you see, so far as the state is concerned, and I'm talking about the State of Iowa, I think that's one thing that you have got to give up. I'm not talking about an Iowa citizen, a private owner, he can go anywhere he wants to.

MR. WALKER: But the east half of the abandoned channel, it would depend on how it moved, if it moved by accretion the riparian landowner would pick up that abandoned channel; if it was an avulsion that water bed would be Iowa lake.

THE COURT: Well, that's all right, that's the landowner, that part's all right, that's the landowner you're talking about.

MR. WALKER: Yes.

MR. MURRAY: Well, the reason I can't give a categorical answer as to owning it or not owning it, it depends on how the Corps did the thing.

THE COURT: Where is that decision, Jack, Texas and New Mexico?

MR. WALKER: Well, I think the significant feature in that case, that was Congress, or, United States and Texas dealing with a territory, and then New Mexico comes along and changes its boundary

in its constitution contrary to the Congressional boundary, and I think that they said there "We don't care what they put in the constitution because the boundary was determined before."

MR. MURRAY: My understanding of Texas versus New Mexico --

THE COURT: I don't understand it that way, I understand it that when you fellows now, when you're talking about the sovereign states, you lump your rights as a proprietary interest as well as anything else, as far as the state is concerned, your sovereign rights and your ownership rights, you see, it says here "We're going to stay on our side so far as any of those rules are concerned."

MR. MURRAY: I haven't read that Texas versus New Mexico.

THE COURT: That's what I understand that case holds.

MR. MURRAY: But my understanding of Texas versus New Mexico is that, first of all, they, the Court, found that a fixed state line was created.

THE COURT: That's right.

MR. MURRAY: That it's never been moved

by accretion, and that's the point on which I believe they reversed the Special Master. He held that, yes, they have created the state line as the center of the river as of 1850.

THE COURT: Jack, that decision is in one of those volumes there, see.

MR. MURRAY: But that as I understand it, he held that it remained a fluid line. The Court said, no, it was a fixed line.

THE COURT: I, I read that decision what they say about accretion, maybe you can read it different ways, but as I read it, it says "The Constitution defined its boundary by the channel of the river. Congress admitted it as a state with that boundary, New Mexico, and now it's a question of the limitation of its boundary area, assert a claim to any land lying east of the line thus limited."

You're done, you're done there so far as the state is concerned.

MR. MURRAY: Then they put the shoe on the other foot too, I think, and they said that neither state can go across that line.

THE COURT: Well, I agree with you, I agree with you so far as Nebraska, if she owns any land there, we're going on the assumption that she doesn't

own it, she can't go across either, I agree with that.

MR. MURRAY: Well, and another thing, Judge, is that I don't read New Mexico versus Texas --

THE COURT: Well, the difference, of course, is that Nebraska doesn't own any riparian land.

MR. MURRAY: Well, I don't read Texas versus New Mexico as involving ownership of any land by either state, it was a pure question of sovereignty.

MR. WALKER: It was a question of Texas patents were attacked by New Mexico.

THE COURT: I know, but New Mexico was claiming a change in the boundary by accretion.

MR. MURRAY: And the Court held it was fixed.

THE COURT: That's right.

MR. MURRAY: And I think that they held it was fixed as to both parties and appointed a Commissioner to go out and survey it.

THE COURT: That's right.

MR. MURRAY: Told him the line to survey and go survey it.

THE COURT: I don't think that they permit one state to move fifteen or twenty miles into another state by, that is, by proprietary title as distinguished from a boundary proposition, I don't think.

MR. MURRAY: I don't think that either state was claiming to move into the other state by a proprietary title, my impression of that case is that it was a dispute about sovereignty from beginning to end.

THE COURT: All right, okay.

MR. MURRAY: And the result was that neither state could accrete into the other state because the center line of the river as of 1850 was the fixed boundary was the result of the case.

There was also -- the most serious dispute in that case was where the 1850 river was.

THE COURT: Yes, I know that.

MR. MURRAY: We certainly feel, Your Honor, that the Court should somehow refrain from recreating two sets of title laws in Iowa, and

this is what Nebraska wants you to do, and this to our mind is what numerous courts have said they will not do. The cases are so numerous that you just can't even guess how many there are, saying that the laws within any state must have equal application to everybody in that state.

We just can't believe that a result of this Compact could have been that Iowa granted and conveyed some of its state-owned river bed or lands along the Missouri River to anybody even if it was Iowa's. That would, in our mind, would just constitute the unjust enrichment of some Iowans at the expense of the general public, and that shouldn't be the result.

So we believe that after the Compact it must be the rule that the state still owns those river beds of the Missouri River bed which are in Iowa. If you change that, the question then becomes, well, where do you stop? Do you just make that change as to the Missouri, as to certain parts of the Missouri? Do you go to the Des Moines, the Cedar, the Mississippi, and say that the law is changed everyplace? It seems to me that if you say that the state conveyed away its river beds on the Missouri you almost have to say it did it everyplace, and that certainly doesn't flow from the Compact. There's just no reasonable construction or interpretation of the Compact to our mind which could be that way.

One other thing, the Court expressed interest

in its order of September 10th in whether or not Judge Van Osterhout's statement in the Tyson case concerning the wildness of the Missouri River was correct and accurate. Until the receipt of that order we had not recognized the Court's particular interest in that subject. We had had in our possession an article on the subject for some time, but we didn't cite it in our written brief, and I wish to offer it to the Court as an additional citation, not a legal citation, to our brief at this time. This is an article, Your Honor, which --

THE COURT: Why don't you put down the name of it a little bit here so we can have it on the record?

MR. MURRAY: The article, for the record, which I have just handed the Court and Nebraska counsel is from the Engineering News Record of August 22, 1935, the title of the article is "The Behavior History of the 'Big Muddy'." The article was written by Mr. Roy N. Towle, who was then Mayor of Omaha, I believe he still lives here in Omaha, a very old man. He was an engineer and surveyor who spent much of his working life on the river, and we believe this article is an authoritative description of what's happened on the river prior to the time the Corps went to work on it.

What he says in substance in this article is that when Lewis and Clark went up the river it was extremely meandering, and as Mr. Walker said at one time they traveled for a day on the river, and then one of the men was able to just take a stroll back to the place where the men had started that morning. But the sense of this article is that the granddaddy of all floods on the river straightened it out. He made, he limited his study in this article to the stretch between Plattsmouth and Sioux City, he didn't go below Plattsmouth, and he says here that Lewis and Clark mileage between Plattsmouth and Sioux City was 250 miles. In 1935, mileage, river mileage, between Plattsmouth and Sioux City was 150 miles. The river had in those intervening years shortened itself by forty percent.

He says that nearly all that happened in 1881. He concludes on the second page, I believe it is, he says "Since then, since 1881, there have been no cutoffs from Sioux City to Plattsmouth." In other words after 1881 there weren't any of those great loops left to cut off, the river just whooshed down through the valley, straightened itself out, and there weren't any cutoffs after 1881.

Now we realize that perhaps there is an inaccuracy in that, maybe there were a few cutoffs, but not many, after 1881. We believe that this, we call this to the Court's attention because it fortifies the reason behind the presumption in favor of ac-

cretion and against avulsion on the Missouri River.

Nebraska argued in 1892 that the ordinary rules of accretion, avulsion, island, and so forth, should not apply to the Missouri River because it was such a wild river that they couldn't. The Court rejected that argument in 1892, and they are in substance making the same proposition now that the ordinary generally recognized rules of accretion and avulsion should not apply and that this Court should create certain large exceptions to those rules.

Now we just don't believe the Court should engage in that, and I say again that the simplest way, the easiest way for this Court to settle or to say that the Compact settled all existing disputes and future disputes up and down the river is for it to say that Iowa law shall apply to the boundary and Nebraska law shall apply to the boundary. That's a simple and logical way to do it without changing the law of either state.

If they want to let their private citizens have their, have the river bed in Nebraska, so be it. But if Iowa has elected to, for the state to have its river bed within Iowa, so be it. We believe that that's the only logical and fair way for the Court to settle at least the phase of the case which deals with problems which really have arisen since 1943.

Thank you.

THE COURT: All right. Any more, gentlemen?

MR. MOORE: Yes, sir.
May it please the Court and counsel -- this is the longest that I have gone in trial without talking.

THE COURT: You have been very quiet all week, Joe.

MR. MOORE: I hope the discussion to date has dispelled any notion that this is a friendly lawsuit, whatever that is, and I'm constitutionally unable to engage in friendly lawsuits. I think the parties are very interested in getting a determination, and it is important to all of us and will materially affect the rights not only of the states but of the residents of both states.

I'm only briefly going to discuss any factual matters, because I think the Court's probably tired of hearing about them, except there are a few statements that have been made which I would like to comment upon and perhaps correct, and I will try to be as brief as possible.

This matter of the avulsions since 1881, I think that we have proved that there were many, many avulsions, whether they were large or small. Iowa seems to take the position that unless there was a substantial piece of land, which I suppose means large, that the Court should not find that

an avulsion took place. I think that size is of materality only where the state might be interested in a particular piece of ground or where the state boundary determination might be important, but to the landowners the fact that the land is not a great vast body of land is fairly immaterial, and cases don't really hinge on the substantial part. Where there was a large substantial piece of land the Court will throw that in, but the cases don't turn on the size of the piece of land around which the river moves by avulsion, and the matter of determination of what has happened, lawsuits up and down the river which have been decided and there have been many decided in Nebraska as has been pointed out, and I don't think that the record purports to reflect the number of cases that have been tried in Iowa.

But the State of Iowa seems to be disturbed by the fact that in Nebraska disputes between private title claimants or private ownership claimants have been determined in the Nebraska courts without joining the State of Iowa. Well, under Nebraska law it is necessary in a quiet title action to join only those persons whose claim is of record and those persons who are occupying the land. Other than that there is no necessity.

The State of Iowa having failed to assert any claim in any fashion, either by filing of record or by occupying the land, were not necessarily parties to determination of quiet titles in Nebraska.

And I might add that in nearly every quiet title action in the State of Nebraska a careful lawyer joins all persons having or claiming any right, title or interest in the real estate. And, of course, not being able to serve those people he serves them by publication. And I'm sure that any farmer up and down the river, if such publication appeared as to his land he's going to notice it and somebody is going to call it to his attention, he's going to be in claiming it. The State of Iowa made no such claim.

Now we say that the only way to settle the problems that this Compact has produced is not to hold as Mr. Murray claims, not as Mr. Walker claims, the Nebraska law applies in Nebraska, Iowa law applies in Iowa; but to do precisely what Nebraska is urging the Court to do, which is to say that the Compact made the law of both states by the agreement of the states. The Iowa land that winds up on the Nebraska side of the river is, has the, all the rights that the Nebraska owner would have had. Now you can't bring that Nebraska owner over into Iowa against his will and take away his riparian rights without running afoul of his constitutional rights.

So we say that the only way that you can get uniformity, equality up and down the Missouri River was to say that the parties have the same rights on both sides of the river and the riparian owner does own the bed. Iowa's counter to that is

"Well, we always recognized your title where the land was ceded, but we reserve the right to inquire." Well, if they reserve the right to inquire in 1970, why in the world didn't they assert their right to inquire in 1943. We can speculate on a dialogue between the representatives of the two states if this issue was known, if this issue was raised and claimed by the State of Iowa in 1943, where the parties are getting together, and they say, now, we don't know where the boundary is, and I think it's, it's clear, nobody really knew where the boundary was.

We have all this land up and down the river, well, we'll cede you everything that's on the east side to Iowa, and, Iowa, you cede us everything that's on the west side. Now suppose at that point Iowa had said, "Ah, but we reserve the right to later inquire to see whether this land was ceded land from Nebraska and inquire into where the boundary actually was, or is, now, in 1943, or see if it was on the Iowa side and is therefore state-owned."

Well, Nebraska representatives are going to be out of their mind if they agree to a thing like that. Their position then would be either we have no deal, or, wait a minute, make your determination now, claim the land you claim, and if we want to set those aside, let's go see what you have. Let's go to the land records in the Secretary of State's office, let's see what you have, let's go to

the State Conservation office and let's see what you have.

And what they would have found was that Iowa had nothing, claimed nothing. Now if that, if that had gone to that issue, if Iowa had at that point been candid or if they had known that later on they would be making these claims and had been candid, then I think that that result would have pertained. Then perhaps some additional language would have been added to the Compact.

They say, "Well, the only thing that was being ceded was sovereignty." Iowa's title depends on their sovereignty. If Nebraska intended to give them land, they would have, they would have perforce have said so, I'm sure, but if you say that ceded from Iowa to Nebraska, meant only sovereignty, and from Nebraska to Iowa it meant only sovereignty, what in the world did Section 3 and 4 mean? What they are saying in Section 2 is "We don't know where the boundary is, we'll set the boundary and all the land on either side, sovereignty is settled." That was that same land they were talking about in Section 3, land ceded, and they could only have meant that for the entire 191 miles of the river, or whatever it is, all of the land on the Nebraska side was ceded and all of the land on the Iowa side was ceded, and that solves the problem of what was ceded in Section 3 and Section 4. It was quite clear it was all ceded. They want to go back now --

THE COURT: Well, what does that do for you, what does that do for you in this case, how does that --

MR. MOORE: It merely says that they have to recognize those titles on the east side of the river, they have to recognize them.

THE COURT: Nebraska titles?

MR. MOORE: Nebraska titles, and it solves this argument about, well, let's go back and inquire and see if a Nebraska court had jurisdiction. Well, let's go back and inquire and see whether it arose on the Iowa side of the river or the Nebraska side of the river.

THE COURT: What do you say, where does the title, where does the phrase "good title" come in?

MR. MOORE: Yes, sir, yes, sir, and if the title was, if the title was supportable in Nebraska, as these titles were, you see, in Nebraska, all you have to do is claim by adverse possession for ten years, no color of title necessary, you're in. That's the kind of title you can get in Nebraska.

THE COURT: Well, if the Court holds that that's what we have to recognize, what's the prob-

lem, that's all I have been saying, I've been trying to say that.

MR. MOORE: That's what we have been trying to say, I think.

THE COURT: Well, I know, but why go any further then? Iowa objects to going any further than just saying, than making that statement.

MR. MOORE: I'm not following you quite.

THE COURT: You're talking now about Iowa's ceding land, granting land.

MR. MOORE: Yes, sir.

THE COURT: As well as sovereignty.

MR. MOORE: Yes, sir.

THE COURT: And Iowa says, no, we don't grant any land, we don't sell any land, we don't convey any land.

Nebraska says to Iowa that Iowa should recognize what Nebraska was recognizing as a good title on the land, regardless of where the land was.

MR. MOORE: Regardless of where it formed and where it was, right.

THE COURT: That's right. Doesn't that still require, we don't know, I don't know of any other piece of land where a private property owner claims a title up north of the river here, north of Omaha, do you, we haven't any evidence of it?

MR. MOORE: Private title --

THE COURT: Yes.

MR. MOORE: Private claimants?

THE COURT: Yes.

MR. MOORE: I think all the cases that we have talked about are all of private claimants, the Tyson case.

THE COURT: Well, I know, you haven't shown a good title on it.

MR. MOORE: Well, yes, I don't, I don't think that we went quite into it to the depth that we did on the others, no, we don't need to, if we can get the principles established these things will take care of themselves.

THE COURT: I'm saying that I agree with you on that principle.

MR. MOORE: All right.

THE COURT: I agree with you on that principle, I think that, Iowa, I think, contended for a while, at least, here, that you had to show all the muniments of title that you would between private property owners, I don't go that, I don't think --

MR. MOORE: No, I think that if this, if this Court can derive some principles, and I think perhaps the Tyson facts and the California Bend facts are sufficient factual situations in which there is no particular disagreement, those factual situations can develop principles which will solve all the problems up and down the river, at least give us some starting points if we decide we want to have a new Compact, which I think was indicated the states wanted to do.

But we have got to find out what the old one means before we can have a new one.

I did want to make just a few comments on some of the statements about the evidence.

Our burden, it seems to me, is primarily that of proving a violation of the Compact, and the question was raised, well, how did Iowa violate the Compact? They violated the Compact by attacking the titles that they agreed to recognize.

There is some language in New Mexico against Texas which is applicable, I think, since the Constitution for which you could read, since the Con-

stitution defined its boundary by the channel of the river as existing in 1850, Congress admitted it as a state with that boundary. New Mexico manifestly cannot now question this limitation of its boundary or assert claim to any of the land lying east of the land the line has thus limited.

I think that is quite appropriate to the situation that we have here. Iowa's agreed to recognize these titles. Now they claim a right to inquire into the titles and to attack the titles that they agreed to recognize; this is a violation of the Compact, and this keeps us in court and we have proved that they have done this and we have therefore sustained the burden of proving what we set out to prove.

Now as to Nottleman Island, Mr. Walker, and I think I quote him accurately referring to the map said, quote "Anything prior to 1923 has no probative value," that's the end of the quote. This is, of course, what we forewarned the Court that they would do, they start with the map that proves their case and come forward from there. The year previous to that the Seth Dean 1922 survey shows the island and shows the situation as we urged it to have been. That's out of the Woods versus Dashner case.

They did the same thing in Schemmel, they started with the Otoe Bend Island case, they started with a 1923 map and implied that the, that when the Corps did their work that they drove their islands --

THE COURT: Well, Joe, I'm rather affirmatively convinced on Nottleman Island and almost convinced on Schemmel.

MR. MOORE: Well, I'll leave it at that.

THE COURT: That the title evidence, that the title evidence favors good title on the proposition, good title proposition, a recognition of a good title, even though it might be weak, put it that way, weak paper title, and this and that sort of thing, the recognition title carries the balance, tips the scale, see.

But I'm still uncertain about what to do up north because, isn't this correct, you presented no property owners up north there claiming title to the property somewhere that Iowa is after, did you?

MR. MOORE: Well, the --

THE COURT: Other than Mr. Brown on there showing maps and things of that kind.

MR. MOORE: Yes, of course, we had the Riley Williams situation, you know, that Mr. Moody testified to that case, and then, of course, the records from the other matters.

THE COURT: But it's hard for me, I'm wor-

ried about what I have to do too, see.

MR. MOORE: I think the facts in those cases, the Tyson case and the California Bend case, I think the facts are pretty well agreed upon and they are stated in the resume in the briefs, and I think what happened there will not be difficult to determine.

The function of the Court in that regard as I see it is to, from those fact situations, draw out some principles of law which will not necessarily decide those cases, because those cases are not before the Court for decision, but they will give some principles, and if the facts of those cases when they get to trial fall into those principles, then they will be easily determined, and for future reference we will now know what the present Compact means so that we may or may not enter into a new one.

I might add that that recognition, Your Honor, counsel for Iowa seemed disturbed that the time wasn't sufficient, but I might point out to the Court that the recognition continued after 1943, it was a continuous thing.

THE COURT: Well, I think that's important, I think it goes right up to the time that Iowa made the claim.

MR. MOORE: I might say, as Mr. Molden-

hauer pointed out not too long, just a few minutes ago, that this question of the disputed area being in the bed of the stream, Iowa seems to want to kind of gloss over, well, they say, it's in the bed and therefore it doesn't make any difference. But the Nebraska owner owns the bed, and Iowa as a state owns only the bed, so the dispute is over the bed, and the fact that it happens to be under water in any particular given time seems to be begging the whole question.

THE COURT: Well, what's wrong though, what's wrong, Mr. Moore, with the recommendation by me that the Compact as you just read in the New Mexico and Texas case limits Iowa to the state line under all conditions and circumstances, see; but that the same rules apply as heretofore between private property owners on each side of the line.

And then if you leave that that way, then you got something you can work on that Iowa must recognize any title that Nebraska had recognized as good, north or south, anywhere.

MR. MOORE: I would suggest this --

THE COURT: And it doesn't mean then, it doesn't mean the same title that Iowa recognized in this Court between its people.

MR. MOORE: I would suggest this proposition to the Court; that if the State of Iowa by legitimate means becomes a riparian owner, and I mean by condemnation, gift, purchase or otherwise, if they become a riparian owner to land along the river, I personally see no particular objection to allow them to, to that land which they own, to allowing them to accrete across the state line, I see no objection to that.

But when they come into Nebraska they are a private owner in Nebraska just like any other private owner, and they are subject to losing their title by adverse possession if someone comes in and takes it away from them.

THE COURT: That's a good point, I think, that's a good point, a good idea.

MR. MOORE: Well, I don't need to go into that business about the time element on the Schemmel land, because it's obvious that they were there in the '30's and went on the tax rolls in '49, and it was more than ten years before the lawsuit was filed.

I think the whole thing boils down, if we can take Iowa out of the land grabbing business along the river, the private titles will take care of themselves.

THE COURT: Well, you're trying to get the

last word on this subject now.

MR. MOORE: We didn't say it initially, they keep saying it.

THE COURT: You're getting peaceful now, you're getting what, complacency.

MR. MOORE: One other thing --

THE COURT: The trial is pretty near over.

MR. MOORE: One other thing that I think Mr. Murray was urging the Court, I think is a dangerous thought, if we allow ourselves to be lulled by it, and that is this idea that the Tyson case has been precedent and relied upon for ten years.

Now we don't think that the Tyson case says quite what Iowa says it is, we happen to think that the case is bad law. But the fact is the Tyson case was decided in 1960 --

THE COURT: Well, the further away I stay from the Tyson case the better off I am.

MR. MOORE: Well, I think some of those fact situations are going to have to be confronted. The Tyson case was decided in 1960, in 1961 the Nebraska Legislature, and I think it's inferable that it was partly because of the Tyson case that

the Nebraska Legislature, in its first session after the Tyson case came down, directed the State Surveyor to look into the situation along the river.

In 1963 after that two year period when the State Surveyor was working the Legislature directed the Attorney General to look into it. In 1964 this lawsuit was filed, and I don't think that any state can move any more rapidly or efficiently than that as a state.

And in 1964, less than three years, or, about three years after the Tyson case was decided we were in Court with this case, and it's misleading to the Court to say that everybody relied upon the Tyson case for a period of ten years because that's up to now.

Thank you.

THE COURT: Well now, I take it then from the record that everybody has had their day in Court, submitted everything they need, they conclude they need to submit, and said about all they need to say.

MR. MURRAY: Your Honor, you'll notice that I didn't use a single exhibit during my argument. I don't want any inference from that fact that we don't consider the exhibits important.

THE COURT: You know, I hate to suggest to Howard, you know, somebody told me I don't know whether he was there, but he's been in this case for

seven years, and he's anxious to quit it. But this case so far as these titles are concerned and this part of the two islands are, if they are going to stand up in the Supreme Court on a fact basis from my part, you know I have to find facts, you see, say, these are the facts.

And my, my method of judicial determination, I did it here a month or so ago, maybe since, is to indicate tentatively and rather strongly how I'm going to decide the case with the aid of counsel. You're going to have to argue that in the Appellate Court, and you've got to have facts in there that's going to support your contentions.

I don't propose to touch on every detail, but if you submit facts and I examine them rather carefully and I think they're all right, sometimes I delete some and I amend them as I see the need; those are the things that you're going to have to stand on in this part, in this title business, and I think that's what the plaintiff has got to do, and I suggest that you do that in this case.

Now if Iowa wants to submit some, that's up to Iowa. I take it there isn't any factual base, I'm glad, I don't know, I thought perhaps when I got here I'd go back to Erie, Pennsylvania, and start working on this case, but I think I got to give you a little more time to see if you want to add anything. I'm in hopes that we can, that you can suggest language, Mr. Murray, see, in accord with my views up there and in accordance with the discus-

sion yesterday afternoon and this morning that will set out principles that the states can live by, that can guide the courts of Nebraska and Iowa and the Federal Courts here as well. The Supreme Court will say "This is it, we accept it."

You think you could do that, or not?

MR. MOLDENHAUER: We would be pleased to, Your Honor, it might take a little time.

THE COURT: Yes, well, that's what I mean, people like to get cases decided, but this kind of a case has been going on for so long, why, I met one of the Justices and he wanted to know just exactly what was going on, they got enough work to do, see, they'll wait until we're ready. So I'd like to leave it that way.

Do you want to send the exhibits back or don't you, or do you want to use them, I got a station wagon engaged?

MR. MOLDENHAUER: I think that we would prefer to send them back, Your Honor, and I think the Court is going to need that space anyway.

THE COURT: That's good.

MR. MOLDENHAUER: We would like some idea of what will happen to them in the last analysis in case they get destroyed or lost.

THE COURT: Oh, no, listen, I don't mean to say that.

MR. MOLDENHAUER: No, I know that.

THE COURT: I'm going to take them back to Erie, I got chambers there and I've got plenty of room down there, and we'll preserve them. I wish you'd get them packed though.

MR. MOLDENHAUER: I meant, after you're through, I hope there s some refe rence made to them after, when you've decided this and everything, and when they go back to the Court in Washington we'll know where they are.

THE COURT: Yes, I'm talking about that too, you may want them, sure, they'll be there, they'll be there, unless they burn up on the way back in this vehicle.

MR. MOLDENHAUER: May I make a couple more questions, Your Honor, mechanical ones.

Do you desire the two states to divide the reporter bill equally as we did the last time?

THE COURT: Divide everything equal, everything.

MR. MOLDENHAUER: And the same with Mr.

Walcott?

THE COURT: Yes, everything, that's the way they have done in all these cases, they should divide the cost, I haven't seen one yet where they haven't done that, they have done that all the way through, if there's no objection to that.

MR. WALKER: No.

MR. MURRAY: No.

MR. MOORE: Does the Court want these arguments written up?

THE COURT: Oh, I think you ought to, sure, oh, we need this, you pay the reporter for it, I just told him, and he's going to send me a copy of it, just one copy is all I need.

MR. MOLDENHAUER: Then there was one other little thing, as we sat here there were some exhibits which were documents, copies of articles and things that I know went into evidence, and I don't remember seeing them when we went through them the last week, and if something is missing, a lot of those can be replaced, they shouldn't be, but --

THE COURT: I know, we've got to be a little

generous on that part, we know, we have considered everything that we looked at in evidence, there's no dispute about it as I see it. The dispute is about what it means and interpretation of it and all that sort of thing, nobody kicked about the introduction.

I'm not sure now where we are. I don't know, maybe in a private conference we can do a little bit better than we have been doing here, I don't know, but it seems to me that it's going to take us some time, Mr. Moldenhauer, five months.

MR. MOLDENHAUER: Pardon me?

THE COURT: I say it's going to take a little time to prepare this, I assume that you're going to prepare it -- Joe seems to be leaning back and laughing, I don't know whether he's going to work on it or not.

MR. WALKER: I know who's going to have to do any work on this for us.

THE COURT: Well, they tell me -- this is off the record.

(Hearing in the above entitled cause concluded at 12:35 o'clock p.m.)

In The

Supreme Court of the United States

October Term, 1964

No. 17, Original

STATE OF NEBRASKA, PLAINTIFF,

VS.

STATE OF IOWA, DEFENDANT.

PLAINTIFF'S BRIEF AND ARGUMENT BEFORE THE SPECIAL MASTER HONORABLE JOSEPH P. WILLSON

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In The

Supreme Court of the United States

October Term, 1964

No. 17, Original

STATE OF NEBRASKA, PLAINTIFF,

vs.

STATE OF IOWA, DEFENDANT.

PLAINTIFF'S BRIEF AND ARGUMENT BEFORE THE SPECIAL MASTER HONORABLE JOSEPH P. WILLSON

INTRODUCTORY STATEMENT

Plaintiff has filed with the Special Master Plaintiff's Resume' of Evidence which details much of the testimony and documentary evidence offered. This Resume' was directed toward the facts with argument or comment limited except where Plaintiff determined the context required comment. This Brief shall be directed towards the argument and the law with more general reference to the facts.

JURISDICTION

The jurisdiction of the Supreme Court of the United States is invoked under Article III, Section 2, Clause 2, the Constitution of the United States which provides:

"In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the Supreme Court shall have original Jurisdiction."

Title 28, U. S. C. Section 1251, provides:

"(a) The Supreme Court shall have original and exclusive jurisdiction of:

(1) All controversies between two or more states:"

This case was brought to enforce the provisions of the Iowa-Nebraska Boundary Compact of 1943, which Agreement was approved by Act of Congress July 12, 1943, Ch. 220, 57 U. S. Stat. At Large 494. The Compact was entered into between the states of Iowa and Nebraska pursuant to Article I, Section 10 of the Constitution of the United States which provides:

"No State shall, without the consent of the Congress*** enter into any Agreement or Compact with another State***."

The question of jurisdiction was argued before the Supreme Court of the United States on January 25, 1965 and on February 1, 1965, the Court entered an order granting the motion of the State of Nebraska for leave to file the Complaint.

It is Nebraska's position that, as a party to the Compact, it has the standing and the right to enforce its terms. Nebraska contends that the State of Iowa is violating the terms and provisions of the Compact and Nebraska is entitled to a decree restraining and permanently enjoining Iowa from violating the Compact and

from interfering with the rights of citizens of either State which were secured to them by the Compact.

SUMMARY OF THE FACTS AND ARGUMENT

When the States of Iowa and Nebraska were admitted into the Union their boundary was the middle of the main channel of the Missouri River. Because of the swiftness of the current of the river, periodic floodings, and the character of the soil through which the river flowed, it made numerous changes over the years all along the Iowa-Nebraska border and these changes caused continuous problems and uncertainties concerning the location of the boundary which were a matter of common knowledge. This was recognized by both states at the time of the complaint filed in 1890 in the case of *Nebraska v. Iowa,* 143 U.S. 359 and the Decree entered in 1892 at 145 U.S. 519 which determined that Carter Lake on the right bank of the Missouri River was in Iowa. In that case, both States recognized the rapidity of the changes of the river and that these characteristics were typical of the Missouri River between the two States and such phenomona had frequently taken place and might, from the character and history of said river be expected to take place in the future. Commencing in 1901, the legislative history of both Nebraska and Iowa shows a continued recognition of the boundary problems with numerous acts submitted or adopted providing for boundary commissions. Some of these proposed acts recognized that it would be expensive and practically impossible to locate the original boundary line. The literature and

newspaper articles over the years also indicate a general recognition of the difficulty of locating the boundary and the frequent changes of the channel of the Missouri River leaving parcels of land segregated on the opposite sides of the river. The early official Corps of Engineers Reports also document many changes and cut-offs of the river without identifying many of them.

Although the first regulation work by the Corps of Engineers along the Missouri River as it ran between Iowa and Nebraska commenced in 1876 or 1877 at Nebraska City and isolated projects were carried on by the Corps over the years, no comprehensive plan for stabilization of the river was commenced in this area until about 1932. The Omaha District Office was established in 1933 and by 1934 the work was well under way to place the Missouri River in a designed channel as established by the Corps of Engineers. This design placed the river in curves with a river width between the banks of approximately 700 feet with a navigable width of 200 feet of 6 foot depth. In the process of this construction, the Corps first commenced to control the river by a series of permeable dikes and, commencing in about 1936, utilized dredges and the construction of canals in order to assist in placing the river as quickly and economically as possible into the designed channel. In doing this, the Corps paid no attention to the boundary between the States and the design ran through land on either side of the river, through bars, and in some instances divided islands or land areas. Consequently, much land which had been on one side of the main channel of the Missouri River was left on the other side upon completion of the work.

Whether islands were left on the Iowa or Nebraska side, depended solely upon the design itself. Prior to 1943, the Corps had constructed approximately 15 canals in addition to having spent millions of dollars to control the Missouri River.

By 1943, the work between Omaha, Nebraska and Rulo was approximately 99% completed according to the Corps official reports and the river was in the designed channel. Between Omaha and Sioux City to the north, the work was approximately 78% completed, although the river was in the designed channel with the exception of approximately 2,000 feet. It was in the belief that the river had been stabilized and finally brought under control by the Corps of Engineers that the two states entered into the Iowa-Nebraska Boundary Compact of 1943. There is little actual legislative history of the 1943 Compact, but it was the culmination of years of negotiation and acknowledgement of problems by the two states. The Iowa legislature first approved the Compact on April 15, 1943 and it was ratified by the Nebraska legislature on May 7, 1943. It was approved by Act of Congress of July 12, 1943. This Compact established the boundary between the two states as the middle of the main channel of the Missouri River as it appeared on the Alluvial Plain Maps obtained from the Corps of Engineers dated June 30, 1940 and March 29, 1940. Not only were these maps dated approximately three years prior to the Compact, but they show the designed channel of the river north of Omaha as being located in many places on dry land and bar area with the river not yet in the designed channel. These maps do not have the degree of

preciseness to enable a surveyor to lay out a line on the ground establishing the center of the designed channel and have been described as analogous to a road map. They had no distances, azimuths, angles or calls or similar information usually required for a survey. Maps on file with the Secretaries of State were of the scale of 1" equals 5,280 feet whereas other Alluvial Plain Maps of the Corps are of the scale of 1 inch equals 2,640 feet. They bear a stamp stating that they were compiled from 1939 aerial photographs and field surveys and that the area landward from the Missouri River was compiled from uncontrolled mosaics of aerial photographs taken by the United States Department of Agriculture in 1936, 1937 and 1938.

These were very general maps and obviously were never intended to be used for the purpose of determining a line upon the ground.

As indicated by the testimony of Mr. Victor M. Petersen, Sarpy County Surveyor, the boundary problems between Sarpy County and Mills County had been discussed by the County Officials and they were faced with the problem that, if a settlement could not be made through the legislature, it would become necessary for a surveyor to lay out the boundary between conflicting areas and this was a job that was considered almost impossible to do.

Immediately at and prior to the time of the adoption of the Compact, the officials of the State of Iowa had made no attempt to identify areas which the State of Iowa claimed as abandoned river channels or islands in

the Missouri River. Several of these islands appeared on the Alluvial Plain Maps and were in existence at the time of the Compact. The testimony of the Iowa Conservation Commission Officials made it clear that no one from the State was paying any attention to these islands at that time. In addition, the State of Iowa had attempted to intervene in the case of *U.S. v. Flower* in the United States District Court, District of Nebraska in 1937 which was an action to quiet title to lands in Thurston County, Nebraska which were on the left bank of the Missouri River. Iowa alleged only that it was intervening to protect its sovereign rights and to protect its rights to assess and collect taxes on the lands and, following a memorandum by the Court indicating there was abandoned river bed in the vicinity, the State withdrew. Iowa never made any claim to this abandoned river bed and was making no such claim at the time of the Compact.

The Iowa Statutes provided that the Secretary of State was to keep records of all property pertaining to the State Land Office and Section 10.2 of the Iowa Code required that separate tract books be kept for all such lands as the State "now owns or may hereafter own, so that each description of state lands shall be kept separate from all others, and each set of tract books shall be a complete record of all the lands to which they relate." However, Iowa had no official record of "State-owned land" held or claimed by the State of Iowa on January 1, 1943 or on July 12, 1943, the date of approval of the Compact, which showed the islands or abandoned channels which Iowa was later to claim in the Missouri River Planning Report of January 1961.

In addition, Section 111.19 of the Iowa Code pertaining to the Iowa Conservation Commission provided for the Commission to at once proceed to establish the boundary lines between the state-owned property under its jurisdiction and privately owned property when said Commission deemed it feasible and necessary. This had been a provision of the Code since 1923 and in 1931 the language "when said Commission deems it feasible and necessary" was inserted. However, the Conservation Commission had not marked any of these island lands or abandoned channels at the time of the Compact and has not marked these boundaries on many of the areas claimed even to the present time. Consequently, at the time of the Compact, the State of Iowa was not making any claim to these lands and there was no record of any such claim in spite of statutory requirements which would have required a record and the marking of such lands.

Both States have agreed that there is no record of lands ceded or actually transferred from one state to the other by the Compact. The States did not provide for the identification by survey or otherwise of land ceded. They did not make any provision to facilitate by payment of costs or otherwise the recordation of title of lands ceded by the Compact.

The language of the Compact was very general in that each state merely ceded to the other the lands lying across the boundary line. It did, however, specifically include provisions concerning titles to land along the Missouri River and the collection of taxes and claims arising from tax liens. Sections 3 and 4 as they appear in the

Compact approved by the Iowa legislature are repeated as follows:

> "Sec. 3. Titles, mortgages, and other liens good in Nebraska shall be good in Iowa as to any lands Nebraska may cede to Iowa and any pending suits or actions concerning said lands may be prosecuted to final judgment in Nebraska and such judgments shall be accorded full force and effect in Iowa.
>
> Sec. 4. Taxes for the current year may be levied and collected by Nebraska or its authorized governmental subdivisions and agencies on lands ceded to Iowa and any liens or other rights accrued or accruing, including the right of collection, shall be fully recognized and the county treasurers of the counties affected shall act as agents in carrying out the provisions of this section: *Provided,* that all liens or other rights accrued or accruing, as aforesaid, shall be claimed or asserted within five years after this act becomes effective, and if not so claimed or asserted, shall be forever barred."

These two sections are as much a part of the Compact as Section 1 which fixed the location of the compromise boundary.

The provisions in the Nebraska Act are reciprocal and there was a specific provision in Section 5 of the Iowa Act, which was adopted first, requiring that the Nebraska Act contain provisions identical with those contained in Sections 3 and 4 but applying to lands ceded to Nebraska.

Just as the maps used to determine the boundary were general maps, this language concerning titles and collection of taxes was also very general and its meaning must be considered in light of the conditions as they

existed at the time of the Compact and the purpose and intent of the parties to the Compact.

The navigation charts and testimony point out that the navigable channel of the Missouri River in the designed channel tends to follow the outside of the bends or curves. The navigable channel was not coincident with a line midway between the banks of the designed channel except at those places where the navigable channel crossed the center from one curve to another. Consequently, land was "ceded" or transferred from one state to the other along the entire boundary. In addition, because of the natural cut-offs, as well as the man-made canals and avulsions, the river necessarily had to have been entirely in Iowa or entirely in Nebraska at many places. In some of these areas, as at Schemmel and Babbitt, the inhabitants and local officials recognized land east of the river was Nebraska land. The Compact was adopted in general terms to accomplish a general purpose of settling and laying to rest all boundary and jurisdictional problems which existed between the States. It was done in a context in which the State of Iowa was making no claims of any kind to abandoned river beds or islands in the Missouri River of the character now claimed and the express conditions of the Compact were to recognize and provide protection to the individual landowners in spite of the many uncertainties concerning the actual location of the prior boundary. The States recognized these many problems and attempted to avoid the requirement of making a determination of where the actual boundary was and the attendant expense. At this late date, neither State should now be able to require someone else to make this

determination of where the boundary was located prior to the Compact.

Following the adoption of the Compact, the State of Iowa continued to make no claim to these lands until the late 1950's and the adoption of Part 1 of the Missouri River Planning Report dated January 1, 1961; and the Iowa State Conservation Commission has failed to mark or identify the boundaries of the lands claimed even up until the present time. In addition, the State of Iowa has failed to claim certain abandoned river channels of the Missouri River and its determination of lands claimed is based upon the research or opinion of a few individuals and is an arbitrary exercise of power completely inconsistent with the actions of the two legislatures in adopting the Compact. Not only did Iowa fail to claim abandoned river channels in the known avulsion of the Flower's Island case, but also as late as 1956 acknowledged that it had no claim of ownership of what was an abandoned channel in that same area in the case of *Kirk v. Wilcox*. They disclaimed title to land which was abandoned river bed and had not been on the tax rolls in the Blackbird Bend or Kirk Bar area and made no claim to the 350 feet of abandoned river channel in the Walter Pegg area. They have made and are making no claim to certain abandoned channels in the California Bend area and they had made no claim to abandoned channel around Nebraska City Island and have even purchased land from a landowner in that abandoned channel. When the river was placed back under the dry land bridge built at Decatur, the State of Iowa then claimed the river bed but made no claim to the bridge. They have also

collected no fees for the right of pipelines to cross the river over what they claim is their land.

At the same time that Iowa was disclaiming title to certain abandoned channels of the Missouri River, it was selecting other lands which it claimed. These decisions were based upon the investigation and private conferences by the same few individuals.

When it became apparent that individuals might be in possession of some of these lands which Iowa was claiming, the officials making the decision automatically assumed that these people were squatters and they never gave these individuals an opportunity to be heard before the Conservation Commission. They proceeded to file law suits against some of these people without ever talking to them. Many of these lands were selected by an investigation of maps and without personal knowledge of their history. They were selected without regard to whether a canal had been dug in the vicinity prior to the Compact and apparently some of the locations depended upon whether there was water separating the area from the bank at the time of investigation. In certain areas land was not claimed if it had been under cultivation and in other areas this was disregarded. Also there was no further investigation of where the main channel of the river had been prior to work by the Corps of Engineers. If an area was never brought to the attention of the authorities in Des Moines, it was not included on the list of areas Iowa claimed and if the attorney representing the Iowa Attorney General's Office would discard an area it then was removed from further consideration.

Settlements were made with some land owners whereas other landowners were sued by the State of Iowa without the opportunity of discussion with Iowa officials concerning the basis of their title to the land or Iowa's reasons for claiming it. In some of these settlements, the Iowa Conservation Commission officials or the Attorney General's Office instructed the surveyor where to place his line. In the Schemmel and Babbitt cases, the State of Iowa did not interview any persons with regard to formation of the land. They took the position that anybody who studied the maps, plats and photographs of the area had knowledge of the relevant facts concerning its formation and they didn't pursue any investigation with any individuals. No investigation was made into the records of the Nebraska Counties in the Schemmel or Babbitt cases prior to the filing of the law suits. When Nebraska titles were presented, Iowa immediately called them spurious and fictitious instruments. At the same time, the State of Iowa said in answers to interrogatories that it does not claim the ownership of all abandoned channels of the Missouri River presently located in the State of Iowa and when asked to describe these abandoned channels, Iowa stated that the entire flood plain of the Missouri River from the hills in Iowa to the hills in Nebraska was once the c h a n n e l of the Missouri River and there is no practical means of describing even generally the vast portion of the flood plain which Iowa does not claim to own.

Iowa also claims possession of some of these areas although the evidence shows the State has never had possession of either the Schemmel or Babbitt areas under

any accepted definition of the term "possession" and the land owners have been in open, notorious and exclusive possession under claim of right for years. The evidence also has shown that the State of Iowa can claim land regardless of the amount involved in order to establish a legal precedent which might help the State in claiming lands in other locations along the river. The Middle Decatur Bend or Riley Williams area is an excellent example of how the State of Iowa can afford to spend more to litigate to obtain condemnation proceeds to a channel or bed of the Missouri River than the land itself is worth. They are using tax funds for this purpose against the landowner who is paying taxes.

Delay by Iowa has placed a tremendous burden on the average farmer. Many of the documents have been lost or destroyed and not all of the Corps of Engineers records are available. Some of these showed the location of canals dredged by the Corps. In addition, witnesses have died and the burden of establishing a location of the river years ago is time consuming, expensive, and in some situations almost insurmountable. By the mere questioning of the title by the State, the farmer is prevented from borrowing on his land to finance his operations. Consequently, the right to try the title in an Iowa court is not a practical right at all but the mere filing of a law suit by the State of Iowa has automatically and immediately prejudiced the rights of the landowner.

These actions by a small group of Iowa individuals clothed with the authority, power and financial resources of the State of Iowa, have created a government of men

and not of laws along the Missouri River. It is incredible that a Compact adopted by the legislatures of both States and approved by the Congress of the United States could result in such injustice and it is Plaintiff's position that Iowa's conduct totally disregards the provisions of the Compact.

The Iowa State Conservation Commission published Part 1 of The Missouri River Planning Report dated January 1, 1961, which lists many areas which the State of Iowa claims. The report recognized that when an opportunity arises where a vast recreational resource can be developed without conflict with other land use it should be explored and developed to its fullest capacity. It acknowledged the uncontrolled movements of the river and the cutting of new channels and abandoning of the old. It further recognized that there would be additional oxbows cut off when the newly designed channel work is done. The report also made the statement that the violent fluctuations in the river in the past "made it virtually impossible to describe the state boundary or to determine land ownership on the Iowa side. It hasn't been necessary to tie down the line between State and private ownership because development for recreation was not considered feasible because of constant change." The report further stated that the Conservation Commission must also, as it deems necessary, establish and mark boundary lines between state property under its jurisdiction and privately owned property. Some of the areas listed in this report received little or no investigation of the claims of ownership under previously existing Nebraska titles and Plaintiff submits that the evi-

dence shows a very limited type of investigation of the Missouri River Valley.

In answers to interrogatories, Iowa has also taken the position that, in those places where the Missouri River is presently confined to the stabilized channel as it appears on the Alluvial Plain Maps referred to in the Iowa-Nebraska Boundary Compact, the State of Iowa claims ownership to the entire bed of the Missouri River which is on the east side of the middle of the main channel as described in the Iowa-Nebraska Boundary Compact. Consequently, in those places where the river and the designed channel were entirely in Nebraska at the time of the Compact, such as at California Cut-off, Otoe Bend, Nottleman Island, Winnebago Bend, Lake Manawa, and other places, the title would have been entirely in Nebraska riparian owners. In some places where the Corps dredged canals entirely within Nebraska, the U. S. only took an easement for the designed channel and not the fee. However, Iowa apparently has taken the position that by the adoption of the Compact, Iowa automatically acquired the portion of the channel east of the middle of the designed channel as it appears on the A. P. Maps. Plaintiff contends that this entirely disregards the Nebraska title and is a failure to recognize that Nebraska title. Iowa has also taken the position that, following the Compact, where the river has moved into Iowa the State automatically acquires the bed and any islands which may have grown up in the bed, totally disregarding the claims of the Nebraska riparian owner. The State of Iowa has taken the position that the Nebraska owner cannot claim accretions across the fixed state boundary

line and Nebraska contends that this approach also violates the spirit and intent of the Compact to recognize private property rights.

Since 1943, the river has been redesigned in various places north of Omaha and at least twelve canals have been dredged. The legislatures of both states have adopted resolutions or bills providing for boundary commissions in recognition of the fact that there are still problems concerning the boundary and that, as of today, the river is entirely in Nebraska at certain places and entirely in Iowa at others. The report of the Iowa Governor's Advisory Committee on the Iowa-Nebraska Boundary of December 1, 1964 recognized also that, according to the Corps of Engineers, it is not possible to locate the State Boundary on the ground from their 1″ equals 400′ construction maps since numerous channel realignments had been made and the basic 1″ equals 400′ maps which show the alignment on the Alluvial Plain Maps were not retained and the Alluvial Plain Maps are too small a scale and do not contain sufficient details to locate the State boundary. This report also included among its recommendations that the States of Iowa and Nebraska file a friendly suit in the Supreme Court to establish guide lines to determine title of lands transferred in the Boundary Compact with reference to individual landowners and claims upon lands by the states. The Governor of Iowa in his speech to the Legislature in 1965 also recommended ratification of the settlement of the dispute as recommended by the boundary committees of both states in order to settle long-pending questions of land ownership and open up the western slope of Iowa to

commercial, industrial and recreational development. It is submitted that this recognition of the present problems by other branches of the Iowa State Government further emphasize the necessity for a construction of the Iowa-Nebraska Boundary Compact of 1943 and the determination concerning the propriety of Iowa's conduct. The States must first know what their present agreement means before they can embark upon a new Compact.

The evidence further establishes that Nottleman's Island formed on the Nebraska side of the main channel of the Missouri River as the river cut to the east and into Iowa. As the river cut to the east, an island to the north of the area originally platted as Nebraska land built up to the south and east downstream and then the river cut through this Nebraska accretion leaving Nottleman Island proper. The Corps of Engineers then stabilized the channel and closed off the main channel which had been around the east side of Nottleman Island leaving the island contiguous to what had been the eastern shore. Nebraska residents lived on this land prior to the Iowa-Nebraska Compact of 1943, paid Nebraska real estate taxes upon it, paid Nebraska personal property taxes upon their property on the island, and title to the land had been quieted in a Nebraska quiet title action prior to the Compact. Some of the property was sold through a Nebraska estate proceedings by license obtained from the District Court of Cass County, Nebraska. The birth of a child born upon the island was recorded in the Nebraska Bureau of Vital Statistics and a child died while her family was living on the island and the death was

recorded in Nebraska. The property was surveyed and described by Nebraska tax lot numbers by the County Surveyor of Cass County, Nebraska in 1933. The inhabitants of the property at all times considered themselves residents and citizens of the State of Nebraska and the State of Nebraska took and exercised jurisdiction over these inhabitants and the land involved. Children living on the island went to Nebraska schools as Nebraska residents and the Iowa School officials refused to allow them to go to school in Iowa. People on both sides of the river including the county officials considered Nottleman Island to be a part of Nebraska prior to the adoption of the Compact. A tax title was issued by the Treasurer of Cass County in 1945 which was within the five year period provided for liens or other rights accrued or accruing as tax claims under Section 4 of the Compact. Following the Compact, the landowners of Nottleman Island brought suit against the Mills County, Iowa, officials to require them to place the land upon the tax rolls and the Iowa Attorney General's Office had notice of this proceeding. The Iowa Attorney General's Office did not take any action at that time to assert title to these lands. The County officials of Mills County acknowledged that these lands had been ceded and found that all county officials along the Missouri River seemed to have similar problems since the lands could not be identified by Iowa descriptions. In 1951 the Iowa Conservation Commission acknowledged that this land was not owned by the State but belonged to the landowners and the Iowa Attorney General not only had knowledge of this situation but referred the Iowa Attorney, Mr. Whitney Gillilland, to the Iowa Conservation Commission.

Mr. Gillilland, a capable Iowa attorney and former Iowa District Judge testified that in 1946 when the suit was brought against the Mills County, Iowa, officials to place the land on the tax rolls, he had no idea that Iowa was making any claim to this land. It might be concluded that, had any owners of Nottleman Island or Schemmel Island or any of these other areas along the Missouri River brought a quiet title action against the State of Iowa at that time, Iowa would not have claimed title and the owners would have their titles quieted and be free from harassment by the State of Iowa.

The owners of Nottleman Island have then paid taxes on the real property in Mills County, Iowa since 1947, or for more than 20 years, and the State of Iowa has also assessed an inheritance tax upon the property upon death of some of the owners.

The land is now almost completely cleared and is extremely valuable and Iowa paid no attention to it until it became of considerable value. They are also claiming approximately 50 feet into Nebraska in this quiet title action and even their own expert witness acknowledged this fact.

In the Schemmel area, the evidence has shown that the river developed a pronounced easterly bend until it reached the Iowa chute which is approximately two miles east in some places of where the designed channel is today and the river then moved to the west between 1900 and 1905 by cutting off some of the Nebraska land. It never thereafter returned as far east as the Iowa Chute and there is testimony it made at least one other

natural jump to the west. Then, in 1938, the Corps of Engineers dug a canal which Iowa admitted was dug entirely in the State of Nebraska; the river was placed in this canal and it is presently there in the designed channel today. Beginning in 1895 Nebraska first commenced taxing this land and a tax deed was issued in 1907 pursuant to court proceedings of 1905. The land was taxed continuously until the Iowa-Nebraska Boundary Compact of 1943 and there were several Nebraska quiet title actions including some of the Schemmel land. The early Iowa records and the Iowa oldtimers recognized the Iowa Chute as being the abandoned bed of the Missouri River. Following the Compact, the land was placed on the Iowa tax rolls in 1949 and the Schemmels have paid taxes on it in Iowa for approximately 20 consecutive years. Tax deeds were also issued by the County Treasurer of Fremont County, Iowa, in 1955. Up until the time of the Compact, the State of Nebraska had exercised and was exercising jurisdiction over the land and Mr. Schemmel had made his title of record in Iowa by recording various documents, including a Nebraska quiet title decree entered in 1941. County officials of both states recognized the land as having been ceded by the Compact.

The Schemmel land has also been cleared and made valuable and Iowa made no claim to this land until it became highly productive farm land. This is another situation where the land had been considered Nebraska land and had not been subject to question until the Iowa Conservation Commission initiated its "land acquisition" program. Iowa took the position in the Schemmel case

when trial was commenced in Fremont County, Iowa, that there had been no avulsions in the area and that it only had to rely on the presumption against movement of the Missouri River by avulsion. They thereby placed the entire burden of establishing the past history of the land on the individual landowner, even though Iowa admits it was aware that the Otoe Canal had been dug by the Corps and the river moved into it.

Plaintiff submits that this course of conduct is a violation of the Iowa-Nebraska Boundary Compact which required Iowa to recognize these titles. They can hardly excuse their action by incompetence or inadequate investigation for the Otoe Canal was a known fact to the Iowa officials. Yet they proceeded to claim all of the Schemmel land, taking the position there had been no avulsions in the vicinity and relying upon the presumption against avulsions. This is indicative of Iowa's aggressive approach and how, in their zeal to acquire rich farm land without compensating the owner, they can ignore known facts. Fortunately, some documents and witnesses were discovered establishing the dredging of the Otoe Canal in Nebraska but, had they not been available, Iowa might have succeeded in its contentions without challenge.

This is a case to enforce and construe the Iowa-Nebraska Boundary Compact of 1943. As such, as in any contract case, the situation is unique to its own facts. The entire history of the Missouri River and the boundary problems between Iowa and Nebraska are essential in determining the meaning of the Compact and the result which the parties attempted to accomplish. This agreement is binding upon both states and their officials and

should have the same meaning whether applied 20 years ago, today, or 20 years hence. The Compact is a living document creating obligations as well as *rights and* Nebraska contends that Iowa officials are completely disregarding these obligations. It is a total document and all sections must be given meaning, not just the section providing for a new boundary line.

The Compact was a compromise and Nebraska contends that this supercedes Iowa's common law and changed the rights which the State of Iowa had in and to the beds or abandoned beds of the Missouri River. This was a necessary consequence of the Compact if private titles are to be recognized under the Compact. It did more than just establish a new state line. It transferred lands all along the boundary from one state to the other and the Compact constituted an agreement by the states that private titles would be good. Section 3 is a recognition of this fact and Section 4 is a further limitation upon the states insofar as any tax claims, which were the only claims being asserted by the states at that time, were concerned. The whole Compact evidences an intent to limit the states in their claims and to finally settle all of the uncertainty which admittedly existed. The fact that imprecise and general maps were used to identify the boundary was a further recognition that the states never intended that this line be laid out upon the ground, but they were more concerned with a general jurisdictional line and, for those purposes, the descriptions in the A. P. maps were adequate. Of course, they also anticipated that the river had been confined to the designed channel and would remain there. The entire Compact

represented an attempt in the easiest and most economical manner possible to solve what were considered to be insurmountable problems and the Compact should be considered in that light.

Iowa's law necessarily was changed by the Compact and the Iowa officials and Courts should be required to acknowledge this fact. Iowa should not be allowed to rely upon Section 1 of the Compact establishing the boundary and ignore the sections concerning the titles to ceded lands as by determining that the land is "in Iowa" this necessarily affects the result because of the application of "Iowa law" that the sovereign owns the beds and abandoned beds of the Missouri River. By requiring the landowner to go behind the Compact and prove that certain lands were "ceded", the State of Iowa has then circumvented a procedure which it avoided in 1943 and has cast an almost insurmountable burden upon the landowner at a time when only Iowa has been benefited by the long passage of time between the Compact and the time that Iowa has made its claim. Such an unfair and inequitable situation should not be allowed to continue.

This case requires a careful consideration of the facts and clear and concise statements outlining the effect of the Compact on the factual situations herein presented in language that even the Iowa State Conservation Commission will understand.

Nebraska contends that it is not necessary to go behind the Compact to determine precisely how the Nottleman Island and Schemmel Island areas formed but that, since there were titles good in Nebraska at the time of

the Compact, the State of Iowa must recognize these titles. If the State of Nebraska or private landowners must make this showing, Nebraska contends that it has been deprived of the benefits of the Compact which were adopted with a view o avoiding this requirement. However, should the Stat of Iowa now be able, after the passage of all these years, to require the determination of what lands were "eded" then Nebraska submits that both Nottleman Islan and the Schemmel area formed in Nebraska. In addtion, Nebraska contends that the exercise of jurisdictio over these areas and the general recognition of the fac that they were Nebraska lands prior to the Compact, stablishes that they were included within the lands "cedd" to Iowa by the Compact regardless of where the formed. Nebraska further contends that Iowa does not "own" the entire bed of the Missouri River where it is presently in Iowa and that there were places suchas at Winnebago Bend, California Bend, Nottleman Islan Schemmel Island, and Lake Manawa to name a few, where the entire Missouri River was in Nebraska immediatly prior to the adoption of the Compact and Iowa hasno claim to the ownership of the soil under the bed of hat river or to beds or abandoned beds of the river in hose places resulting from subsequent movements of th river such as at California and Winnebago Bends. Nbraska further contends that the title of Nebraska ripaian owners is not limited by the present fixed state lin as established by the Compact and that, when the rive retreats into Iowa, the state must recognize that the title b the bed and islands or accretions to the bed may lie in Nbraska riparian owners as vested property rights and such title is not subject to attack by

the State of Iowa by a quiet title action and cannot be taken without payment of just compensation.

When Iowa recognized that titles "good" in Nebraska would be "good" in Iowa knowing the situation that existed along the Missouri River, the State was acknowledging that it would not attack these titles and the State would not claim ownership as against the individual owners.

It is plaintiff's position that the Compact changed the law applicable to the boundary between the States of Iowa and Nebraska and, at the same time, established guarantees applicable to conduct by the States concerning private property rights along the Missouri River, and these provisions take precedence and are controlling over the statutes and common law of both states. It is Plaintiff's position that the States, rather than going to the trouble and expense of ascertaining the boundary and determining what land was specifically being ceded all along its length, compromised and worked out a solution which would avoid the necessity of ever having to make those determinations. Plaintiff therefore contends that Iowa's conduct, which would require individuals to establish the jurisdictional situs of their land as of 1943, is violating the contractual obligations of the Compact. However, should the Court hold that Iowa is able to place this burden upon these farmers and landowners, then it is Plaintiff's position that the evidence has established that both Nottleman Island and Schemmel Island were a part of Nebraska ceded to Iowa by the Compact. The designed channel of the Missouri River was entirely within Nebraska at both of those points and the title to the bed

was entirely in Nebraska riparian owners subject only to the public easement for navigation and public use and the State of Iowa must recognize this title which Nebraska contends was not impaired by the Compact. This discussion will first consider the law prior to the Compact and then the applicable principles determining the effect of the Compact upon that prior law.

ARGUMENT

I.

The Nebraska law provides that title to the beds and abandoned beds of navigable streams is in the riparian owners subject to the public easement of navigation.

Immediately prior to the adoption of the Iowa-Nebraska Boundary Compact of 1943 the law of Nebraska was, and remains, that title to the beds of navigable streams is in the riparian owners subject to the public easement of navigation, each owner owning to the thread of the stream. The leading case is *Kinkead v. Turgeon,* 74 Neb. 580, 109 N. W. 744, reversing 74 Neb. 573, 104 N. W. 1061. This case was decided in 1906 and, even at that early date, the Nebraska Court recognized the characteristics of the Missouri River and noted at 109 N. W. 746-747:

> " . . . In passing upon the applicability of the common law to our conditions in the first place it is well to observe that for upwards of half a century the people of the territory of Nebraska and the state of

Nebraska have been in occupancy of the west bank of the Missouri River. The first settlement of the territory was along the Missouri River and its fertile valley has been the home of thrifty farmers ever since. It is a matter of public knowledge of which the court will take judicial notice that that great river in this locality takes its course through a wide valley composed in the main of loose, sandy, and friable soil of great fertility; that it is subject to annual floods, sometimes of great extent and volume; that its course is erratic and tortuous; that sometimes, during flood periods, its current will strike or impinge upon its banks at such an angle and with such effect, as, even in a single day, to undermine the same and cause large masses of soil to fall into the stream and be disintegrated and thus whole farms are swallowed up with almost inconceivable rapidity, while in other localities hundreds of acres are often added to its banks by the process of accretion. It is further a matter of common knowledge that at a number of points along the northern and western boundary of the state the river has, as in this case, cut across the neck of a peninsula, entirely abandoned its old bed and left the former peninsula with the abandoned bed entirely across the river upon the eastern or northern bank and thus physically dissevered from the state of Nebraska and conjoined to Dakota, Iowa, or Missouri. See Nebraska v. Iowa, 143 U. S. 359, 12 Sup. Ct. 396, 36 L. Ed. 186; Missouri v. Nebraska, 196 U. S. 23, 25 Sup. Ct. 155, 49 L. Ed. 372. These processes have been going on for 50 years. During the whole period of time the state of Nebraska has existed it has never asserted any title or dominion over the abandoned river bed but has left the riparian owner in full possession and control of the same to the thread of the stream, and many fertile farms now occupy the place where the waters once flowed. When the river abandoned the bed the riparian owner occupied it, claiming title thereto and, as fast as it became

> subject to useful purposes, reclaimed it for agriculture. For so long a period, therefore, it has been considered by the authorities of the state of Nebraska that the common law is applicable to the conditions along the Missouri River and the fact of this administrative construction of the law by the state authorities, extending over so many years, is entitled to great, if not controlling, weight upon this question. . . ."

The Court commented that, while the Missouri River had been declared by Congress to be a navigable stream and during the early years furnished almost the only channel of communication with the territory along its course and around its head waters, the difficulties caused by the characteristics of the river had caused commerce to resort to rail transportation. The Court said that at some points on the boundary of Nebraska, the then present channel of the river was removed to a distance of more than a mile from where it was thirty years ago. It also noted a number of "cut-off lakes" occupying abandoned river beds along the Missouri River and that the public right attaches to the waters of the new channel to the same extent as it did while it flowed in the former bed. The public has lost nothing by the change of channel and the Court then stated at 109 N. W. 747-748:

> ". . . As was said long ago by Ulpian: 'In like manner, if a river leaves its bed and begins to flow elsewhere, whatever is done in the old bed is not subject to the interdict, because not done in a public river, as the bed belongs to the neighbors on each side, or else the bed belongs to the occupant if he has fields marked off thereon. Certainly the bed ceases to be public. Also the new channel which the river has made, although it was private, begins, neverthe-

less, to be public, because it is impossible that the channel of a public river should not be public. (D.3. 12. 1. 7)" Ware's Roman Water Law, 34 §22. To hold otherwise in case of a stream of the characteristics of the Missouri River might well lead, by way of repeated changes of the river's channel, to additions to the public domain at the expense of adjoining proprietors. For example, if in this case we should hold that the bed of the abandoned stream belonged to the state of Nebraska, by the same reasoning the bed of the new channel belongs to the state, and if the river should again change its channel nearby by another avulsion, thus leaving the new bed dry, the state then would be the owner of the land in two abandoned river beds and also of the bed of the new channel. The property in the second and third bed then would be wrested without compensation from the property of private individuals. A doctrine which might work such an injustice as this ought never to be adopted by a court if any other view is reasonable. The interest of the public in the waters and bed of a navigable river is analogous to that of the public in a public road. It has the right of passage over the stream as it had over the road. The owner of the land abutting upon a public road can do nothing in any way to interfere with the rights of the public in the same, nor can the riparian owner on the banks of a navigable stream exercise any dominion over its waters or over the bed thereof in any manner inconsistent with, or opposed to, the public easement. When the public entirely abandons a public road either by virtue of nonuser or by its vacation through proper proceedings, it does not retain the title to the land over which the easement of travel existed, but it reverts to the adjoining owners to the middle of the road. And so with a navigable river of this class. When, by reason of natural changes, the stream abandons the bed over which, through the instrumentality of its waters, the public has the right

> to pass, the right of passage is as effectually abandoned at that point as when a road is vacated and a new one opened to take its place. The right of the public is to travel in the new road and its right and privilege to pass over the old reverts to the abutting owners, and so with the river, the public right of navigation attaches to the new channel of the stream by virtue of the change of its waters, over which alone the right of navigation can exist, and the abandoned bed, which is of no avail for public use as a means of travel, reverts to the riparian owners to the thread of the channel where the waters flowed."

The Nebraska rule is based upon the equitable principles that, where a person is subject to having his property added to by gradual movement of the river, he also suffers the possible loss which might result.

The Nebraska Court has also held that, where accretion was begun by deposit against shores of the mainland, the subsequent existence of an intermediate stream between the mainland and the accretion does not prevent the accretion from belonging to the owner of the mainland. *Independent Stock Farm v. Stevens,* 128 Neb. 619, 259 N. W. 647 (1935).

In Nebraska, since the riparian owner owns the land to the thread of the stream, islands and accretion to the bed belong to the riparian owner. If the river which constitutes a boundary changes its main channel without excavating, passing over, and then filling the intervening place between its old and new main channel, the change from the old to the new main channel is considered an avulsion and the boundary remains in the former channel. In *State v. Ecklund,* 147 Neb. 508, 23 N. W. 2d 782 (1946)

the Nebraska Supreme Court considered a situation where the thread of the stream at one time was near the north bank of the North Platte River but, over a period of time, the thread became located at the south side of the Platte River leaving an area between the former channel and the new channel. The Court distinguished this case on its facts from earlier Nebraska cases in that the land being litigated in the Ecklund case was old bed of the river which, as more and more water had been taken out for storage above, had been relicted and grown up with brush and willows and grass. The Court then said at 23 N. W. 2d 789-790:

> "The thread of the stream was 40 years ago near the north bank, today it is not far from the south bank, and if the thread of the stream had gradually and imperceptibly moved to the south across all the intervening bed of the river it would, under the authorities cited, have carried the boundary line between plaintiff's and two defendants' lands with it. However, that is not the fact, but the main current to the north gradually became less and less, while the current flowing south of Ware Island became larger, and is now the thread of the stream, and under the authorities the case falls within a recognized exception to the general rule and the boundary line remains where it was at first.
>
> The case closest in point on the legal proposition involved is found in an opinion in the Eighth Circuit Court of Appeals, in Commissioners of Land Office of State of Oklahoma v. United States, 270 F. 110, 113. The case was heard before Sanborn and Carland, Circuit Judges, and Munger, District Judge, and the opinion was written by Judge Sanborn, from which we take the following excerpt: 'The general rule on this subject is: (1) That where the thread of

the main channel of the river is the boundary between two estates and it changes by the slow and natural processes of accretion and reliction, the boundary follows the channel; (2) but, where it changes by the sudden and violent process of avulsion, the boundary remains where the main channel was at the time of the avulsion, subject always to such changes as may be wrought after the avulsion by accretion or erosion while the old channel is occupied by a running stream. Counsel rely upon the first clause of this rule. That clause is applicable to and governs cases where the boundary line, the thread of the stream, by the slow and gradual processes of erosion and accretion creeps across the intervening space between its old and its new location. To this rule, however, there is a well-established and rational exception. It is that, where a river changes its main channel, not by excavating, passing over, and then filling the intervening place between its old and its new main channel, but by flowing around this intervening land, which never becomes in the meantime its main channel, and the change from the old to the new main channel is wrought during many years by the gradual or occasional increase from year to year of the proportion of the waters of the river passing over the course which eventually becomes the new main channel, and the decrease from year to year of the proportion of its waters passing through the old main channel until the greater part of its waters flow through the new main channel, the boundary line between the estates remains in the old channel subject to such changes in that channel as are wrought by erosion or accretion while the water in it remains a running stream.' "

Where the title to the bed belongs to private individuals, there can be an avulsion between the banks. The evidence shows that the Corps of Engineers at various times built dikes out into the Missouri River and did not

wash away everything as they moved the channel. They attempted to move the channel around bars or islands as they existed without washing them away if at all possible since this was the easiest and quickest method. There also are examples in evidence where dikes were built out and holes were left in the dikes to maintain navigation. When these gaps would be closed, the navigable channel would automatically jump to the outside of the dikes and Plaintiff contends that this constituted an avulsion. In addition, when the Corps of Engineers dredged a canal and moved the river into the canal this also constituted an avulsion, whether or not the canal was dredged through high bank land or in the bed of the river. This is discussed in *Uhlhorn v. U. S. Gypsum Company,* 366 F. 2d 211 (8th Cir., 1966), cert. den. 85 U. S. 1026, discussed, infra.

II.

Although the Iowa law purportedly was to the effect that the state owned title to the beds of navigable streams within Iowa, this doctrine was not being applied so as to assert title of the State of Iowa in lands along the Missouri River at the time of the Compact and was not applied in such manner for many years thereafter.

In Iowa, the Courts had followed the principle that the State owns title to the beds of all navigable streams within the State to the high water mark. *McManus v. Carmichael,* 3 Iowa 1 (1856). However, at the time of the Compact, the evidence shows that the State of Iowa was not interested in and made no claim to islands or bars

which had arisen in the bed of the Missouri River as a result of the construction work by the Corps and the State of Iowa had made no claim to various abandoned channels of the Missouri River. Plaintiff submits that there would even have been some question whether these abandoned channels or areas created by the movement of the Corps were property of the State since, in at least one state where the State owned the bed of navigable streams, this title was considered to be in the nature of a defeasible fee with the bed of the abandoned channel reverting to the riparian owners and the new bed becoming property of the state. *Manry v. Robison,* 56 S. W. 2d 438 (Tex. 1932). This case turned upon the Mexican or Roman law and the court entered into an extensive discussion of the early authorities. The Texas Court mentioned that there could be no doubt but the laws of England with reference to rivers were founded upon the Roman law. It then stated at 56 S. W. 2d 446:

> "Each of the nations named in selecting its interpretation of the Roman law as to the ownership of stream beds, so long as occupied, chose that rule which was best suited to its conditions. *The jurisprudence of all the nations mentioned, France, Spain, Mexico, Texas (down to 1840), and England (as to nontidal streams), however, agree with the Roman law, that when a river abandons its bed and selects a new channel, the abandoned bed becomes the property of the adjacent land owners.* Authorities supra; Farnham on Waters, vol. 1, § 49."

In 1956, just prior to the time the Conservation Commission commenced its activity investigating lands along the Missouri River, an article appeared in 42

Iowa Law Review 58 entitled **DETERMINATION OF RIGHTS TO REAL PROPERTY ALONG THE MISSOURI RIVER IN CONNECTION WITH RIVER STABILIZATION** which discussed treatment by the Iowa Courts of Missouri River lands at pages 60-61 as follows:

> "When the Missouri River has retreated from the Iowa shore, in times past, it has created sandbars, leaving a depression immediately below the 'high bank land' and following the gradual contour of the bank. Waters would occasionally stand or flow in such depression during high stages of the Missouri River. Such water in the depression below the high bank has been referred to as a 'shute.' As time passed, this shute would become closed at its northern end by natural fill, and thereafter water would back up the shute from the lower end, until finally the whole shute would become filled and be generally dry. The nature and formation of such sandbars has caused the Iowa courts to vascillate in determining whether they were islands or accretions to the high bank land. Islands can acquire accretions the same as the mainland. Slight variances in the facts of the formation of the sandbars caused variances in the application of the rules of law. However, the characteristics of formation of such sandbars are generally similar, and it would seem that the Iowa courts are more frequently holding sandbar formations in the Missouri River to be accretions to the lands of the riparian owners.
>
> The North Dakota Supreme Court has recently held that where accretions from the mainland and accretions from an island gradually meet and become continuous dry land, the respective owners of the island and mainland would be entitled to their respective accretions, divided upon a line to be surveyed.

> If such sandbars are deemed islands, then there is reason to believe that the State of Iowa, at the instance of the State Conservation Commission, might lay claim to them as state property. However, there has been no determination by the courts that the State of Iowa would have a right to such sandbars, or new lands added to the territorial domain of Iowa through the process of avulsion, or land that may be added to the domain of Iowa by stabilizing work now in progress by the United States Corps of Engineers, against claims by riparian owners. Such conflicts may develop on account of the substantial amount of new land that will be added to the domain of Iowa by reason of such channel stabilization work, and the determination of the state boundary along the center line of such stabilized channel."

The article then indicated that once the Missouri River becomes stabilized, there was apt to be greater probability of conflicting interests in this bar land between the Federal and State Governments on the one hand and the riparian owners or adverse possession claimants on the other. This article was cited by the Iowa Supreme Court in *State of Iowa v. Raymond*, 254 Iowa 828, 119 N. W. 2d 135 and was mentioned in the case of *Wilcox v. Pinney*, 250 Iowa 1378, 98 N. W. 2d 720.

Plaintiff would point out that the river had been stabilized below Omaha prior to 1943 and even up until 1956 there had been no determination by the courts of the State of Iowa that the state would have a right to sand bars or new lands added to the territorial domain of Iowa through the process of avulsion or by the stabilization work. It was only at or after this time that Iowa's aggressive program to obtain title to these lands

without compensating the landowners commenced. Iowa had not asserted title to abandoned channels even though it was aware of such channels as indicated by its conduct in the case of *U. S. v. Flower* and Iowa was not claiming abandoned channels in 1956 at the time of the *Kirk v. Wilcox* case. Someone then came up with a new doctrine or a new and unwarranted application of an old doctrine which would allow the State of Iowa to assert title to some of these areas under the guise of its common law. This would enable Iowa to transmogrify the Compact utilizing the new jurisdictional boundary of the state but ignoring the provisions of the Compact requiring the State to recognize titles to lands good in Nebraska. Nebraska contends that the Nebraska riparian owner's right to the bed is a vested right which cannot be taken away from him without just compensation. Iowa should not be able to circumvent those riparian rights by a mere change in application of its so-called common law in complete disregard of the effect of the provisions of the Compact upon that law.

III.

Riparian rights are vested property rights of which an owner cannot be deprived without the payment of just compensation. The Nebraska owner preserved his riparian rights in the bed of the Missouri River and these rights were not taken away by the transfer of jurisdiction to Iowa.

Riparian rights are vested property rights of which a property owner cannot be deprived without the payment of just compensation. This was so stated in the

case of *Manry v. Robison,* supra, with reference to the rights of the riparian owner in an abandoned channel where the river had moved by avulsion. In *New Orleans v. U. S.,* 10 Pet. 662 and *County of St. Clair v. Lovingston,* 23 Wall. 46, the Supreme Court of the United States held that the future right to alluvion is a vested right which is an inherent and essential attribute of the original property. The Court said at 23 Wall. 68-69:

> "The question here under consideration is not a new one in this court. In *New Orleans v. U. S.,* it was said: 'The question is well settled at common law that the person whose land is bounded by a stream of water which changes its course gradually by alluvial formations, shall still hold the same boundary, including the accumulated soil. No other rule can be applied on just principles. Every proprietor whose land is thus bounded is subject to loss by the same means which may add to his territory, and as he is without remedy for his loss in this way he cannot be held accountable for his gain.'
>
> To the same effect are *Saulet v. Shepherd* and *Schools v. Risley.*
>
> In the light of the authorities alluvion may be defined as an addition to riparian land, gradually and imperceptibly made by the water to which the land is contiguous. It is different from reliction, and is the opposite of avulsion. The test as to what is gradual and imperceptible in the sense of the rule is, that though the witnesses may see from time to time that progress has been made, they could not perceive it while the process was going on. Whether it is the effect of natural or artificial causes makes no difference. The result as to the ownership in either case is the same. The riparian right to future alluvion is a vested right. It is an inherent and essential attribute of the original property. The title to the in-

crement rests in the law of nature. It is the same with that of the owner of a tree to its fruits, and of the owner of flocks and herds to their natural increase. The right is a natural, not a civil one. The maxim *'qui sentit onus debet sentire commodum'* lies at its foundation. The owner takes the chances of injury and of benefit arising from the situation of the property. If there be a gradual loss, he must bear it; if a gradual gain, it is his. . . ."

As a vested right, the Nebraska riparian owner's ownership of the bed of the Missouri River and any accretions, islands, or bars in that bed, could not be taken away from the owner by the mere transfer of jurisdiction over the land. In addition, since the right to accretions is also vested, the changing of the boundary to a fixed state line should not deprive the Nebraska riparian owner of additions to his land when the river moved to the east into Iowa as happened in the case of *State of Iowa v. Tyson,* 283 Fed. 2d 802.

These vested rights must be recognized by the State of Iowa not only under the specific contractual provisions of the Compact, but also under the common law. They should not be nullified by findings that the river, being now in Iowa, is subject to Iowa law that the State owns everything within the bed.

IV.

Where a navigable river forms the boundary between two states, the thalweg or middle of the main navigable channel, with certain exceptions, is the boundary. This is the steamboat channel or the channel used for navigation and is not necessarily the line of the deepest water.

Where a navigable river constitutes the boundary between states, the general rule is the actual boundary is the middle of the principal or main navigable channel or thalweg. If there is more than one channel, the boundary is the middle of the one usually followed in navigation of the river. This rule is well established by a long line of decisions by the Supreme Court. In the case of *Iowa v. Illinois,* 147 U. S. 1, Iowa had contended that, for purposes of taxation of bridges crossing the Mississippi River and for all other purposes, the boundary line between the two states was the middle of the main body of the river, taking the middle line between its banks or shores without regard to the "steamboat channel." Illinois claimed that its jurisdiction extended to the middle of the "steamboat channel." The Court held that the true line in navigable rivers between the States of the Union which separates the jurisdiction of one from the other is the middle of the main channel of the river and, if there be several channels, to the middle of the principle one or the one usually followed. The basis for this rule is that the right of navigation is presumed to be common to both in the absence of a special convention between the neighboring states or long use of a different line equivalent to such a convention.

In *Minnesota v. Wisconsin,* 252 U. S. 273, the Court, in determining the boundary between Minnesota and Wisconsin in Upper and Lower St. Louis Bays, considered the effect of certain soundings and said at pages 282-283:

"The doctrine of Thalweg, a modification of the more ancient principle which required equal division of territory, was adopted in order to preserve to each State equality of right in the beneficial use of the stream as a means of communication. Accordingly, the middle of the principal channel of navigation is commonly accepted as the boundary. Equality in the beneficial use often would be defeated, rather than promoted, by fixing the boundary on a given line merely because it connects points of greatest depth. Deepest water and the principal navigable channel are not necessarily the same. The rule has direct reference to actual or probable use in the ordinary course, and common experience shows that vessels do not follow a narrow, crooked channel close to shore, however deep, when they can proceed on a safer and more direct one with sufficient water.

As we view the whole record, the claim of Wisconsin cannot prevail unless the doctrine of Thalweg requires us to say that the main channel is the deepest one. So to apply it here would defeat its fundamental purpose. The ruling depth in the waters below Upper bay was eight feet, and practically this limited navigation to vessels of no greater draft. For these there was abundant water near the middle line. Under such circumstances Minnesota would be deprived of equality of right both in navigation and to the surface if the boundary line were drawn near its shore."

See also *Louisiana v. Mississippi*, 202 U. S. 1; *Arkansas v. Tennessee*, 246 U. S. 158; and *New Jersey v. Delaware*, 291 U. S. 361.

The testimony of the knowledgeable witnesses in the Nottleman Island area was that the boats went around the east or left bank side of Nottleman Island prior to the commencement of the construction work by the Corps of Engineers. In the Schemmel case, the testimony of wit-

nesses closely familiar with the river was that the boats went along the left or eastern bank immediately prior to the commencement of the river work by the Corps of Engineers. This testimony by river people who were either boat captains or, in the Schemmel case, a fisherman who was completely familiar with the river, should prevail over any reconnaissance or soundings maps offered by Defendant for which foundation is seriously lacking.

V.

When by natural, gradual, and imperceptible processes of erosion and accretion, the navigable channel moves, washing away everything in its path, the boundary follows the stream and remains the varying center of the channel. However, when the navigable channel of the river moves or is moved without overflowing, excavating and passing over the intervening area, or without destroying the vegetation, this is in law an avulsion and the boundary becomes fixed in the abandoned channel at such point where the water ceases to flow. There can be an avulsion between the banks of the river when the main channel is moved around an area which is below the ordinary high water mark. There were avulsions all along the Missouri River wherever the Corps of Engineers dredged canals or moved the navigable channel around bars, islands or intervening river bed.

The Supreme Court of the United States has applied the previous rule to the Missouri River in the cases of *Nebraska v. Iowa,* 143 U. S. 359 and *Missouri v. Nebraska,*

196 U. S. 23. However, in both of those cases, the Court also recognized that there was an exception to the general rule that the boundary follows the stream and remains the varying center of the main navigable channel when the thalweg moves gradually, naturally, and imperceptibly, washing away everything as it moves. This exception occurs when the river moves or is moved leaving land, bar, or vegetation between the former and latter locations of the main channel. In those situations, which are described as avulsions, the boundary becomes fixed in the center of the old channel and the new channel no longer is the boundary between the States. Such movements are also described as sudden or perceptible. As Mr. Justice Brewer stated in Nebraska v. Iowa, 143 U. S. at 360-1:

> "It is settled law, that when grants of land border on running water, and the banks are changed by that gradual process known as accretion, the riparian owner's boundary line still remains the stream, although, during the years, by this accretion, the actual area of his possessions may vary. In *New Orleans v. United States*, 10 Pet. 662, 717, this court said: 'The question is well settled at common law, that the person whose land is bounded by a stream of water which changes its course gradually by alluvial formations, shall still hold by the same boundary, including the accumulated soil. No other rule can be applied on just principles. Every proprietor whose land is thus bounded is subject to loss by the same means which may add to his territory; and as he is without remedy for his loss in this way, he cannot be held accountable for his gain.' (See also *Jones v. Soulard*, 24 How. 41; *Banks v. Ogden*, 2 Wall. 57; *Saulet v. Shepherd*, 4 Wall. 502; *St. Clair County v. Lovingston*, 23 Wall. 46; *Jefferis v. East Omaha Land Co.*, 134 U. S. 178).

"It is equally well settled, that where a stream, which is a boundary, from any cause suddenly abandons its old and seeks a new bed, such change of channel works no change of boundary; and that the boundary remains as it was, in the centre of the old channel, although no water may be flowing therein. This sudden and rapid change of channel is termed, in the law, avulsion. In Gould on Waters, Sec. 159, it is said: 'But if the change is violent and visible, and arises from a known cause, such as a freshet, or a cut through which a new channel is formed, the original thread of the stream continues to mark the limits of the two estates.'"

The Court then cited extensively from an opinion of the Attorney General as follows at pages 361-362:

"With such conditions, whatever changes happen to either bank of the river by accretion on the one or degredation of the other, that is, by the gradual, and, as it were, insensible accession or abstraction of mere particles, the river as it runs continues to be the boundary. One country may, in process of time, lose a little of its territory, and the other gain a little, but the territorial relations cannot be reversed by such imperceptible mutations in the course of the river. The general aspect of things remains unchanged. And the convenience of allowing the river to retain its previous function, notwithstanding such insensible changes in its course, or in either of its banks, outweighs the inconveniences, even to the injured party, involved in a detriment, which, happening gradually, is inappreciable in the successive moments of its progression.

"But, on the other hand, if, deserting its original bed, the river forces for itself a new channel in another direction, then the nation, through whose territory the river thus breaks its way, suffers injury by the loss of territory greater than the benefit of retain-

> ing the natural river boundary, and that boundary remains in the middle of the deserted river bed. For, in truth, just as a stone pillar constitutes a boundary, not because it is a stone, but because of the place in which it stands, so a river is made the limit of nations, not because it is running water bearing a certain geographical name, but because it is water flowing in a given channel, and within given banks, which are the real international boundary."

This case found an avulsion in the Carter Lake area when the Missouri River suddenly cut through the neck of an ox-bow and made a new channel.

The Court also found an avulsion in the case of *Missouri v. Nebraska*, 196 U. S. 23 leaving Nebraska land on the Missouri side of the river at McKissick's Island opposite Peru, Nebraska, which is downstream from the Schemmel area. In these situations, the boundary then becomes fixed at the center of the old channel regardless of continued changes in a newly formed channel. *Nebraska v. Iowa*, 143 U. S. 359; *Missouri v. Nebraska*, 196 U. S. 23; *Arkansas v. Tennessee*, 246 U.S. 158; *Louisiana v. Mississippi*, 282 U. S. 458; *Kansas v. Missouri*, 322 U. S. 213.

These rules are based upon equitable principles that, whereas gradual additions and losses of land seem fair to both states, sudden changes were inequitable. What is considered a sudden or perceptible change varies greatly with the particular factual situations, and is dependent upon those facts.

In *St. Clair County v. Lovingston*, 23 Wall. 46, the Court said at page 68:

> "The test as to what is gradual and imperceptible in the sense of the rule is, that though the witnesses may see from time to time that progress has been made, they could not perceive it while the process was going on."

State v. Ecklund, 147 Neb. 508, 23 N. W. 2d 782, has already been referred to as holding that there can be an avulsion where the main channel of the river moves around area within its bed without overflowing, excavating and passing over the intervening area.

In another recent Eighth Circuit Case, *Uhlhorn v. U.S. Gypsum Company,* 366 F. 2d 211 (8th Cir., 1966), cert. den. 385 U. S. 1026, the Court considered the question of whether there could be an avulsion within the banks of the Mississippi River as it ran between Arkansas and Tennessee. In order to improve navigation, the United States Army Corps of Engineers had dredged across a reef or bar over a period of years between 1930 and 1936 in an attempt to open a channel across accretions to the bar. The Corps again attempted to establish a new channel in 1937. Following flood waters of 1938, the river abandoned its former channel which had been the boundary between Tennessee and Arkansas and, for the first time, voluntarily adopted the dredged channel as its main channel. The District Court had appointed a Master who found that the shift in the thalweg had occurred sometime between December, 1937 and May of 1938. Even after May of 1938, the original channel maintained a relatively deep channel and was used by river traffic. Then during 1940 and 1941, additional spoil was placed at the head of the old channel in an effort to seal it off and concentrate all the flow through the new channel and

the main channel of navigation never returned to the old channel. This dredging by the Corps was done across a low water sand bar and at the time of the shift in the channel, the area was some four feet below the ordinary high water level. The case concerned title to that portion of the bar which was cut off. This was a well reasoned opinion and is cited extensively, beginning at 366 Fed. 2d 217, because of its significance in holding that there can be an avulsion where the river is diverted through bar area within the bed which was not above the ordinary high water mark:

> "Our problem requires an examination of three rules of law well established in this country. They are (1) the rule of thalweg; (2) the rule of avulsion; and (3) the island rule. The rule of the thalweg holds that where a navigable river is the boundary between states the true line is the middle or thread of the main channel of the river. State of Iowa v. State of Illinois, 147 U.S. 1, 13 S.Ct. 239, 37 L.Ed. 55 (1893). Later cases affirmed State of Iowa v. State of Illinois and treated the question as settled. State of Arkansas v. State of Tennessee, supra; State of Washington v. State of Oregon, 211 U.S. 127, 29 S.Ct. 47, 53 L.Ed. 118 (1908); State of Louisiana v. State of Mississippi, 202 U.S. 1, 49, 26 S.Ct. 408, 50 L.Ed. 913 (1906). The thalweg rule acknowledges a change in the boundary only if accomplished by the slow, gradual, imperceptible or insensible, processes of erosion and accretion.
>
> The rule of avulsion is also settled and was articulated by the Supreme Court in State of Nebraska v. State of Iowa, 143 U.S. 359, 361, 12 S. Ct. 396, 397, 36 L. Ed. 186 (1892):
>
> > 'It is equally well settled, that where a stream, which is a boundary, from any cause suddenly

> abandons its old and seeks a new bed, such change of channel works no change of boundary; and that the boundary remains as it was, in the center of the old channel, although no water may be flowing therein. This sudden and rapid change of channel is termed, in the law, 'avulsion.' * * * 'But if the change is violent and visible, and arises from a known cause, such as a freshet, or a cut through which a new channel is formed, the original thread of the stream continues to mark the limits of the two estates.' (Citing Gould on Waters § 159 and cases.)
>
> * * * Accretion, no matter to which side it adds ground, leaves the boundary still the center of the channel. Avulsion has no effect on boundary, but leaves it in the center of the old channel.

"See also State of Missouri v. State of Nebraska, 196 U.S. 23, 35, 25 S. Ct. 155, 49 L.Ed. 372 (1904), where a portion of the above excerpt was quoted with approval.

The island rule is an exception to the accretion and thalweg rules in that the thalweg of the original channel remains the boundary between the states even though it migrates slowly and imperceptibly from one side of an island to the other. This exception to the rule of accretion appears to have been first mentioned in the State of Missouri v. State of Kentucky, 11 Wall. 395, 78 U.S. 395, 20 L.Ed. 116 (1870), and defined by this court in Davis v. Anderson-Tully Co., supra:

> The general rule is: (1) That, where the main channel of a navigable stream is the boundary between two states and it changes by the slow and natural processes of accretion and reliction, the boundary follows the channel; and that (2) where it changes by the sudden and violent process of avulsion, the boundary remains where

> the main channel was at the time of the avulsion, subject always to such changes as may be wrought after the avulsion by accretion or erosion while the old channel is occupied by a running stream. (Citations omitted.) But the first clause of this rule was made to govern and is applicable to cases where, by the slow and natural processes of accretion and erosion, the main channel creeps over the land between its old and its new course. To the rule stated in this clause there is a well-established and rational exception. It is that when a navigable stream changes its main channel of navigation, not by creeping over the intermediate lands between the old channel and the new one, but by jumping over them or running around them and making or adopting a new course, the boundary remains in the old channel subject to subsequent changes in that channel wrought by accretion and erosion while the water in it remains a running stream, notwithstanding the fact that the change from the old channel to the new one was wrought gradually during several years by the increase from year to year of the proportion of the waters of the river passing over the course which eventually became the new channel, and the decrease from year to year of the proportion of its waters passing through the old channel until finally the new channel became the main channel of navigation. (Citations omitted.) Id.252 F. at 685.

"To the same effect, see Commissioners of Land Office of State of Oklahoma v. United States, 270 F. 110, 113, 114 (8th Cir. 1920) and cases therein cited.

The difficulty in this case lies not in the understanding of or agreement with the general rules but rather in their application to the facts here presented. The Master made certain findings of fact which the District Court adopted and which we must

accept unless they are clearly erroneous. Transportation Ins. Co. v. Hamilton, 316 F. 2d 294, 296 (10th Cir. 1963); H. F. Wilcox Oil & Gas Co. v. Diffie, 186 F.2d 683 (10th Cir. 1950); Howard Industries, Inc. v. Ræe Motor Corp., 293 F.2d 116, 117 (7th Cir. 1961); Dyker Bldg. Co. v. United States, 86 U.S.App.D.C. 297, 182 F. 2d 85 (1950).

The evidence was conflicting as to the character and elevation of Massey Towhead at the time the river abandoned the Bendway and selected the Pointway as its main channel. The Master found that Massey Towhead was a sizeable land formation attached to the Arkansas shore by a low water sand bar but that at the time of the shift in the channel the area was some four feet below the ordinary high water level. The Master found that it was not eroded by the river but continued to grow by accretion until the change in channels. And although the Master found that avultive processes caused the change, he concluded it was not a "true" avulsion because Massey Towhead, at the time of the shift, was not above ordinary high water and, therefore, not land in place. Consequently, the Master concluded that the state boundary shifted as if by erosion and accretion. We do not agree (neither did the District Court) with this conclusion. Although the Master's report indicates that he did a tremendous amount of research on the legal issue involved, he frankly stated that he had been unable to find one decision which passed squarely upon the point in this case so as to support his conclusion. We have been favored in this case with excellent briefs by both parties, and each presents arguments both vigorous and persuasive. Both parties cite numerous cases and counsel differ radically on the interpretation of the decisions. We have reviewed all cited cases with interest but find, as did the Master, that none of them involves the identical issue which the facts here present. In the usual case of avulsion, land is severed and new banks are formed

which enclose the river's new bed. And, in each of the island cases there seems to be no question but that the area in controversy had reached the elevation of ordinary high water and could technically be classified as an island.

We do not cite any of these many cases because we do not believe any is controlling or even persuasive upon the decision here.

We do not think that where a state's boundary is fixed by a navigable river, such boundary can or should be changed by any action of the river except by the gradual and imperceptible process of erosion and accretion, and this we believe to be logical regardless of how the boundary happened to be originally located in the thalweg of the river. To hold otherwise would alter the scope of the doctrine of accretion as well as do violence to the teachings of the Supreme Court. This we have no right to do. A state's boundary should not be cavalierly changed simply because the process through which the river seeks a new channel cannot be considered as "true" avulsion. In most instances where a river changes by avultive processes, it has left intervening land above high water mark, but we do not think the elevation of the land mass between an old channel and a new one that is cut by avultive processes is a decisive criterion for a change in a state boundary. By all logic and reason, the boundary should not and does not change from the original thalweg except as the Supreme Court said in State of Arkansas v. State of Tennessee, supra, "by gradual process." Since there was admittedly nothing gradual here, we conclude and believe that State of Arkansas v. State of Tennessee, supra, commands that the boundary remains in the thalweg of the Bendway Channel subject to its erosion and accretions occurring prior to its stagnation and death.

> We are also of the opinion that the rule of avulsion is applicable here. Massey Towhead was on May 6, 1938 a massive land mass although infrequently submerged by some four feet when the river reached ordinary high water. Massey Towhead was not only massive but solid and compact. It resisted all efforts of the Corps of Engineers to dredge a channel across it. Furthermore, after the Engineers abandoned their intensive efforts, it remained intact after the flood of 1937. It was not until after the revetment of the Tennessee side and the flood of 1938 that the river adopted the Pointway Channel. Massey Towhead remained as it was after the channel change. It was as discernible, intact and identifiable after the channel change as it was before. It did not suffer erosion. Under the facts, it would be completely illogical to conclude that the rule of avulsion does not apply simply because the identifiable land was not above the high water mark."

This case stands as clear authority that there can be an avulsion in the bed of the stream when the main channel is moved around a low water bar or area which is below the ordinary high water mark. Where the Corps of Engineers dredged canals along the Missouri River, Plaintiff submits that these were avulsions under the law and, where the river was actually the boundary, such boundary following the placing of the river in the canal became the abandoned channel.

Where the river moves without washing away or destroying the vegetation this is in law an avulsion. The evidence of the trees on the Schemmel land and the admission by Iowa's witness, Dr. Ruhe, that the river could have moved across the places where those trees were located without destroying the trees, establishes an

avulsion at the time of the work by the Corps of Engineers. The evidence of the 1895 tree and the witness Ruhe's testimony that the river could have moved across that area without destroying the tree also establishes the 1900 to 1905 avulsion In the case of *McCafferty v. Young,* 144 Mont. 385, 397 P. 2d 96, 99-100, the Court considered the evidence of trees in determining an avulsion and said:

> "While it is true, as counsel for defendant contends, that it is presumed that changes in river banks are due to accretion rather than avulsion (Wyckoff v. Mayfield, 130 Ore. 687, 280 P. 340), that rule does not apply where there is evidence of avulsive change. We think the evidence showing the age of trees lying between the former channel and the new channel precludes any conclusion that the lateral migration of the river was slow and imperceptible. The witness Hamre, who was the Helena National Forest Supervisor, testified that the trees lying on the land between the two channels were 70 to 80 years in age and still growing. Had the lateral migration of the river been gradual the soil supporting the roots would have been eroded and the trees would have been washed out. Instead, this physical evidence demonstrates that those trees have remained strong since at least 1880 or 1890. The question is one of fact, and the trial judge found there had been an avulsive change. We feel there is ample and credible evidence to support that finding, and, therefore, it will not be disturbed. Rumsey v. Spratt, 79 Mont. 158, 255 P. 5."

VI.

Following an avulsion, the center of the old channel remains the boundary and this boundary remains subject to gradual change as long as the

abandoned channel remains a running stream. When the water becomes stagnant, the process is at an end and the middle of the abandoned channel becomes fixed as the boundary.

Following an avulsion, so long as the former channel of the river remains a running stream, the boundary marked by it is still subject to be changed by erosion and accretions. But when the water becomes stagnant, the boundary then becomes fixed in the middle of the former navigable channel and the gradual filling up of the bed that ensues is not to be treated as an accretion to the shores, but as an ultimate effect of the avulsion. *Arkansas v. Tennessee,* 246 U. S. 158. In *Louisiana v. Mississippi,* 282 U. S. 458 this abandoned channel was referred to as the "dead thalweg".

Consequently, in the Schemmel case, it is plaintiff's position that the Iowa Chute became the fixed boundary between Iowa and Nebraska as this was the final place marked by the termination of the flowing water of the Missouri River. However, should it be assumed for purposes of argument that the Missouri River in 1934 in the Schemmel area was the boundary, plaintiff contends the movement of the river to the west and into the Otoe Canal constituted an avulsion and the boundary would then have become fixed in the place along the east bank where water last flowed which was along the eastern side of Schemmel Island, leaving all of the island in Nebraska prior to the adoption of the Compact in 1943. In the Nottleman Island area the boundary would have been located in the abandoned channel to the east of the island prior to the Compact.

VII.

Regardless of how land along navigable rivers may have formed, long acquiescence by one state in possession of territory by another is conclusive of the latter's sovereignty over that territory. Lapse of time is particularly significant in boundary and jurisdictional disputes and the state raising claims should not be benefited by its own delay in asserting those claims. Equitable principles support a determination that will least disturb rights and titles long regarded as settled and fixed by the people most to be affected. The fact that officers and representatives of both states, as well as the inhabitants, recognized that both Nottleman Island and Schemmel Island were in Nebraska prior to the compact should be controlling that these were Nebraska lands.

Regardless of how land along navigable rivers may have formed, there is another well-established principle applicable to the boundary between States that land may become a part of a State as a result of long and continuous exercise by that State of sovereignty and jurisdiction over the land with the acquiesence of the other state. In the case of *Handly's Lessee v. Anthony,* 5 Wheat. 374, the question was raised whether certain lands along the Ohio River were in Indiana or Kentucky. The Court considered the facts that the people who inhabited the peninsula or island had always paid taxes to Indiana, voted in Indiana, and had been considered within its jurisdiction, both while it was a territory and since it had become a state. The jurisdiction of Kentucky was never

extended over them. Mr. Chief Justice Marshall stated at page 384:

> "It is a fact of no inconsiderable importance in this case, that the inhabitants of this land have uniformly considered themselves, and have been uniformly considered, both by Kentucky and Indiana, as belonging to the last-mentioned state. No diversity of opinion appears to have existed on this point. The water on the north-western side of the land in controversy, seems not to have been spoken of, as a part of the river, but as a bayou. The people of the vicinage, who viewed the river in all its changes, seem not to have considered this land as being an island of the Ohio, and as a part of Kentucky, but as lying on the north-western side of the Ohio, and being a part of Indiana."

The case of *Indiana v. Kentucky,* 136 U.S. 479, involved the claims of Indiana and Kentucky to jurisdiction over a tract of land embracing about 2,000 acres lying on what was then the north side of the Ohio River. Kentucky had claimed that the owners held their titles under grants made by Kentucky as the original proprietor. The land was taxed in Kentucky, the residents voted in Kentucky, and the courts of Kentucky had exercised jurisdiction over the land. The Court considered the fact that it was over seventy years after Indiana became a state before she commenced suit and during all of that period, Indiana never asserted any claim by legal proceedings to the tract in question. It then said beginning at page 510:

> "* * * On the day she became a State her right to Green River Island, if she ever had any, was as perfect and complete as it ever could be. On that day, according to the allegations of her bill of com-

plaint, Kentucky was claiming and exercising, and has done so ever since, the rights of sovereignty both as to soil and jurisdiction over the land. On that day, and for many years afterwards, as justly and forcibly observed by counsel, there were perhaps scores of living witnesses whose testimony would have settled, to the exclusion of a reasonable doubt, the pivotal fact upon which the rights of the two States now hinge and yet she waited for over seventy years before asserting any claim whatever to the island, and during all those years she never exercised or attempted to exercise a single right of sovereignty or ownership over its soil. It is not shown, as he adds, that an officer of hers executed any process, civil or criminal, within it, or that a citizen residing upon it was a voter at her polls, or a juror in her courts, or that a deed to any of its lands is to be found on her records, or that any taxes were collected from residents upon it for her revenue.

This long acquiesence in the exercise by Kentucky of dominion and jurisdiction over the island is more potential than the recollections of all the witnesses produced on either side. Such acquiescence in the assertion of authority by the State of Kentucky, such omission to take any steps to assert her present claim by the State of Indiana, can only be regarded as a recognition of the right of Kentucky too plain to be overcome, except by the clearest and most unquestioned proof. It is a principle of public law universally recognized, that long acquiescence in the possession of territory and in the exercise of dominion and sovereignty over it, is conclusive of the nation's title and rightful authority."

In *Arkansas v. Tennessee*, 310 U.S. 563, Arkansas brought suit against Tennessee seeking a decree determining the true boundary between the states at certain points known as "Moss Island" and "Blue Grass Towhead." The

island was physically connected to and a part of the eastern shore of the Mississippi River and the Master found that the land was originally on the west bank of the Mississippi River, but an avulsion took place occasioned by the water cutting across the neck of a peninsula. This is the same case which was illustrated by one of the slides of Professor Gilliland in his explanation of cutoffs. The Master found that the lands were within Tennessee "as a result of prescription." The Court related the Master's summary of the evidence as follows at pages 567-568:

> " 'The contemporary evidence shows that as early as 1823 entries of the land were being made under the authority of Tennessee and surveys were made under authority of Tennessee as early as 1824. Witnesses sixty-five, seventy-eight and eighty-four years old testified before me that the inhabitants of the island always voted in Tennessee elections; were taxed by Tennessee, married by Tennessee Justices of the Peace, required to do road work under Tennessee authority, educated upon the island in a school operated by Tennessee. The records of Dyer County, Tennessee, showed that assessments on the lands in controversy for local taxes were made by Tennessee authorities and land taxes paid to Tennessee as far back as 1870, prior to which records are missing. Tennessee Exhibit 42 shows a tax sale by a Tennessee sheriff in 1848 covering lands on the island. The bill of exceptions in the case of *Moss v. Gibbs* shows testimony in that case that as far back as 1826 Tennessee assessed the lands on the cutoff island, collected the taxes on them and served process there.'
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> * * *
>
> The Master was equally explicit in finding that the record showed the acquiescence of Arkansas in

this assertion of dominion by Tennessee. On this point his report states:

'There is no showing that Arkansas ever asserted any claim to the land in controversy prior to the institution of this suit. The lands were never surveyed or granted by Arkansas. In 1848 the United States Surveyor of Public Lands in Arkansas wrote to the General Land Office in Washington that he had been called upon to survey the lands on the cutoff island. He received a reply authorizing him to proceed with the survey of the island "more especially if it is not claimed by the State of Tennessee." But no survey was ever made. On October 10th, 1935, application was filed with the Commissioner of State Lands of Arkansas for the purchase of Blue Grass Towhead, but no action was taken thereon. The opinion of the Supreme Court of Tennessee in *Moss v. Gibbs*, 57 Tenn. 283, was published in the year 1872 and made the claims of Tennessee a matter of public notoriety.'"

Mr. Chief Justice Hughes stated that the findings of the Master were fully supported by the record. He then said at pages 569-571:

"The contentions of Arkansas in opposition to the application of the principle of prescription and acquiescence in determining the boundary between States cannot be sustained. That principle has had repeated recognition by this Court. In *Rhode Island v. Massachusetts*, 4 How 591, 639, the Court said: 'No human transactions are unaffected by time. Its influence is seen on all things subject to change. And this is peculiarly the case in regard to matters which rest in memory and which consequently fade with the lapse of time, and fall with the lives of individuals. For the security of rights, whether of states or individuals, long possession under a claim of title is protected. And there is no controversy in which this great principle may be involved with greater

justice and propriety than in a case of disputed boundary.' Applying this principle in *Indiana v. Kentucky*, 136 US 479, 510, to the long acquiescence in the exercise by Kentucky of dominion and jurisdiction over the land there in controversy, the Court said: 'It is a principle of public law universally recognized, that long acquiescence in the possession of territory and in the exercise of dominion and sovereignty over it, is conclusive of the nation's title and rightful authority.' Again in *Louisiana v. Mississippi* 202 U.S. 1, 53, the Court observed: 'The question is one of boundary, and this Court has many times held that, as between the States of the Union, long acquiescence in the assertion of a particular boundary and the exercise of dominion and sovereignty over the territory within it, should be accepted as conclusive whatever the international rule might be in respect of the acquisition by prescription of large tracts of country claimed by both.' See, also, *Virginia v. Tennessee*, 148 U.S. 503, 523; *Maryland v. West Virginia*, 217 U.S. 1, 41-44; *Vermont v. New Hampshire*, 289 U.S. 593, 613.

In *Michigan v. Wisconsin*, 270 U.S. 295, 308, the Court thus referred to the recognition of this principle in international law, saying: 'That rights of the character here claimed may be acquired on the one hand and lost on the other by open, long-continued and uninterrupted possession of territory, is a doctrine not confined to individuals but applicable to sovereign nations as well, *Direct United States Cable Co. v. Anglo-American Telegraph Co.*, (1877) L.R. 2 A.C. 394, 421; Wheaton, International Law, 5th Eng. Ed., 268-269; 1 Moore, International Law Digest, 294 *et seq.*, and a fortiori, to the quasi-sovereign States of the Union.' Prescription in international law, says Oppenheim, may be defined as 'the acquisition of sovereignty over a territory through continuous and undisturbed exercise of sovereignty over it during

such a period as is necessary to create under the influence of historical development the general conviction that the present condition of things is in conformity with international order.' And thus he finds that prescription in international law 'has the same rational basis as prescription in municipal law — namely, the creation of stability of order.' Oppenheim, International Law, 5th Ed., pp. 455, 456. See, also Hall, International Law, 8th Ed., pp. 143, 144; Hyde, International Law, § 116.

This principle of prescription and acquiescence, when there is a sufficient basis of fact for its application, so essential to the 'stability of order' as between the States of the Union, is in no way disregarded or impaired by our decisions in *Arkansas v. Tennessee, supra,* and *Arkansas v. Mississippi, supra,* upon which counsel for Arkansas rely. In those cases the evidence fell short of the proof of long acquiescence which was necessary to warrant the application of the principle and there was no such showing of acts of dominion and jurisdiction as are shown on the part of Tennessee in the instant case."

See also *Maryland v. West Virginia*, 217 U. S. 1, *Rhode Island v. Massachusetts*, 4 How. 591, *Virginia v. Tennessee*, 148 U. S. 503, and *Michigan v. Wisconsin*, 270 U. S. 295.

The exercises of jurisdiction by the State of Nebraska over the Nottleman Island area by having surveyed the land, taxed the realty, taxed the personal property of the inhabitants, registered births and deaths, quieted title and conveyed title through estate proceedings and the issuance of a license to sell real estate issued through the District Court, and the fact that the inhabitants all considered it to be in Nebraska, coupled with a complete

lack of exercise of any jurisdiction over the area by the State of Iowa would seem to be conclusive that this was Nebraska land prior to the Compact. Even though the period of time elapsed may have been shorter in the Nottleman Island case, had the land not been ceded there would have been an additional 20 years or more of exercise of jurisdiction by Nebraska. In the Schemmel situation, the land was surveyed as a part of Otoe County and has been on the Nebraska tax rolls since 1895 and the tax deeds, quiet title actions, and taxation of the land coupled with the lack of exercise of jurisdiction by the State of Iowa and the general recognition by the State of Iowa of the abandoned channel in the Iowa Chute also established the land as Nebraska land. These two situations were existing at the time of the Compact, and Iowa contracted in recognition of those situations. In each of these cases the general reputation in the vicinity was significant in determining the state in which the property was located and the treatment of this property by the county and state officials and citizens generally was relevant in acknowledging the proper situs of the land. Certainly the tax records, assessment records, school records, and birth records become even more significant when it is considered that they were of record and of public knowledge at the time that the states entered into the agreement concerning the new boundary.

In the disputed boundary case of *Minnesota v. Wisconsin*, 252 U. S. 273, 280 the Court made the comment:

> "For many years officers and representatives of both states regarded the boundary as on or near this line."

In other boundary cases the Court has taken into account the general treatment of the boundary by the citizens and local public officials. In *Vermont v. New Hampshire*, 289 U. S. 593, the Court considered the Connecticut River boundary between Vermont and New Hampshire under early grants and, in determining that the boundary was the low water mark on the western side of the Connecticut River, the Court said at 614-615:

> "A large amount of evidence, thought to have some bearing on the practical construction given to the boundary by the two states, has been introduced in the present suit. Most of it, when examined in detail, is of such slight weight and so inconclusive as to make unnecessary any extensive review of it here. Of some, but by no means controlling significance, are instances of action by towns in New Hampshire recognizing low-water mark on the west bank as the boundary of the towns and of the state, and numerous deeds or other formal documents introduced in evidence affecting titles in each of the towns on the west bank of the river by which the property conveyed was extended to the river or included the privilege of the use of the water. In the absence of evidence of like character showing the assertion of title or jurisdiction in New Hampshire above the low-water line, these facts have some persuasive force in showing that inhabitants along the questioned boundary considered that it extended along the river at low-water mark. See *Handly v. Anthony, supra*, 384."

The Court also considered the history of taxation of the two states and the fact that Vermont had omitted taxation of the disputed property. The Court said at page 616:

> ". . . The fact that in the period of over a century following Vermont's admission to statehood this is

> the first well authenticated instance of an effort on the part of the New Hampshire authorities to tax property located on the west bank of the river is of substantial weight in indicating acquiescence by New Hampshire in the boundary line restricting her jurisdiction to the river at the low-water mark."

In *Handly's Lessee v. Anthony*, 5 Wheat. 374, the Court said it was of no inconsiderable importance that the inhabitants of the land uniformly considered themselves, and were uniformly considered, as belonging to Kentucky.

It should not be necessary to repeat that in the Schemmel case not only was the land taxed continuously in Nebraska since 1895, but the Iowa tax records show it was not placed upon their rolls until 1949 when the Schemmel family started paying taxes in Iowa and have paid them continuously there ever since. In the Nottleman Island situation, the land was also on the tax rolls in Nebraska since 1933 whereas it was not on the Iowa rolls. It was placed upon the Iowa tax rolls in 1947 and the owners have paid taxes upon it in Iowa ever since. Certainly the county officials of the Iowa counties recognized that these lands were ceded by the Compact.

VIII.

A compact entered into between states and approved by Congress is a contract which is binding upon the legislative, executive and judicial branches of the states as well as their citizens. As such it should not be subject to unilateral determination by only one of the stste.

Having considered the general principles of law applicable to the Missouri River and the boundary between Iowa and Nebraska at common law and prior to the adoption of the Iowa-Nebraska Boundary Compact of 1943, it then becomes essential to examine the effect of the Compact on the existing law. The two states, rather than determining their existing rights in and to the lands along the Missouri River by judicial proceedings, instead entered into a compact to compromise and adjust these rights. This Compact superceded the prior law and now governs not only the location of the boundary but the obligations of the states to recognize private titles to lands along the Missouri River. It is a fallacy to use the Compact to establish a jurisdictional line but disregard the other provisions as Iowa has been doing. In both the Schemmel and Babbitt cases, Iowa reportedly used the "compact line" as the westerly limits of its claim and various other maps in evidence indicate that Iowa has used that compact line as the westerly boundary of lands claimed. There is conflict between Iowa and Nebraska as to the correctness of where Iowa has placed this line and their method of placing it, but for purposes of this argument plaintiff would concede that defendant is utilizing its concept of the compact line. In the *Tyson* case Iowa again used the compact line not only as its western border, but as a line to cut off riparian rights of the Nebraska owners. Nebraska contends that the Compact is a unified document and the provisions establishing the lines cannot be separated from the safeguards to titles and the limitations upon the states which are also contained in the Compact. This case is not just a

boundary case, but is a case based upon Compact. A Compact entered into between states and approved by Congress is a contract which is binding upon the states as parties thereto, and is binding upon the legislative, executive and judicial branches. As such, it should not be subject to unilateral determination by only one of the states, but the determination of the rights, duties and obligations is properly a function of the Supreme Court of the United States.

The Compact was entered into with the consent of Congress under authority of Article I, Section 10 of the Constitution of the United States. Interstate compacts are properly classified as contracts and have been so classified since an early time in our history. In *Greene v. Biddle,* 8 Wheat. 1 the Court, in declaring a statute of the State of Kentucky unconstitutional because it was in conflict with the provisions of the Compact between Kentucky and Virginia, said at pages 92-93:

> "A slight effort to prove that a compact between two states is not a case within the meaning of the constitution, which speaks of contracts, was made by the counsel for the tenant, but was not much pressed. If we attend to the definition of a contract, which is the agreement of two or more parties, to do, or not to do, certain acts, it must be obvious, that the propositions offered, and agreed to by Virginia, being accepted and ratified by Kentucky, is a contract. In fact, the terms compact and contract are synonymous; and in *Fletcher v. Peck,* the Chief Justice defines a contract to be a compact between two or more parties. The principles laid down in that case are, that the Constitution of the United States embraces all contracts, executed or executory, whether between individuals, or between a state and indi-

> viduals; and that a state has no more power to impair an obligation into which she herself has entered, than she can the contracts of individuals. Kentucky, therefore, being a party to the compact which guaranteed to claimants of land lying in that state, under titles derived from Virginia, their rights, as they existed under the laws of Virginia, was incompetent to violate that contract, by passing any law which rendered those rights less valid and secure."

The Court recognized rights derived from the laws of Virginia prior to the separation of Kentucky from Virginia because the Compact provided that all private rights and interests to lands derived from the laws of Virginia shall remain valid and secure under the laws of Kentucky. The Compact was not invalid upon the ground of its surrendering rights of sovereignty which were inalienable.

In *Fletcher v. Peck*, 6 Cranch 87 at 136, Mr. Chief Justice Marshall said:

> "A contract is a compact between two or more parties, and is either executory or executed."

In *Rhode Island v. Massachusetts*, 12 Pet. 657, Mr. Justice Baldwin pointed out that at the time of the adoption of the Constitution, there were existing controversies between 11 states respecting their boundaries which had arisen under their respective charters and had continued from the first settlement of the colonies. He then stated at pages 724-726:

> "By the first clause of the tenth section of the first article of the constitution, there was a positive prohibition against any state entering into 'any treaty, alliance or confederation,' no power under

the government could make such an act valid, nor dispense with the constitutional prohibition. In the next clause, in a prohibition against any state entering 'into any agreement or compact with another state, or with a foreign power, without the consent of congress; or engaging in war, unless actually invaded, or in imminent danger, admitting of no delay.' By this surrender of the power, which, before the adoption of the constitution, was vested in every state, of settling these contested boundaries, as in the plentitude of their sovereignty they might; they could settle them neither by war, nor in peace, by treaty, compact or agreement, without the permission of the new legislative power which the states brought into existence by their respective and several grants in conventions of the people. If congress consented, then the states were in this respect restored to their original inherent sovereignty; such consent being the sole limitation imposed by the constitution, when given, left the states as they were before, as held by this court in *Poole v. Fleeger*. 11 Pet. 209; whereby their compacts became of binding force, and finally settled the boundary between them; operating with the same effect as a treaty between sovereign powers. That is, that the boundaries so established and fixed by compact between nations, become conclusive upon all the subjects and citizens thereof, and bind their rights; and are to be treated to all intents and purposes, as the true real boundaries. 11 Pet. 209; s. p. 1 Ves. sen. 448-9; 12 Wheat. 534. The construction of such compact is a judicial question, and was so considered by this court in the *Lessee of Sims v. Irvine*, 3 Dall. 425-54; and in *Marlatt v. Silk*, 11 Pet. 2, 18; *Burton v. Williams*, 3 Wheat. 529-33, &c."

The Court then went on to consider that agreements relating to boundaries were included within the Compact clause and that the construction of compacts was a proper function of the Court.

In *West Virginia, ex rel. Dyer v. Sims,* 341 U. S. 22, the State Auditor of West Virginia had refused to issue a warrant to defray West Virginia's share of the expenses arising out of a Compact entered into with seven other states to control pollution of the Ohio River. An action of mandamus was brought by a Commissioner to compel the State Auditor to issue a warrant for West Virginia's share of the expenses. Mr. Justice Frankfurter described the nature and effect of a compact in the following language at 341 U. S. 28:

> "But a compact is after all a legal document. Though the circumstances of its drafting are likely to assure great care and deliberation, all avoidance of disputes as to scope and meaning is not within human gift. Just as this Court has power to settle disputes between States where there is no compact, it must have final power to pass upon the meaning and validity of compacts. It requires no elaborate argument to reject the suggestion that an agreement solemnly entered into between States by those who alone have political authority to speak for a State can be unilaterally nullified, or given final meaning by an organ of one of the contracting States. A State cannot be its own ultimate judge in a controversy with a sister State. To determine the nature and scope of obligations as between States, whether they arise through the legislative means of compact or the 'federal common law' governing interstate controversies [*Hinderlider v. LaPlata Co.,* 304 U. S. 92, 110], is the function and duty of the Supreme Court of the Nation. Of course every deference will be shown to what the highest court of a State deems to be the law and policy of its State, particularly when recondite or unique features of local law are urged. Deference is one thing; submission to a State's own determination of whether it has undertaken an ob-

ligation, what that obligation is, and whether it conflicts with a disability of the State to undertake it is quite another."

The adjustment of disputes by Compact was considered by the Court in *Hinderlider v. LaPlata River & Cherry Creek Ditch Co.*, 304 U. S. 92, concerning a Compact for the apportionment of waters of an interstate stream in which Mr. Justice Brandeis stated at pages 104-106:

"The Supreme Court of Colorado held the Compact unconstitutional because, for aught that appears, it embodies not a judicial, or quasi-judicial, decision of controverted rights, but a trading compromise of conflicting claims. The assumption that a judicial or quasi-judicial, decision of the controverted claims is essential to the validity of a compact adjusting them, rests upon misconception. It ignores the history and order of development of the two means provided by the Constitution for adjusting interstate controversies. The compact—the legislative means—adapts to our Union of sovereign States the age-old treaty making power of independent sovereign nations. Adjustment by compact without a judicial or quasi-judicial determination of existing rights had been practiced in the Colonies, was practiced by the States before the adoption of the Constitution, and had been extensively practiced in the United States for nearly half a century before this Court first applied the judicial means in settling the boundary dispute in Rhode Island v. Massachusetts, 12 Pet. 657, 723-725.

The extent of the existing equitable rights of Colorado and of New Mexico in the La Plata River could obviously have been determined by a suit in this Court, as was done in Kansas v. Colorado, supra, in respect to rights in the Arkansas River and in Wyoming v. Colorado, supra, in respect to the Laramie.

> But resort to the judicial remedy is never essential to the adjustment of interstate controversies, unless the States are unable to agree upon the terms of a compact or Congress refuses its consent. The difficulties incident to litigation have led States to resort, with frequency, to adjustment of their controversies by compact, even where the matter in dispute was the relatively simple one of a boundary. In two such cases this Court suggested 'that the parties endeavor with the consent of Congress to adjust their boundaries.' Washington v. Oregon, 214 U. S. 205, 217, 218; Minnesota v. Wisconsin, 252 U. S. 273, 283. In New York v. New Jersey, 256 U. S. 296, 313, which involved a more intricate problem of rights in interstate waters, the recommendation that treaty-making be resorted to was more specific; and compacts for the apportionment of the water of interstate streams have been common."

Consequently, it was well recognized that States could adjust their differences without resorting to judicial determination. This is what Iowa and Nebraska did when they entered into the Compact of 1943 and avoided the time consuming and expensive process which Iowa is forcing Nebraska to undertake today. Had the Compact not been adopted, then the situation would have been different, and a judicial determination of the boundary might be necessary in those places where it was in dispute; but the States attempted to eliminate this requirement by agreement and recognition of existing titles. The Court also said in *Hinderlider* that the question of apportionment of waters of an interstate stream between the two states was a question of "federal common law" upon which neither the statutes nor the decision of either state can be conclusive.

As a contract, rights and obligations were created which were binding on each state and its officials. As stated in 81 C. J. S., States, Section 10c at page 906:

> "A compact made by two states in the manner permitted or prescribed by the federal Constitution is a law, or, in legal effect, a contract binding on all the parties thereto, the obligation of which continues as long as that contract exists. * * * its provisions limit the agreeing states in the exercise of their respective powers, and are binding on the citizens of both states, and on the judicial, as well as the executive, branch of the state government, although the validity and interpretation of a compact have been held matters for judicial construction."

In *Virginia v. Tennessee*, 148 U. S. 503, the Court exercised jurisdiction over a dispute between the State of Virginia and Tennessee as to their true boundary. Virginia claimed that an agreement between the two states entered into in 1803 constituted a compact establishing the boundary which was binding whereas Tennessee claimed that the Compact was not valid. Mr. Justice Field, after considering that the line had been accepted by both states as a satisfactory settlement of the controversy which had lasted for nearly a century, stated at page 515:

> "* * * As seen from the acts recited, both States through their legislatures declared in the most solemn and authoritative manner that it was fully and absolutely ratified, established and confirmed as the true, certain, and real boundary between them; and this declaration could not have been more significant had it added, in express terms, what was plainly implied, that it should never be departed

from by the government of either, but be respected, maintained and enforced by the governments of both."

He further defined a compact at page 520:

"Compacts or agreements—and we do not perceive any difference in the meaning, except that the word 'compact' is generally used with reference to more formal and serious engagements than is usually implied in the term 'agreement'—cover all stipulations affecting the conduct or claims of the parties."

IX.

Provisions of compacts become the law of the contracting states and state statutes or laws which conflict with an interstate compact are invalid and unenforceable.

The provisions of compacts become the law of the contracting state and a state statute or law which conflicts with an interstate Compact is invalid and unenforceable. *Green v. Biddle,* 8 Wheat 1, *The Interstate Compact Since 1925* by Zimmerman and Wendell, p. 32. In *U. S. v. Bekins,* 304 U. S. 27, which was a case involving the composition of debts under the Federal Bankruptcy Act, the Court considered the sovereign power of the state to make contracts and Mr. Chief Justice Hughes said at pages 51-52:

"* * * It is of the essence of sovereignty to be able to make contracts and give consents bearing upon the exertion of governmental power. This is constantly illustrated in treaties and conventions in the international field by which governments yield their freedom of action in particular matters in order to gain the benefits which accrue from international accord. 1 Oppenheim, International Law, 4th ed. §§ 493, 494;

> 2 Hyde, International Law, § 489; *Perry v. United States,* 294 U. S. 330, 353; *Steward Mach. Co. v. Davis,* 301 U. S. 548, 597. The reservation to the States by the Tenth Amendment protected, and did not destroy, their right to make contracts and give consents where that action would not contravene the provisions of the Federal Constitution. The States with the consent of Congress may enter into compacts with each other and the provisions of such compacts may limit the agreeing States in the exercise of their respective powers. Const. Art. 1, § 10, subd. 3; Poole v. Fleeger, 11 Pet. 185, 209; Rhode Island v. Massachusetts, 12 Pet. 657, 725; Hinderlider v. La Plata River & C. C. Ditch Co., post, 92. * * *"

It is Nebraska's position that, when Iowa agreed to recognize Nebraska titles, this included the rights of Nebraska owners to the bed of the Missouri River and there were many places along the boundary where this bed was entirely within Nebraska. This was the situation in Winnebago Bend, California Bend, the Nottleman Island area, and Otoe Bend as established by the evidence in this case and is certainly the situation in many other areas, particularly where canals were dug in Nebraska. The law of Iowa is what the Compact determines it to be, not what Iowa officials and Iowa courts might declare it to be without regard to the Compact.

In the construction of agreements or compacts, the fundamental rule is to ascertain the substantial intent of the parties and, in making this inquiry, it is proper to examine into the state of things existing at the time and the circumstances under which the agreement was made. The history leading up to the compact is relevant in determining the proper construction and effect of the

Compact as applicable to titles along the Missouri River. In the case of *Chesapeake & Ohio Canal Co. v. Hill,* 15 Wall. 94, the Court had before it the construction of a contract for the taking of water from the canal and Mr. Justice Bradley stated at pages 99-101:

> "The large investment of capital made by the appellee in sole reliance on the water-power which the lease secures, with the full knowledge which the appellants had of this reliance and intended investment, renders it necessary that we should look carefully to the substance of the original agreement, of January, 1864, as contradistinguished from its mere form, in order that we may give it a fair and just construction, and ascertain the substantial intent of the parties which is the fundamental rule in the construction of all agreements. * * *
>
> * * * "And in making this inquiry we have a right to examine into the state of things existing at the time and the circumstances in which the lease was made. This kind of evidence is especially pertinent when the inquiry is as to the subject matter of the agreement."

In determining the subject matter of the boundary compact and the titles which should be recognized, it is significant that the Compact was the result of years and years of controversy and uncertainty and a recognition of many cut-offs by the Missouri River, leaving land of each state isolated on the other side.

In referring to the construction of an Act of Congress, Mr. Justice Davis stated in *U. S. v. Union Pacific Railroad Co.,* 91 U. S. 72 at 79:

> "* * * The act itself speaks the will of Congress, and this is to be ascertained from the language used.

> But courts, in construing a statute, may with propriety recur to the history of the times when it was passed; and this is frequently necessary, in order to ascertain the reason as well as the meaning of particular provisions in it. *Aldridge v. Williams,* 3 How. 24; *Preston v. Browder,* 1 Wheat. 120."

In *In re Ross,* 140 U. S. 453, a case concerning jurisdiction to try and sentence an American seaman for a crime committed on board an American ship in the harbor of Yokohama which involved a treaty with Japan, the Court said through Mr. Justice Field, at p. 475:

> "* * * It is a canon of interpretation to so construe a law or a treaty as to give effect to the object designed, and for that purpose all of its provisions must be examined in the light of attendant and surrounding circumstances. To some terms and expressions a literal meaning will be given, and to others a larger and more extended one. The reports of adjudged cases and approved legal treatises are full of illustrations of the application of this rule. The inquiry in all such cases is as to what was intended in the law by the legislature, and in the treaty by the contracting parties."

X.

General rules of construction apply in the interpretation and meaning of agreements between states. Such agreements are to be interpreted with a view to public convenience and the avoidance of controversy and the great object where it can be distinctly perceived, ought not to be defeated by those technical perplexities which may sometimes influence contracts between individuals. Considerations which govern the diplo-

matic relations between states require that their obligations should be liberally construed so as to effect the apparent intention of the parties to secure equality and reciprocity between them.

In the case *Handly's Lessee v. Anthony,* 5 Wheat. 374, the question was raised whether certain lands along the Ohio River were in Indiana or Kentucky. Mr. Chief Justice Marshall stated at pages 383, 384:

> "The case is certainly not without its difficulties; but in great questions which concern the boundaries of states, where great natural boundaries are established in general terms, with a view to public convenience, and the avoidance of controversy, we think the great object, where it can be distinctly perceived, ought not to be defeated by those technical perplexities which may sometimes influence contracts between individuals."

Nebraska contends that the Iowa-Nebraska Compact was adopted in general terms with a view to public convenience and the avoidance of controversy and this great object should be effectuated. The interpretation which Iowa places upon the Compact leads to further controversy and Iowa's technical construction that titles were only to be recognized to lands which individuals must now prove in the Iowa Courts to have been "ceded" is not consistent with the purpose of the Compact. A necessary consequence of Iowa's construction is to throw the parties back to the original situation and revive old controversies at a time when the property owners are at a distinct disadvantage because of the passage of time. These owners are protected against the attacks of other individuals by statutes of limitation and adverse posses-

sion but, if the sovereign is immune to these defenses, the landowner is placed at an almost impossible disadvantage.

In *Massachusetts v. New York,* 271 U. S. 65, the Commonwealth of Massachusetts brought an action against the State of New York to quiet title to land located in the City of Rochester and to enjoin the city from taking it by eminent domain. The title to the land in controversy depended upon the meaning and effect of the Treaty of Hartford entered into between New York and Massachusetts in 1786. Mr. Justice Stone stated that it was the meaning of the grant itself which determined the principal question and then continued at page 87:

> "In ascertaining that meaning, not only must regard be had to the technical significance of the words used in the grants, but they must be interpreted 'with a view to public convenience, and the avoidance of controversy', and 'the great object, where it can be distinctly perceived, ought not to be defeated by those technical perplexities which may sometimes influence contracts between individuals.' Marshall, C. J., in *Handly's Lessee v. Anthony,* 5 Wheat. 374, 383-384. The applicable principles of English law then well understood, the object of the grant, contemporaneous construction of it, and usage under it for more than a century, all are to be given consideration and weight. *Martin v. Waddell,* supra."

The Court also went on to consider the practical construction by the two states of the Treaty of Hartford and of the grants made by Massachusetts immediately following it, and the long, continued, acquiescence by Massachusetts in that construction.

The case of *U. S. v. Chaves,* 159 U. S. 452, involved claims to certain lands in New Mexico under a claimed Mexican land grant with the original grant papers having subsequently been lost. The United States denied that such a grant was ever made. The Court of Private Land Claims which had adjudged the title of the claim to be good and valid had been established by an Act which provided that all proceedings should be conducted as near as may be according to the practice of the courts of equity of the United States and that the Court was to settle and determine the question of the validity of title and boundaries of the grant or claim according to the law of nations, the stipulations of the treaty between the United States and Mexico, and the laws and ordinances of the government from which it is alleged to have been derived. Mr. Justice Shiras, in delivering the opinion of the Court, stated at page 457:

> "The first rule of decision thus laid down by Congress for our guidance is that we are to have regard to the law of nations, and as to this it is sufficient to say that it is the usage of the civilized nations of the world, when territory is ceded, to stipulate for the property of its inhabitants. *Henderson v. Poindexter,* 12 Wheat. 530, 535; *United States v. Arredondo,* 6 Pet. 691, 712; *United States v. Ritchie,* 17 How. 525.
>
> We adopt the language of Chief Justice Marshall, in the case of *United States v. Percheman,* 7 Pet. 51, 86, as follows: 'It may not be unworthy of remark that it is very unusual, even in cases of conquest, for the conquerer to do more than to displace the sovereign and assume dominion over the country. The modern usage of nations, which has become law, would be violated; that sense of justice and of right which

> is acknowledged and felt by the whole civilized world would be outraged, if private property should be generally confiscated and private rights annulled. The people change their allegiance; their relation to their ancient sovereign is dissolved; but their relations to each other and their rights of property remain undisturbed. If this be the modern rule, even in cases of conquest, who can doubt its application to the case of an amicable cession of territory?"

In *Sullivan v. Kidd,* 254 U. S. 433, a case involving the construction of a treaty between Great Britain and the United States relating to the tenure and disposition of real and personal property, the Court through Mr. Justice Day stated at page 439:

> "Writers of authority agree that treaties are to be interpreted upon the principles which govern the interpretation of contracts in writing between individuals, and are to be executed in the utmost good faith, with a view to making effective the purposes of the high contracting parties; that all parts of a treaty are to receive a reasonable construction with a view to giving a fair operation to the whole. Moore, International Law Digest, vol. 5, 249."

The Court further stated at page 442:

> "While the question of the construction of treaties is judicial in its nature, and courts when called upon to act should be careful to see that international engagements are faithfully kept and observed, the construction placed upon the treaty before us and consistently adhered to by the Executive Department of the Government, charged with the supervision of our foreign relations, should be given much weight."

In *Nielsen v. Johnson,* 279 U. S. 47, a Danish citizen died residing in Iowa, leaving as his sole heir his mother,

a resident and citizen of Denmark. Iowa attempted to assess an inheritance tax against the estate and the administrator contended that the tax was void as in conflict with the treaty between the United States and Denmark. The Iowa Supreme Court upheld the statute fixing the tax as not in conflict with the treaty. Mr. Justice Stone, in considering Iowa's contentions, stated at pages 51-52:

> "The narrow and restricted interpretation of the Treaty contended for by respondent, while permissible and often necessary in construing two statutes of the same legislative body in order to give effect to both so far as is reasonably possible, is not consonant with the principles which are controlling in the interpretation of treaties. Treaties are to be liberally construed so as to effect the apparent intention of the parties. *Jordan v. Tashiro*, 278 U. S. 123; *Geofroy v. Riggs*, 133 U. S. 258, 271; *In re Ross*, 140 U. S. 453, 475; *Tucker v. Alexandroff*, 183 U. S. 424, 437. When a treaty provision fairly admits of two constructions, one restricting, the other enlarging rights which may be claimed under it, the more liberal interpretation is to be preferred, *Asakura v. Seattle*, 265 U. S. 332; *Tucker v. Alexandroff, supra; Geofroy v. Riggs, supra*, and as the treaty-making power is independent of and superior to the legislative power of the states, the meaning of treaty provisions so construed is not restricted by any necessity of avoiding possible conflict with state legislation and when so ascertained must prevail over inconsistent state enactments. See *Ware v. Hylton*, 3 Dall. 199; *Jordan v. Tashiro, supra;* cf. *Cheung Sum Shee v. Nagle*, 268 U. S. 336. When their meaning is uncertain, recourse may be had to the negotiations and diplomatic correspondence of the contracting parties relating to the subject matter and to their own practical construction of it. Cf. *In re Ross, supra*, at 467; *United States v. Texas*,

162 U. S. 1, 23; *Kinkead v. United States,* 150 U. S. 483, 486; *Terrace v. Thompson,* 263 U. S. 197, 223.

> The history of Article 7 and references to its provisions in diplomatic exchanges between the United States and Denmark leave little doubt that its purpose was both to relieve the citizens of each country from onerous taxes upon their property within the other and to enable them to dispose of such property, paying only such duties as are exacted of the inhabitants of the place of its situs, as suggested by this Court in *Peterson v. Iowa, supra,* p. 174; and also to extend like protection to alien heirs of the noncitizen."

The Court, interpreting the language with "that liberality demanded for treaty provisions" reversed the Iowa Supreme Court's decision.

See also *Factor v. Laubenheimer,* 290 U. S. 276 and *Jordan v. Tashiro,* 278 U. S. 123.

Nebraska contends that the Compact should be liberally construed to protect the rights of the individuals owning or claiming lands along the Missouri River because Sections 3 and 4 were obviously inserted for their benefit.

The Compact should not be restrictively construed to enlarge the rights of the states at the expense of the landowners who were not personally parties to the Compact.

XI.

In construing compacts and agreements and in ascertaining their meaning, it is proper to look to the practical construction placed upon

them by the parties. Want of assertion of power by those who presumably would be alert to exercise it is equally significant in determining whether such power was actually conferred.

Nebraska considers that it is significant that the State of Iowa delayed for almost twenty years in laying claim to the Schemmel and Babbitt lands and in adopting their program of land acquisition along the Missouri River. An official of the Iowa State Conservation Commission as far back as 1951 stated by letter that Nottleman's Island was not State property but belonged to some of the individuals presently claiming it. The Iowa Attorney General's Office had notice of this claim both in 1947 and again in 1951. At the same time, the local governmental agencies recognized these titles and the lands were being taxed. The County Officials and taxing officials served under offices created by the statutes of the State of Iowa and the procedures are governed by Iowa Statute. At the same time, there was nothing of record in any Iowa governmental agency including those required by statute to keep records of public and state owned lands which indicated a claim by the State of Iowa to these lands and in some specific situations where Iowa had notice that lands constituted former river beds or abandoned river beds, the officials failed to take any action to establish Iowa's claim. This course of conduct was consistent with an interpretation of the Compact that these titles were originally intended to be protected.

In the case of *Pigeon River Improvement, Slide & Boom Co. v. Cox,* 291 U. S. 138, the Court construed the Webster-Ashburton Treaty along the boundary between

Minnesota and Canada and in doing so held it appropriate to look to the practical construction which had been placed upon the treaty. In *Choctaw Nation of Indians vs. U. S.*, 318 U.S. 423, the Court considered Indian treaties concerning the allotment of land to the Indians, and Mr. Justice Murphy said at pages 431-432:

> "* * * Of course, treaties are construed more liberally than private agreements, and to ascertain their meaning we may look beyond the words to the history of the treaty, the negotiations, and the practical construction adopted by the parties. *Factor v. Laubenheimer,* 290 U.S. 276, 294-295; *Cook v. United States,* 288 U.S. 102, 112."

The long lapse of time in pressing any claims by the State of Iowa or its Conservation Commission may be significant in determining whether there is any validity to these claims. Mr. Justice Frankfurter, in considering the power of the Federal Trade Commission, stated in *Federal Trade Commission v. Bunte Brothers, Inc.,* 312 U.S. 349 at 351-352:

> "That for a quarter century the Commission has made no such claim is a powerful indication that effective enforcement of the Trade Commission Act is not dependent on control over intrastate transactions. Authority actually granted by Congress of course can not evaporate through lack of administrative exercise. But just as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred. See *Norwegian Nitrogen Co. v. United States,* 288 U.S. 294, 315. * * *"

XII.

Boundaries between states are of solemn importance and should not be subject to change by man-made works where the United States Army Corps of Engineers arbitrarily created a new designed channel for the Missouri River and then, by construction and dredging, moved the river into that designed channel.

The Missouri River along the Iowa-Nebraska Boundary has created unique problems not only because of its many natural movements but because it was channelized by the Corps of Engineers. The evidence shows the design was determinative of where the river was to be placed and by man-made works, the river was then placed in that design. This was without regard to the boundary between the states and which side of the main channel land areas had been located prior to the commencement of the construction work. Consequently, islands or bar areas were arbitrarily placed on the Iowa or Nebraska side, depending upon the design. In some cases, such as the Auldon Bar situation, land areas were bisected with portions placed on each side. Plaintiff submits that boundaries between states are of solemn importance and prior to the Compact the Iowa-Nebraska boundary was not subject to change by man-made works where the Corps of Engineers arbitrarily created a new designed channel for the Missouri River and then by construction and dredging, moved the Missouri River into that designed channel.

As pointed out by the Court in *Florida v. Georgia*, 17 How. 478 at 494:

> "By the 10th section of the 1st article of the constitution, no state can enter into any agreement or compact with another state, without the consent of congress. Now, a question of boundary between states is, in its nature, a political question, to be settled by compact made by the political departments of the government. * * * "

If states cannot change the boundary between them by agreement without the consent of congress, it is unthinkable that the United States Army Engineers may do so simply by carrying out construction in aid of navigation.

The Missouri River between Iowa and Nebraska is to be distinguished from most situations in that the entire river along the Iowa-Nebraska border has been diverted by man-made works into a designed channel until it is no longer a natural river but is almost analagous to a canal. The result of the movement of the river by the Corps was such that considerable areas of land became attached to either shore which had prior to the construction either been islands or had been attached to the opposite shore or been within the bed of the river. This was a drastic change, completely unnatural and it is submitted that neither the United States Engineers nor any human agency has authority to change a state boundary and destroy titles in this manner.

The Court has often considered man-made changes in rivers and their effect upon property rights, but in almost all of these instances, the changes have been individual in nature and have not been of the scale engaged in on the Missouri River. Plaintiff contends that this

action by the Corps of Engineers created the equivalent of an avulsion along the entire length of the Iowa-Nebraska Missouri River boundary and did not change the boundary. Instead, the states, in recognizing the practicality of the new river location which they thought had been stabilized by the Corps of Engineers, changed the boundary by Compact to conform to what each state thought was going to be the permanent channel of the Missouri River.

In light of this diversion by human agencies, Iowa should not be able to take advantage of work by the Corps of Engineers to deprive other riparian owners of their vested property rights. When the Corps dredges canals and constructs dikes and revetments it is submitted that this change is not slow and gradual or imperceptible to be analogous to movement of the river by accretion. It is further submitted that when the Corps moved the river by the construction of dikes and by dredging, it did not create land which Iowa thereby became entitled to.

In the case of *Whiteside v. Norton,* 205 Fed. 5, (C.C.A., 8th Cir., 1913), appeal dismissed 239 U.S. 144, private parties were engaged in litigation to preserve their rights to the bed of the St. Louis River which formed the boundary between the states of Minnesota and Wisconsin. A navigable channel ran close to the Minnesota shore and north of a small island which formed on the Wisconsin side. The government of the United States, in the exercise of its power to improve navigation, dredged an artificial channel through these waters whereby the navigable channel was established south of the island and several hundred feet south of the former

main and natural channel. The work was begun in 1899 and completed in 1902. The trial court ruled as if the new channel had been the result of a gradual and natural modification of the old. The Circuit Court of Appeals, 8th Circuit, however, reversed the trial court and stated at page 13:

> "* * * We cannot agree that human agencies can thus suddenly bring about what like acts of nature admittedly cannot accomplish. Cutting this channel was analogous to avulsion; it could not operate to change the boundary between the states of Wisconsin and Minnesota. In any view, the title to this island remains where it was before the government made this improvement, in which case the complainant cannot prevail. * * *"

Appeal was then taken to the United States Supreme Court in *Norton v. Whiteside,* 239 U.S. 144, where Mr. Chief Justice White described the nature of the suit as one "* * * to quiet his title to the whole or part of a certain island which emerged from the waters in front of his land, or, considered from the same point of view in a broader aspect, to protect his asserted riparian rights in the submerged land in front of his shore property." The Court dismissed the appeal for want of jurisdiction but also stated at page 154;

> "* * * Fifth, because we are clearly of the opinion that the mere fact that Congress in the exercise of its power to improve navigation directed the construction of the new channel affords no basis whatever for the assumption that thereby as a matter of Federal law rights of property, if secured by the state law, were destroyed and new rights of property under the assumption indulged in incompatible with that law were bestowed by Congress. * * *"

In *State v. Bowen,* 149 Wis. 203, 135 N. W. 494, a dam was built above an island in the Mississippi River diverting the main channel from the eastern or Wisconsin side to the western or Minnesota side of an island. The defendants were charged with fishing in the east channel in violation of Wisconsin law and the district attorney of LaCrosse County contended that the boundary had changed with the change of channel. The Wisconsin Supreme Court said at 135 N. W. 495-496:

> "In Iowa v. Nebraska and Missouri v. Nebraska, supra, it is held that, where a stream which is the boundary between two states from *any cause* suddenly abandons its old bed and seeks a new one, such change in the channel results in no change in the boundary. That remains in the center of the old bed or channel, even though it may be dry. In each of those cases, the change was caused by avulsion. In the present case, the change was caused by the construction of a dam. It is obvious that any change wrought in the flow of the water by means of a dam cannot affect the question of state boundary any more than can such change produced by avulsion. It is only where the change takes place by the slow process of erosion or accretion that a change in boundary is effected. Missouri v. Nebraska, 196 U.S. 23, 25 Sup. Ct. 155, 49 L. Ed. 372. States and individuals alike are subject to the losses and gains of erosion and accretion; but neither can have the boundaries of his domain changed by avulsion, or by the diversion of the water effected by human agencies. * * *"

In *James v. State,* 72 S. E. 600 (Ga. App.) the venue of an alleged offense depended on the location of the boundary between the states of South Carolina and Georgia. The United States government by a series of dikes had diverted the natural channel of the Savannah

River from the South Carolina side to the Georgia side for the purpose of improving the navigation of the river on the Georgia side at the city of Augusta. The Supreme Court of Georgia stated at page 602:

> "It is insisted, however, by learned counsel for the plaintiff in error, that this current or main thread of the channel has been changed by the work of the United States government for the purpose of improving the navigability of the Savannah River near the city of Augusta, and that the channel of the river is now located much nearer the Georgia side, and that this change in the channel or current of the river changes ipso facto the boundary line between the two states. In support of this contention it is said that Const. U.S. art. 1, § 8, par. 3, gives to the federal government control of all navigable rivers between states, and that it therefore follows that any change in the channel or current of a navigable river is a lawful change, and thereafter the channel of the river is fixed, and the boundary line follows this current or channel. Unquestionably the United States government, by the provision of the Constitution above quoted, has control over navigable rivers for the purpose of improving navigation; but the exercise of this right cannot in any sense affect the boundary lines as fixed by treaties, or law, or prescription, between states, or between riparian owners. Where grants of land border on navigable streams, no change which the United States government might make in the course of such stream could affect in any way the rights of the riparian owners as fixed and determined by deeds or prescription, and, of course, where a river is made a boundary line between two states, if the course of the river is changed or diverted by the United States government in the exercise of its authority to improve navigation, the change in the course of the river would not affect the boundary

line, but the boundary line would remain as fixed by law, treaty, or prescription. The legal effect of the act of the government in changing the main channel or current of the river is analogous to a change caused by avulsion, and not by accretion. The treaty of Beaufort, as therein stated, settled and adjusted the boundary differences between the states of Georgia and South Carolina, and established a fixed and permanent boundary line between them, and this boundary line was distinctly declared to be the current or main thread or channel of the Savannah River between the two states, between designated points on said river. This boundary line, so fixed and established by authority of the two sovereign states, could not be changed or affected by any act of the federal government in pursuance of its power over navigable rivers. Indeed, we do not think that this right to regulate and improve navigable rivers has any relation whatever to the question of boundary lines."

In *Southern Portland Cement Co. v. Kezer,* 174 S. W. 661 (Tex. Civ. App.) the Court of Civil Appeals of Texas declined to hold that the boundary between the states of New Mexico and Texas was changed by the construction of a wing dam on the Rio Grande River which switched the current from one side to the other.

In *Uhlhorn v. U. S. Gypsum Company,* 366 F.2d 211 (8th Cir. 1966) cert. den. 385 U. S. 1026, the United States Court of Appeals for the Eighth Circuit held that the boundary was not changed but remained in the abandoned channel where the Corps of Engineers had dredged through a bar below the normal high water mark to create a new channel.

This work by the Corps placed many areas, which undoubtedly were in the jurisdiction of Iowa on the

Nebraska side of the river and lands which were within Nebraska's jurisdiction on the Iowa side of the river. This created an additional state of uncertainty which existed at the time of the Compact, and the work by the Corps and the fact that they had supposedly stabilized the channel was a factor taken into consideration by the two States. This work by the Corps further would have accentuated the problems of establishing the prior boundary by judicial proceedings and all of this was avoided by the Iowa-Nebraska Boundary Compromise of 1943.

XIII.

A state which acquires land in another state can claim no sovereign immunity or privilege with respect to this land and the state holds this land as a subject and not as a sovereign. The same principles should apply to lands on both sides of the Missouri River and Iowa should not be entitled to assert rights or claims merely because the Compact placed the lands within the jurisdiction of Iowa.

A state which acquires land in another state can claim no sovereign immunity or privilege with respect to this land and holds such land as a subject and not as a sovereign. See *Georgia v. Chattanooga,* 264 U. S. 472, 81 C. J. S., States, Section 104 at page 1075 and *State v. City of Hudson,* 231 Minn. 127, 42 N. W. 2d 546. Also, when a government appears in the Courts of a foreign state, it does so with no other rights and immunities than those which pertain to private corporations or individuals. *Guarantee Trust Co. v. United States,* 304 U. S. 126.

Consequently, as to land "owned" by the State of Iowa which was placed on the Nebraska side of the designed channel by the terms of the Compact and came within the jurisdiction of Nebraska, Iowa's rights or claims as a state were only the same as those by any other owners without the benefit of sovereign immunity. If Iowa has failed to assert its rights, it would lose them just as any other claimant. This would necessarily follow from the change of jurisdiction of the lands regardless of the implications arising from the fact that Iowa "ceded" these lands to Nebraska and thereby gave up its rights to them. The evidence shows that Iowa has made no claim to any lands on the Nebraska side of the river until one representative of the Attorney General's Office raised such claims. Certainly Iowa's rights should have been determined by the Compact and its conduct thereafter and no change of administration of officials should have the result of changing the law.

The evidence also shows that, in determining its claim to Auldon Bar, the Iowa officials made no attempt to determine where the main channel of the river was prior to the construction by the Corps of Engineers in that area. When the Corps cut through the two islands leaving portions on the Nebraska side of the river and portions of the two islands which eventually grew together and formed one island on the Iowa side of the river, Iowa just claimed the area left in Iowa by the Compact. This points up the fact that it was the design of the Corps of Engineers determining which side of the river lands would be placed upon and then the adoption of

the Compact which have ultimately determined which lands Iowa is claiming. Had the Corps reversed the channel and placed the islands above and below Nottleman's Island on the east side of the river and Nottleman Island on the west side of the river, there would have been no attack upon Mr. Babbitt's title or that of the other owners of Nottleman's Island, but the owners of those islands above and below would have been in jeopardy. The same would be true for the Schemmel land. This is such an unjust result that the position of the State of Iowa can hardly be tenable.

The evidence has also shown the unfairness precipitated by a decision by the State of Iowa to attack a landowner's title in the Iowa courts. The assumption that the defense of such an action will generally assure ample vindication of his rights guaranteed by the Compact is inadequate in these cases.

XIV.

It is neither fair nor equitable for Iowa to rely upon any legal presumption that past movements of the Missouri River were gradual and not by avulsion.

Evidence has established that the State of Iowa is relying upon presumptions in placing the tremendous burden of proving the physical location of the State line as it existed in 1943 upon the individual land owner. In the *Schemmel* case, Iowa only called two witnesses, Mr. Huber and Mr. Windenburg and then rested, taking advantage of Iowa law and the presumptions that all movements of the river had been gradual as indicated by Mr. Murray's

opening statement. The Iowa Courts have even gone so far as to state the presumption in the following language: "The land, being concededly on the east side of the Missouri River, is presumed to be in Iowa." *Kitteridge v. Ritter,* 172 Iowa 55, 151 N.W. 1097, 1098. Plaintiff submits that there can be no basis for such a presumption where the changes are man-made and there were numerous canals and movements of the river by the Corps of Engineers. These changes together with all natural prior changes were taken into consideration in arriving at the location of the new boundary in drafting the Compact. Such presumption, if allowed to persist, works to the detriment of owners of land ceded by Nebraska by clearly placing the burden of proof upon them to prove title to lands east of the designed channel. Iowa, by waiting, is the only party benefited because the loss or destruction of records, death of witnesses and difficulty of proving happenings of years ago can only work to the disadvantage of the landowner if such a presumption can be utilized by the State. It is submitted that a statement from this Court destroying such a presumption on the Missouri River is necessary and proper as a result of the Compact.

Plaintiff further submits that it is not equitable for the State of Iowa to tax land, fail to have any public record of its claim, and then suddenly attempt to appropriate it under the guise of a quiet title proceeding pursuant to the Iowa common law principle of the State's right to the beds of navigable streams. In *United States Gypsum Co. v. Greif Bros. Cooperage Corp.,* 389 F.2d 252 (8th Cir. 1968), U. S. Gypsum Company claimed land

in the Mississippi River by virtue of an "island deed" from the State Land Commissioner of Arkansas. Greif Brothers filed an action to quiet title to the area and have the "island deed" from the State of Arkansas voided, claiming through various indicia of ownership and the payment of taxes on the land. They also claimed the land did not form as an island and was not subject to sale as such, but formed as accretion to riparian lands. Greif Brothers further claimed that even if the land did form as an island, the state of Arkansas was divested of any title thereto by reason of its acceptance of taxes paid by Greif on the land since 1941. The case also involved previous litigation and a question of res judicata, but the following language and reasoning would also seem to be applicable to claims by the State of Iowa to the Nottleman and Schemmel areas. The Court said at page 263:

> "It appears neither fair nor equitable to allow Gypsum to hold back for 11 years on its purported 'Island Deed' application while Greif paid taxes on this property, and then after partially unsuccessful litigation, perfect its vested interest in the disputed lands by completing its so-called 'Island' acquisition. Nor does it appear permissible for the State to accept taxes on this land for an extended period of time when it had, in an ex parte proceeding on application of Gypsum, determined the disputed area to be island land.
>
> We acknowledge the State's right to public lands and that adverse possession does not run against public property, but the disputed land here was not used for public purposes nor set aside for public use, but was the kind of land the State desired to have placed on the tax rolls either as accretions or relictions, or as island lands. It is true the State did acquire some

additional revenue in selling the disputed area as island lands, but it does not appear that the State should be able to both assess and collect taxes on the land and still hold title to it under the circumstances of this case."

XV.

Iowa ignored the lands along the Missouri River until they became valuable. The misapplication of a common-law principle concerning title to the beds of streams in disregard of the Compact constitutes a taking of private property by the State of Iowa without compensation to the land owner. Iowa is not justified in this course of conduct.

The evidence shows that Iowa paid no attention to these lands along the Missouri River until they became valuable and then Iowa has looked to obtaining some of them for purposes of trading for other land areas. Iowa should not be allowed to take advantage of this economic benefit under the guise of promotion of recreation. In *Hilt v. Weber,* 252 Mich. 198, 233 N. W. 159, the Court considered state ownership of land between the meander line and Lake Michigan. The decision only referred to dry land between the meandered upland and the point to which the water had receded. Prior Michigan cases described as the *Kavanaugh cases* had indicated that the riparian owners' title went to the meander line along the Great Lakes and the title outside this meander line, subject to the rights of navigation, was held in trust by the State for the use of its citizens. The Court recognized the harm that could result from taking sound

language and wresting it from its proper setting and applying it to a different situation. The Court then recognized that the right to acquisitions to land, through accession or reliction, is one of the riparian rights. The Court indicated that the *Kavanaugh cases* enumerated principles in variance with settled authority and said at page 167:

> "* * * When to that are added the considerations that they operated to take the title of private persons to land and transfer it to the state, without just compensation, and the rules here announced do no more than return to the private owners the land which is theirs, the doctrine of stare decisis must give way to the duty to no longer perpetuate error and injustice.
>
> With much vigor and some temperature, the loss to the state of financial and recreational benefit has been urged as a reason for sustaining the Kavanaugh doctrine. It is pointed out that public control of the lake shores is necessary to insure opportunity for pleasure and health of the citizens in vacation time, to work out the definite program to attract tourists begun by the state and promising financial gain to its residents, and to conserve natural advantages for coming generations. The movement is most laudable and its benefits most desirable. The state should provide proper parks and playgrounds and camping sites and other instrumentalities for its citizens to enjoy the benefits of nature. But to do this, the state has authority to acquire land by gift, negotiation, or, if necessary, condemnation. There is no duty, power, or function of the state, whatever its claimed or real benefits, which will justify it in taking private property without compensation. The state must be honest."

The Court went on to recognize that riparian rights

are property, for the taking or destruction of which, compensation must be made by the State. The previous Michigan decisions holding that riparian owners along the Great Lakes owned only to the meander line were overruled.

In like manner, Nebraska contends that Iowa must be honest with its citizens and with owners claiming through Nebraska titles prior to the Compact and Iowa's purposes do not justify the taking of this private property without compensation.

The evidence shows that, should Iowa contend that these lands are "trust lands" they have not been treated as such in the past, as witnessed by Iowa's disclaiming certain lands such as the Lakin-Peterson lands, failing to claim abandoned channel in the California Bend area and the Flower's Island area, and in purchasing land which was in the abandoned channel which was around Nebraska City Island. The nature of Iowa's trust was described by the Iowa Supreme Court in the case of *Peck v. Alfred Olson Const. Co.*, 216 Iowa 519, 245 N. W. 131 at 134, which involved construction by the state of a dock on the shore of a navigable lake:

> "* * * By the cession of the national government to the state, no proprietary benefit was conferred. On the contrary, a burden was imposed. The subject-matter of the cession carried with it no emolument nor promise of future revenue. * * *"

Plaintiff submits that Iowa is only looking toward future revenues and proprietary benefit, having ignored any burdens imposed upon the State by its so-called "trusteeship." This is indicated not only by their failure to

take any interest in these lands along the Missouri River until they became valuable farm lands, but also by their announced intention to use some of these lands as trading stock. Iowa would now apply such a principle for recreation purposes where the motive appears to be primarily because of financial benefit. Just as in Michigan, the Conservation Commission should not be permitted to take property without compensation under a misapplication of riparian law.

CONCLUSION

The Iowa-Nebraska Boundary Compact of 1943 is a contract binding upon each State and its legislative, executive and judicial branches and binding upon the citizens of each State as well. In construing the Compact, it is proper to examine into the history of the times and the problems which the Compact was intended to remedy. Consequently, the factual situations existing at the time of adoption of the Compact and the historical problems leading up to the Compact are all relevant in determining its true meaning and intent. In boundary compacts, which are particularly affected by long delay and passage of time, the agreements are to be construed to eliminate controversy and avoid injustice, oppression or absurd consequences. This Compact, which was adopted in broad and general terms, was remedial in nature and should be liberally construed to protect the rights of individuals along the river. Any construction which allows the contesting of a former Nebraska title by the State of Iowa

operates to effectually deprive the landowner of the guarantees secured to him under the Compact and constitutes a violation of the solemn promises made by the State of Iowa to the State of Nebraska.

Plaintiff submits that, under the provisions of Section 3 of the Compact, Iowa is obligated to accept as good and valid all claims to lands along the Missouri River deriving from a Nebraska title or indicia of ownership prior to the Iowa-Nebraska Boundary Compact, including private claims to all areas over which Nebraska was exercising jurisdiction at or prior to 1943. Iowa cannot, at this late date, now question titles flowing from Nebraska. In like manner, Iowa should be restrained and enjoined from filing quiet title actions to lands along the Missouri River based upon Iowa's doctrine of the sovereign ownership of beds and abandoned beds of the Missouri River. By agreeing that Nebraska titles would be good in Iowa, it was a necessary result of the Compact that Iowa's common law concerning sovereign "ownership" of the bed and abandoned beds of the Missouri River as Iowa is now attempting to apply it is not applicable. By entering into the Compact in 1943 under the circumstances and conditions as they existed at that time, Iowa waived, relinquished and contracted away all claims which it had to islands, bars, or other land area which had not been marked as property of the State or were not of record in the State of Iowa General Land Office. The Nebraska riparian owners have retained their title to the bed of the Missouri River and accretions, bars, or islands attaching to that bed in spite of the fact that the land or river bed may now be located in Iowa. This title is sub-

ject to the public easement for navigation as defined by Nebraska law. Iowa should be restrained and enjoined from attacking the landowners' title to that river bed under Iowa's doctrine of sovereign ownership and Iowa should not be allowed to require any landowner to prove in a court of law that his land was "ceded" by the Compact in 1943. Such conduct is inequitable, unfair, and a violation of the Compact.

Plaintiff submits that it is also now the law of Iowa, with regard to lands along the Missouri River, that present Nebraska riparian owners' rights continue to extend to the thread of the Missouri River which is not necessarily the boundary between Iowa and Nebraska and, when the Missouri River moves or is moved into the State of Iowa, the title of the Nebraska riparian owner is not cut off or divested at the state line but continues in the same manner as if the boundary between Nebraska and Iowa were still a movable boundary.

The specific areas described in the cases of *State of Iowa v. Babbit* and *State of Iowa v. Schemmel* were formed in Nebraska and ceded to Iowa by the Iowa-Nebraska Boundary Compact of 1943. Iowa should be restrained and enjoined from further attempts to quiet title to such areas in disregard of the provisions of the Compact and this Court should declare that Iowa has no claim thereto based upon any principle of sovereignty.

In the California Bend area, Winnebago Bend area, and such other places as the river was entirely in Nebraska at the time of the Compact, either because of nat-

ural avulsions, canals dredged by the Corps of Engineers, or movement of the river by the Corps, the State of Iowa has no title to the bed of the Missouri River as the title remains in the Nebraska riparian owners subject to the public easement of navigation and use. Iowa further has no claim to lands or river beds resulting from movements of the river out of the designed channel following 1943 in those places.

Insofar as claims by the State of Iowa are concerned, there should no longer be any presumption that movements by the Missouri River in the past have been slow and gradual in such manner that the boundary moved with the river. There should be a presumption that, as to lands east of the Compact line, any title deriving from the State of Nebraska or any area over which Nebraska exercised jurisdiction at the time of the Compact was ceded by Nebraska to Iowa by the Iowa-Nebraska Boundary Compact. This presumption should be irrebuttable insofar as the State of Iowa is concerned and Iowa should be restrained and enjoined from attacking such titles.

Only with these findings can (a) the State of Nebraska and its citizens be guaranteed the rights which Iowa agreed to in the Iowa-Nebraska Boundary Compact of 1943 and (b) title problems be laid to rest for the future economic and recreational development of the Missouri River Valley. The Defendant should be more anxious to obtain such result for the simple reason that all the uncertainty is on the Iowa side of the river.

Respectfully submitted,

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PROOF OF SERVICE

I, Howard H. Moldenhauer, Special Assistant Attorney General of the State of Nebraska, and a member of the Bar of the Supreme Court of the United States, hereby certify that on February 17, 1970, I served a copy of the foregoing Plaintiff's Brief and Argument Before The Special Master Honorable Joseph P. Willson by depositing same in a United States Post Office, with first class postage prepaid, addressed to:

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In the

Supreme Court of the United States

October Term, 1964

No. 17, Original

STATE OF NEBRASKA, *Plaintiff*,

vs.

STATE OF IOWA, *Defendant*.

DEFENDANT'S BRIEF AND ARGUMENT BEFORE THE SPECIAL MASTER HONORABLE JOSEPH P. WILLSON

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DEFENDANT'S BRIEF AND ARGUMENT BEFORE THE SPECIAL MASTER HONORABLE JOSEPH P. WILLSON

INTRODUCTORY STATEMENT

Plaintiff has filed with the Special Master what she entitled a "Resume of Evidence." It is, however, only a "Resume of Plaintiff's Evidence in Argumentative Form."

Defendant responds to the Plaintiff's Brief and Argument as briefly as possible without the insertion of testimony or exhibit references, and tries to assist the Special Master by inserting those portions of the testimony and exhibits that substantiate her arguments in response to Plaintiff's Propositions, by reporting the same and placing the same in a separate volume for convenience in references. There has been no attempt herein to set out all evidence and exhibits that are in the record favorable to Defendant, but only sufficient thereof to substan-

tiate Defendant's argument without being redundant, and without encumbering this Brief with matters which only have remote bearing on the issues.

Defendant has made no attempt herein to raise new issues and has diligently confined herself to answering the specific issues and propositions tendered by Plaintiff in her Brief and argument.

JURISDICTION

The Plaintiff, State of Nebraska, has petitioned this Court to invoke its original Jurisdiction under Article III, Section 2, Clause 2 of the Constitution of the United States of America citing same, together with Title 26, U. S. C., Section 1251. That this Court under the foregoing has authority to invoke its original Jurisdiction is not disputed, where on the request of either contracting party to an Interstate Compact an interpretation thereof is requested, with an allegation of violation by the other party thereto. As it appears, Plaintiff has confined herself to but one complaint, i. e., Iowa has violated the terms of the 1943 Nebraska-Iowa Boundary Compact.

As stated now by Plaintiff, this case is brought to enforce the provisions of the Iowa-Nebraska Boundary Compact of 1943; and Plaintiff contends as a party to the Compact, she has the standing and the right to enforce its terms, alleging that Iowa is violating its terms. The Compact is not long, nor does it seem vague or ambiguous, and except for the boundary description, is as follows:

IOWA-NEBRASKA BOUNDARY COMPROMISE

"An Act to establish the boundary line between Iowa and Nebraska by agreement; to cede to Nebraska and to relinquish jurisdiction over lands now in Iowa but lying westerly of said boundary line and contiguous to lands in Nebraska; to provide that the provisions of this Act become effective upon the enactment of a similar and reciprocal law by Nebraska and the approval of and consent to the Compact thereby effected by the Congress of the United States of America and to declare an emergency.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF IOWA:

SECTION 1: On and after the enactment of a similar and reciprocal law by the State of Nebraska, and the approval and consent of the Congress of the United States of America, as hereinafter provided, the boundary line between the States of Iowa and Nebraska shall be described as follows: . . .

SECTION 2: The State of Iowa hereby cedes to the State of Nebraska and relinquishes jurisdiction over all lands now in Iowa but lying westerly of said boundary line and contiguous to lands in Nebraska.

SECTION 3: Titles, mortgages, and other liens good in Nebraska shall be good in Iowa as to any lands Nebraska may cede to Iowa and any pending suits or actions concerning said lands may be prosecuted to final judgment in Nebraska, and such judgments shall be accorded full force and effect in Iowa.

SECTION 4: Taxes for the current year may be levied and collected by Nebraska or its authorized governmental subdivisions and agencies on lands ceded to Iowa and any liens or other rights accrued or accruing including the right of collection, shall be fully recognized and the county treasurers of the counties affected shall act as agents in carrying out

the provisions of this section: PROVIDED, that all liens or other rights accrued or accruing, as aforesaid, shall be claimed or asserted within five years after this act becomes effective, and if not so claimed or asserted, shall be forever barred.

SECTION 5: The provisions of this act shall become effective only upon the enactment of a similar and reciprocal law by the State of Nebraska and the approval of and consent to the Compact thereby effected by the Congress of the United States of America. Said similar and reciprocal law shall contain provisions identical with those contained herein for the cession to Iowa of all lands now in Nebraska lying easterly of said boundary line so described in Section 1 of this Act, and contiguous to lands in Iowa and also contain provisions identical with those contained in Sections 3 and 4 of this Act, but applying to lands ceded to Nebraska.

SECTION 6: (Effective on publication April 21, 1943.)

The foregoing, on its face, does not appear to be complicated, uncertain, confusing or ambiguous. In Section 2, Iowa ceded all lands in Iowa lying west of the agreed boundary line to Nebraska, and Nebraska (by a reciprocal section) ceded all lands in Nebraska lying east of the agreed boundary line to Iowa. In Section 3, all titles, mortgages and other liens good in Nebraska shall be good in Iowa as to *any lands Nebraska may cede to Iowa.* There are no words or phrases in this Compact that can be interpreted to preclude Iowa from retaining ownership of lands belonging to her whether ceded to Nebraska or not, or that indicia of title in Nebraska to lands outside its boundaries and jurisdiction are *good*

in Nebraska, and hence, must be recognized as *good* in Iowa. There are no words or phrases in this Compact that can be interpreted to deny Iowa the right and duty to have disputed titles to lands in Iowa determined under Iowa title laws, which now include the foregoing Compact, in the courts of Iowa and the Federal Courts of original jurisdiction.

The Plaintiff, State of Nebraska, has failed to carry its burden as Plaintiff in demonstrating to the Court by any clear and convincing evidence of Iowa violating the terms of this Compact or interfering with the rights of her citizens secured by the Compact, and the complaint should be dismissed.

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IOWA'S SUMMARY OF FACTS AND ARGUMENT

Commencing on page 3 and continuing onto page 27 of Nebraska's Brief and Argument, counsel for Nebraska have summarized the facts which they presumably believe to be germane to the case. Iowa submits that many of the matters related by them are not germane, and do not afford the Special Master any assistance in determining the issues now before the Court.

It is interesting history that it took the two states approximately 42 years (1901-1943) to negotiate and enter into the Boundary Compact of 1943. It is true that the purpose of both states in entering into the Compact was so that there would henceforth be a definite boundary line which could be located by the people, by the county

officials, by the Corps of Engineers, by the peace officers of both states, etc. But if Nebraska is seeking to read into these protracted negotiations some continuing sinister plot on the part of Iowa to take some wrongful advantage of Nebraska or her citizens, such conclusion is completely unwarranted. Iowa believes that if the fact of lengthy negotiations means anything in this case, it means that both states adopted the Compact with eyes wide open; that they composed a Compact saying precisely what they mutually wanted it to say; that the Compact therefore means precisely what it says, no more or no less.

It is true that, after all these negotiations, the legislatures adopted a Compact which describes a state boundary line that in a few locations may be difficult to precisely locate on the ground or in the water, as the case may be. Nebraska was unable to point to a single segment of the Compact line where the line *cannot* be accurately located. Willis Brown, the Nebraska State Surveyor, was able to locate the boundary to his satisfaction at Nottleman Island. L. H. Hart, the former Corps of Engineers surveyor, now deceased, actually laid out many miles of the Compact line during his lifetime. Surveyor Jack Virtue testified that he has accurately surveyed numerous segments of the Compact boundary. Professor R. J. Lubsen inferred that there is sufficient data in the Corps of Engineers files to enable accurate location of the Compact boundary line throughout its approximate 191 mile length. See also testimony of R. L. Huber. (See Appendix A.)

The entire record in this case abidingly establishes by more than a preponderance of evidence that the Compact boundary line *can be located.*

But suppose, for the sake of argument, that the Compact boundary cannot be located. We search Nebraska's Argument in vain for any relief sought by Nebraska stemming from this alleged fact. Therefore, whether or not the boundary fixed by Compact in 1943 can be located is irrelevant to any issue now before the Court.

What the Corps of Engineers did prior to 1943 to place and confine the Missouri River in the channel which they had designed for it *is* germane and relevant to the issue in this case.

The evidence of the Alluvial Plain Maps, of the Reconnaissance Maps, of the Construction Maps and the testimony of General Loper and of R. L. Huber, engineer in charge of design, establish that wherever possible, the Corps designed the river to be where they found it. Moving the river wasn't an easy matter; therefore, they planned and moved it as little as possible. Almost throughout its length, the Corps found a natural river much too wide (and hence, too shallow) for navigation purposes.

Wherever the Corps found it necessary to narrow the river or to move it in order to place it and confine it in a designed width of about 700 feet and in the sweeping curves which they deemed desirable, the Corps method at the outset was to push the banks inward or push the channel gradually toward one shore by constructing pile dikes out from the shores or from one shore, causing the

channel to narrow and move gradually in the desired direction until the channel attained the designed width and alignment. Sometimes, it was found necessary to construct pile revetments along the opposite shore against which the water was being pushed, in order to prevent the opposite shore from being washed away too much. (See Appendix B.)

At Otoe Bend, the Corps found a natural river running much too wide, and it was almost a straight reach for several miles from Frazier's Bend to below Hamburg Bend. The river here was both too wide and too straight. The design and the project here were to narrow the channel and make it curve. Otoe Bend would be a curve toward Nebraska, almost entirely within the wide natural channel. (See Appendix C.)

The Modus Operandi was construction of pile dikes (sometimes called baffles) out from the Iowa shore, in the upstream portion of the bend, thus narrowing the channel and forcing the water to flow in the westerly part of the old natural channel. These dikes were permeable, and for some time, river waters continued flowing through them; this was a deliberate part of the Corps plan; the Corps wanted land to form between and below the dikes so that ultimately, all the water would come to flow around the outer ends of the dikes in the designed channel; the Corps plan was that silt-laden water would flow through the dikes, its velocity would be slowed by the dikes, the silt would be dropped, and the area between and below the dikes would become land. The plan worked and the northerly 75% of Otoe Island was formed in what had

theretofore been the Iowa half of the old, wide channel. (See Appendix D.)

In the downstream portion of Otoe Bend, by 1938, the channel had moved southwesterly toward the designed channel, but it had not reached the designed location and was not moving in that direction as fast as the Corps desired. In the meantime, a new tool had become available to the Corps—dredge boats. To accomplish the final movement of the channel in the lower portion of the bend, a canal was dredged in the designed channel and the river was diverted into the canal; it was expected that the water would wash away the banks so that the canal would ultimately become the main channel some 700 feet wide with a navigable depth; this is what happened. (See Appendix E.)

At this point, two remarks concerning the Otoe Bend canal are in order: First, Nebraska would have this Court find that this canal (and all other canals) was, in law, a man-made avulsion; Iowa submits that not all canals are man-made avulsions, and the Otoe Bend canal in particular, was not an avulsion. Second, even if the Otoe Bend canal were to be considered as an avulsion, it would not follow that Otoe Island was in Nebraska prior to the 1943 Boundary Compact and ceded to Iowa by the Compact; as hereinabove pointed out, the greater part of Otoe Island (approximately the northerly 75%) had already formed in Iowa, east of the river, in and prior to 1938; if it be deemed that the 1938 canal was an avulsion, its legal result would be that the state boundary remained in the channel which became aban-

doned as a result of the avulsion; as stated in Division VI of Nebraska's Brief, this boundary remained subject to gradual change as long as the abandoned channel remained a running stream, and then, when the water became stagnant, the process was at an end and the middle of the abandoned channel became fixed as the boundary.

The "abandoned channel" referred to in this rule is not some channel where the river may have flowed 50 years before the avulsion or 5 years before the avulsion or 5 months before the avulsion; it is the channel in which the river was flowing *immediately before* the avulsion. Nebraska, in its Brief, attempts to whiz by and finesse this point because whereas Otoe Island contains a total acreage of about 600 acres, only about 70 acres at most in the Southwesterly part of the island could have been involved in the alleged canal avulsion of 1938. (See Appendix F.)

Returning to Iowa's proposition that the 1938 canal at Otoe Bend was not an avulsion: The rules of avulsion only come into play when *a substantial body of identifiable land is cut off*. We believe that *no land* was cut off by the Otoe Bend canal of 1938; certainly no substantial body of land was cut off; hence there was no avulsion. The evidence concerning the canal and its effect in the form of maps and photographs is almost voluminous. This evidence shows that the area between the channel where the river was flowing in 1938 immediately prior to the construction of the canal, and the canal was entirely water and sand bar; it was not "land" at all; it was river bed. This conclusion is corroborated by the fact that the

Corps neither purchased nor condemned any right-of-way for the canal; it was Corps policy then, as it is today, to purchase right-of-way whenever their works are going to destroy private property; they considered that the Otoe Bend canal was being dredged within the bed of the river, and not through any "land" which necessarily would have been privately owned. (See Appendix G.)

At Rock Bluff Bend, all moving of the channel was accomplished by the gradual pushing-washing method. At the upstream end of Rock Bluff Bend, in which Nottleman Island already existed on the Iowa side of the natural river, the channel was narrowed and pushed westerly by the construction of pile dikes out from the Iowa shore. In the downstream part of the bend (between Queen Hill and King Hill), it was pushed easterly by the construction of pile dikes out from the Nebraska shore. Entirely by this method, the channel was caused to attain its desired alignment. (See Appendix H.)

As stated by Nebraska at page 5 of its Brief, by 1943 the works below Omaha were 99% complete and between Omaha and Sioux City, the works were 78% complete, and the river was entirely in its designed channel except only about 2000 feet. All of this project had been done by the gradual pushing-washing method, except the work had been aided by approximately 11 canals. Presumably, the Iowa-Nebraska state boundary line was the thalweg of the river throughout the river's length, except for Carter Lake, where this Court had determined in 1892 that the state boundary was through the lake, and not in the river.

Although no judicial determinations have been made in litigation where both states were party to the action that the pre-1943 boundary was any place other than in the river at any location other than Carter Lake, Iowa believes there is clear, satisfactory and convincing evidence that the boundary was not in the river at the following locations:

1) *Nebraska City Island.* Iowa always recognized that Nebraska City Island was Nebraska land on the Iowa side of the river until ceded to Iowa by the 1943 Boundary Compact.

2) *St. Mary's Bend.* Nebraska and Federal Courts had found that the river had departed from Clarke Lake by an avulsion, leaving the state boundary in Clarke Lake. Also, the construction of St. Mary's Bend Canal in about 1936 was a true man-made avulsion, cutting off a substantial body of identifiable land. Therefore, most certainly, the pre-Compact state boundary was not in the river at St. Mary's Bend. The Special Master may count himself fortunate that he has no duty or obligation in this case to determine where the boundary was in St. Mary's Bend prior to the Compact.

3) *California Bend.* Iowa has always recognized that the dredging of the California Bend Canal in about 1938 was a true man-made avulsion.

4) *Peterson Bend.* We understand the Nebraska Court found that the Peterson Cut-off Canal, dredged in about 1939, was a man-made avulsion, cutting off a substantial body of identifiable Iowa land, leaving it on the Nebraska side; the Court therefore held that Remington, who had owned the land when it was in Iowa, was still the owner in Nebraska after the Compact.

5) *Winnebago Bend.* The pre-Compact boundary was most certainly not in the river as the river was running in 1943. In *U. S. v. Flowers,* the Federal Court had held on in 1938, that there had been two avulsions at Winnebago Bend prior to 1938; that the first of these had stranded Iowa land on the Nebraska side of the river, and that the second had stranded Nebraska (Indian) land on the Iowa side of the river. Also, the Winnebago Bend Canal was dredged in about 1938. Again, the Special Master has no responsibility to determine in this case where the pre-Compact boundary in Winnebago Bend was; it suffices to say that it was not in the 1943 designed channel.

6) *Bartlett-Pinhook Bend.* A canal had been dredged through an island in about 1938 and the river was running through the canal in 1943. This canal was probably a man-made avulsion. The question remains as to which state the island was in prior to 1938, and the Special Master has no duty to make that determination here.

Nebraska would have the Court hold and decree that the state boundary line never moved with a movement of the river channel if the channel movement was caused by works of the Corps of Engineers. Such a holding would be contrary to the law of accretion and avulsion as it has been applied in all states where the question has arisen (including Iowa and Nebraska) and in the Supreme Court of the United States. The true rule is that the boundary line moved whenever the river channel moved by the gradual process of accretion and regardless of whether such movement of the channel was natural or caused by works of the third party, Corps of Engineers. See Divisions V and XII hereafter in this Brief.

Iowa believes that there is a greater weight or pre-

ponderance of evidence in this case to justify a finding by the Court that both Nottleman Island and Schemmel Island were in Iowa before 1943; that therefore there is no violation of the Compact by Iowa in claiming ownership of them, because they were not ceded land. But Iowa counsel would be remiss if they failed, at this point, to say that such is not necessary in order to sustain Iowa's position.

The law is that Nebraska, as Plaintiff in this case, certainly has the normal and ordinary Plaintiff's burden of proving its allegations by a preponderance of evidence. Therefore, if the Court finds the evidence to just be in balance, the Court's solution would necessarily be in favor of Iowa and against Nebraska.

But Nebraska shoulders an even greater burden in this case than the normal Plaintiff's burden. At least three separate and distinct rules cast upon Nebraska the burden of proving its allegations by clear, satisfactory and convincing evidence:

First, is the rule of the Supreme Court of the United States that whenever one sovereign state is charging another sovereign state with violation, the burden is on the charging state to prove such violation by clear, satisfactory and convincing evidence.

Second, is the presumption in favor of accretion and against avulsion; in other words, whenever a boundary river has moved, it is presumed that it moved gradually by the process of forming accretions to one shore while washing away the other shore, and that it did not move

suddenly by an avulsion; it is therefore presumed that the boundary moved as the channel moved and remained in the channel. The evidence necessary to overcome this presumption is that the party claiming avulsion must prove avulsion by clear, satisfactory and convincing evidence. In Nebraska's Division XIV, they infer that this presumption is just a peculiarity of Iowa law, but see Iowa's Division XIV establishing that it is the general rule, applied in Iowa, Nebraska, the Supreme Court of the United States, and the Courts of numerous other states.

Third, is the presumption favoring the permanency of state boundaries. That is to say, prior to 1943, when the Iowa-Nebraska boundary was defined as "the middle of the Missouri River," it is presumed that from time to time and at all times, the boundary was "the middle of the Missouri River." The burden on anyone claiming it was somewhere else is to prove that it was somewhere else by clear, satisfactory and convincing evidence. Concerning burden of proof, see Division XIV.

Twice in Nebraska's Summary of Facts (on pages 5 & 9) Nebraska calls the Court's attention to the fact that it was Iowa who adopted the Compact first in 1943 and that it was Nebraska who adopted it later in 1943. What relevancy is there in this fact? The inference is that Iowa drew the Compact and Nebraska merely acceded to its terms and therefore the Compact should be strictly construed against Iowa as scrivener. What happens to this inference when you consider that, in a matter of fact, Nebraska adopted the Compact first in 1941, and

Iowa failed to adopt a reciprocal act in 1941 only because the Governor of Nebraska failed to notify the Governor of Iowa until it was too late in the Iowa legislative session of the year for the Iowa legislature to act on it? (See Exhibit P-1856. Boundary Compact adopted by Nebraska May 21, 1941.)

Commencing at the bottom of page 13 and continuing onto page 14 of Nebraska's Summary of Facts, they mention and discuss the subject of "adverse possession" of the Schemmel and Babbitt areas. We believe that this is the first time in this case that Nebraska has put forth "adverse possession" as a ground for relief sought. Until now, we had thought Nebraska to agree with Iowa that "adverse possession" is not an issue in the case and really has nothing to do with the case. We can hardly believe that Nebraska, now, at this late date, is seeking to inject the issue of "adverse possession" into the case; it wasn't pleaded; but even more to the point, it is universally the law that a State cannot lose any real estate it may own by any fact or theory of "adverse possession." *Armstrong v. Morrill,* 14 Wall. 120, 20 L. Ed. 765; *Sioux City v. Betz,* 232 Iowa 84, 4 N. W. 2d 872; *State v. Cheyenne County,* 132 Neb. 1, 241 N. W. 747; *Topping v. Cohn,* 71 Neb. 559, 99 N. W. 372.

In passing, it should be noted that neither "laches" nor "estoppel" is an issue in this case; neither "laches" nor "estoppel" is pleaded; but more to the point, the necessary element of a detriment suffered by Nebraska is utterly lacking; there is no evidence whatsoever of detriment or change of position by Nebraska in reliance on any action or failure to act on the part of Iowa.

The charge made by Nebraska in its Complaint was that Iowa "acquiesed in the possession of said territory by the State of Nebraska." (See paragraph XII, Nebraska's Complaint.) There is not one iota of evidence that Nebraska ever "possessed" either Nottleman Island or Schemmel Island or any other area which Iowa claims to own.

Relevant to these matters of adverse possession, laches, estoppel or acqquiescence, is the undisputed fact of record that every claimant of land claiming adverse to Iowa who testified in this case admitted that he or she already realized net profits from farming of the lands so that if it be now determined that they did not and do not own the land, none of them will suffer financial loss. The picture which Nebraska attempts to paint on pages 14 and 15 of the great, powerful, wealthy State of Iowa unfairly and dishonestly taking advantage of some poor, downtrodden, brave, honest and venturesome farmers is not a true picture. On the same pages, Nebraska is critical of Iowa for its alleged failure to move rapidly with its program of quieting its titles to state owned areas along the Missouri River. In other words, they are critical of our programs, and they are also critical that we didn't institute the program sooner; they are also critical that we didn't investigate thoroughly before instituting the program. It would appear that there is no way Iowa can please Nebraska in the matter, except by withdrawal, leaving the area to be fought over by the hunters, fishermen, squatters, etc. Iowa cannot in conscience withdraw; the public stake in the matter is too great;

and there is no evidence or ground appearing in this case to warrant this Court in commanding Iowa to withdraw.

Commencing on page 18 of her Brief, Nebraska sets out her version of the facts regarding Nottleman Island. Nebraska counsel, apparently realizing that their evidence to establish that Nottleman Island formed in Nebraska is woefully insufficient, passed over this crucial phase of the matter with three sentences at the beginning of the paragraph commencing on page 18. Their treatment of this subject is almost an admission of their failure to prove even *when* the island formed, and if they failed to prove *when* it formed, they can hardly claim to have proved *where* the main channel was when it formed. Iowa counsel believes the record, taken as a whole, can only be interpreted as establishing that Nottleman Island first appears on the map of the Corps Hydrographic Survey of 1923 as a willow bar east of the main channel and therefore in Iowa; it continues to appear on every map and every aerial photograph thereafter and it is ever-afterward on the Iowa side of the main channel.

Nebraska counsel, after whizzing by the matter of Nottleman Island's formation, proceeds to discuss at some length the evidence concerning acquiescence and prescription. This matter will be discussed in detail in DIVISION VII hereinafter. Suffice to say at this point that the first exercise of sovereignty by Nebraska over Nottleman Island was in September of 1933, when R. D. Fitch made his survey; this was less than 11 years before the Boundary Compact; and never has a sovereign state been held to have lost territory by acquiescence in such a short period of time. (See Appendix K.)

Commencing on Page 20 of Nebraska's Summary of Facts is Nebraska's summary of what they believe the evidence to show concerning Otoe Bend or Schemmel Island. They assert that they have proved an avulsion at Otoe Bend between 1900 and 1905. Iowa denies that any such avulsion is proved; in fact the evidence by Dr. Ruhe, Dr. Fenton and Dr. Brush disproves it; the evidence taken as a whole disproves it. The evidence of Nebraska exercising sovereignty over Schemmel Island before the Boundary Compact is even less than at Nottleman Island; Henry Schemmel doesn't claim ever to have seen the island until 1939; Iowa certainly couldn't have acquiesced in four years. Mr. Schemmel admits as a witness that he didn't farm any part of the island until 1955.

Near the bottom of Page 22 Nebraska commences her list of contentions:

First, she wants the Boundary Compact to be "enforced and construed". Iowa has no objections to this. Iowa would only object if the Court were to write a new compact or amend the compact as written by the parties, under the guise of "construing" or "interpreting", which is really what Nebraska is asking. Iowa does not object to enforcement of the compact in accordance with its plain meaning and intent.

Nebraska says that "the compact was a compromise". Iowa agrees. But Iowa fails to see any compromise in the compact construction for which Nebraska is contending. She says Iowa's common law was superceded and changed, but wherein does she admit that Nebraska's law was superceded or changed? She says Iowa relin-

quished and quitclaimed away all of her state owned lands in the vicinity of the river, but wherein does she admit that Nebraska made any reciprocal relinquishment or disclaimer?

Nebraska asserts that where lands were ceded from Nebraska to Iowa, Nebraska law must still be applied to determine their boundaries, and riparian rights of accretion, reliction, island, avulsion, etc. must continue to be determined by Nebraska law; but Nebraska asserts that when lands were ceded by Iowa to Nebraska, those titles must be determined under Nebraska law. Where is there any "compromise" in these assertions?

The way they would have the Compact construed and enforced, it would be no compromise at all; it would just be "Iowa! Stay out." and "Us Nebraskans will settle who owns all lands along the river."

Iowa agrees that the Compact does not permit Iowa to own any *land ceded* by Nebraska to Iowa. Iowa cannot own any land which formed and came into existence in Nebraska anyway, whether ceded or not. Iowa claims only land which she believes to have formed in Iowa and became state owned by Iowa law. This is and always has been the pole star in Iowa's program designed, not to acquire land for the people of Iowa, but to prevent and stop the loss of lands already public property to the trespassers and squatters who would appropriate them for private gain.

Second, Nebraska wants the Court to tell Iowa to keep hands off all lands where "there were titles good in Nebraska." It is truly beyond the comprehension of

counsel for Iowa that there could possibly be a "title good in Nebraska" to any parcel of land which was not in Nebraska. It simply is not possible.

Third, Nebraska wants the Court to find that she has proved by clear, satisfactory and convincing evidence that Nottleman Island and Schemmel Island were "ceded lands", having been in Nebraska by acquiescence or prescription prior to 1943. Iowa contends that the facts necessary to establish that these islands were "ceded lands" have not been proved.

It is Iowa's contention by way of counterclaim, filed herein, that if the court finds that the Iowa common law with relation to State ownership of navigable river beds within the State was changed by the 1943 Boundary Compact then it must follow that Nebraska's common law relating to adverse possession was also changed. If Nebraskans retained all appurtenances to their Nebraska titles after their lands were ceded to Iowa, then it must follow that the State of Iowa retained all appurtenances to its titles to lands which were ceded to Nebraska, including the appurtenances that Iowa lands which were state owned could not be adversely possessed, and were exempt from taxation.

ARGUMENT

I.

Nebraska's Proposition I in its Brief heretofore filed is as follows:

"The Nebraska law provides that title to the beds and abandoned beds of navigable streams is in the riparian owners subject to the public easement of navigation."

Iowa agrees that this is a fair general statement of the law of Nebraska.

Iowa's position is, however, that the proposition has no application in the instant case unless and until Nebraska has established by clear, satisfactory and convincing evidence that at least some of the lands, river beds, or abandoned river beds which Iowa claims to own had their origin and came into existence in Nebraska. Iowa's position is that Nebraska has failed to carry this burden and that, therefore, Nebraska's Proposition I has no application in the case at bar.

Detailed discussion of the evidence bearing on whether Nottleman Island or Otoe Island formed in Iowa or Nebraska will follow in later divisions of this Brief. Also, the evidence bearing on whether other areas claimed by Iowa formed in Nebraska or Iowa is discussed in detail later in this Brief.

In argument under Proposition I, Nebraska counsel assert that the Nebraska rule is "based upon * * * equitable principles * * *," thereby inferring that the Iowa rule is not based upon "equitable principles." In *Kinkead v. Turgeon*, as first decided, and set out in 74 Neb. at page 573, 104 N. W. 1061, the Court citing *Bouvier v. Stricklett*, 40 Neb. 793, 59 N. W. 550, as authority, stated Nebraska had adopted the rule that the State owned

the beds of navigable rivers and not the riparian owners, and on page 1063 of 104 N. W. Rep. stated:

> "* * * It is also apparent that each of these two divergent lines of authority start from a basis both sound and sane, and that the results of each of these lines of decisions have been sanctioned and approved by the Supreme Court of the United States."

Iowa does not want the Supreme Court to dictate a change in Nebraska's internal law, and would expect Nebraska to extend Iowa the same courtesy. As stated in *Arkansas v. Tennessee*, 246 U. S. 158 at page 176:

> "How the land that emerges on either side of an interstate boundary stream shall be disposed of as between public and private ownership is a matter to be determined according to the law of each state, under the familiar doctrine that it is for the states to establish for themselves such rules of property as they deem expedient with respect to the navigable waters within their borders and the riparian lands adjacent to them. (Citing cases.) Thus, Arkansas may limit riparian ownership by the ordinary high-water mark (Citing cases.) and Tennessee, while extending riparian ownership upon navigable streams to ordinary low-water mark, and reserving as public the lands constituting the bed below that mark, (Citing cases.) may, in the case of an avulsion followed by a drying up of the old channel of the river, recognize the right of former riparian owners to be restored to that which they have lost through gradual erosions in times preceding the avulsion, as she has done in *State v. Muncie Pulp Co.*, 119 Tenn. 47, 104 S. W. 437. But these dispositions are in each case limited by the interstate boundary, and cannot be permitted to press back the boundary line from where otherwise it should be located."

See also Nebraska Supreme Court decision affirmed on appeal in the Supreme Court of the United States in *Whitaker v. McBride*, 197 U. S. 857 affirming 65 Neb. 137, 90 N. W. 966.

The Nebraska Supreme Court found in the case of *State of Nebraska v. Ecklund*, 145 Neb. 508, 23 N. W. 2d 782, cited by complainant, that a very definite island in the Platte River was not excavated, passed over by the channel and then filled in, but in fact, the North channel dried up and the South channel became the thread of the stream. The owner of the island was awarded the area in the abandoned channel to the center. The facts indicated an avulsion. Iowa recognizes the rule of avulsion when the facts constituting an avulsion are established. In the instant case, the complainant has failed to prove avulsion. The mere allegation of an avulsion does not establish the fact, the burden of the complainant and the presumption against avulsion require clear and convincing evidence. This has not been provided under the record in the instant case.

Here Nebraska claims that its laws were absolutely unaltered or changed by the adoption of the Compact, but in some manner yet unexplained the terms of the Compact completely change Iowa's title laws; Iowa's position, which is based on good authority, is that the Compact became the law of both states, but that it was not intended, nor should it be construed as having changed the existing title laws of either state.

II.

Nebraska's Proposition II is as follows:

> **"Although the Iowa law purportedly was to the effect that the state owned title to the beds of navigable streams within Iowa, this doctrine was not being applied so as to assert title of the State of Iowa in lands along the Missouri River at the time of the compact and was not applied in such manner for many years thereafter."**

Iowa's Proposition II responsive to this is as follows:

> **The Iowa law provides that title to the beds and abandoned beds (where the bed became abandoned by avulsion) and all accretions to the beds of navigable streams in Iowa is in the state, and this law of Iowa has been applied to lands along the Missouri River consistently from 1856 to date.**

As heretofore mentioned in Iowa's Response to Division I, the Iowa Supreme Court never deviated from the doctrine and applied it consistently from 1856 down to the present time in every case where the issue was tendered; and the cases were numerous; and many of them involved the Missouri River. A sampling of the cases decided by the Iowa Supreme Court involving Missouri River lands is set forth in Appendix I.

The Iowa Conservation Commission was exercising its statutory powers relative to state owned lands in proximity to the Missouri River at least as early as 1939,

and was dealing, in one way and another, with these lands continuously from that time to the present.

The Judicial Department of the State of Nebraska knew what the Iowa doctrine was. In 1935, in its decision of *Independent Stock Farms v. Stevens,* 128 Neb. 619, 259 N. W. 647, the Nebraska Supreme Court stated:

> "All states do not agree as to the ownership of land along navigable streams like the Missouri River. In Nebraska this court, after the rehearing in the case of *Kinkead v. Turgeon*, 74 Neb. 573, 580, 104 N. W. 1061. 109 N. W. 744, 1 L. R. A. (N. S.) 762, 7 L. R. A. (N. S.) 316, 121 Am. St. Rep. 740, 13 Ann. Cas. 43, held that the riparian owners are entitled to the possession and ownership of the soil formerly under the waters of such a stream as far as the thread of the stream. while in other states the title to the bed of the navigable river is in the state, and the grantee of land along the line of such streams owns only to the shore line. *Haight v. City of Keokuk,* (1856) 4 Iowa 199; *Payne v. Hall,* 192 Iowa 780, 185 N. W. 912. So that if an island occurs in the Missouri River on the Iowa side of the thread of the stream, it is an accretion to the soil in the bed of the river, and not to the land of the riparian owner."

See also: *Kinkead v. Turgeon*, supra.

The Iowa Executive Council, including the Governor and several other elected State officials, had occasion to affirm the Iowa doctrine in 1939, when it refused to sell Wilson Island in Pottawattamie County to Travelers Insurance Company. (Hon. George Wilson was Governor of Iowa at that time; hence, the name "Wilson Island.") The Executive Council had caused a patent to be issued to the City of Sioux City for the land involved in *Sioux*

City v. Betz, 232 Iowa 84, 4 N. W. 2d 872, in 1938. The Executive Council had caused a patent to be issued to the City of Sioux City for the land involved in *Solomon v. Sioux City*, 243 Ia. 634, 51 N. W. 2d 472, in 1940.

The Federal District Court for the Southern District of Iowa recognized the Iowa doctrine that the state owns all that part of the bed of the Missouri River which is in Iowa in a least two cases: *Iowa v. Carr*, 191 Fed. 257 (D. C. Ia.), 1911; *U. S. v. 242.83 acres of land, Tyson, et al.*, 283 Fed. 2d 802, Exhibit D-1049.

The Federal District Court for the District of Nebraska knew the Iowa doctrine in 1937 when it decided *U. S. v. Flower, et al.*, Exhibit D-1114.

The Circuit Court of Appeals for the 8th Circuit, which includes both Iowa and Nebraska, knew and applied the Iowa doctrine when it decided *U. S. v. Flowers, et al.*, in 1939, Exhibit D-1115, 108 Fed. 2d 298, also when it decided *Iowa v. Tyson*, supra, in 1960, Exhibit D-1113, 283 Fed. 2d 802.

As can be seen by the foregoing and Appendix II, the Iowa doctrine relative to river beds and islands has been applied by the Courts of Iowa, the Executive branch of the State, and the Legislative branch as well. The Judicial branch of the State of Nebraska, as shown, understood the Iowa doctrine and knew that it was being applied over the years. The Legislative and Executive branches of Nebraska must also have been aware of such doctrine and its application, if many Legislative Boundary Commissions, appointed by the Governor, expended the time and energy that counsel for Nebraska would have

us believe that they did, in meetings with the Iowa Boundary Commission, and we would hope they made their own investigation of the Iowa and Nebraska laws relative thereto.

Iowa believes that Nebraska's Proposition II fails for two reasons. First, the facts as established by the evidence and record in the instant case do not sustain this allegation. Secondly, repeal, alteration or abrogation of either a common law or statutory law by implication is not favored. It is Iowa's belief that the 1943 Compact when adopted by both states and approved by Congress became the statutory law of both states. Nebraska would have us believe that as a statute it repealed Iowa's common law doctrine established and enforced since *McManus v. Carmichael*, 3 Ia. 1, in 1856. Our courts, both State and Federal, have almost universally held that unless the intention of the legislature to alter or repeal is clearly expressed, the Courts will not give a statute the effect of repealing or altering existing laws. Earl T. Crawford, in his text *Statutory Construction*, sets out this theory as follows: Section 228 at page 422:

> "THE COMMON LAW.—If a statute is ambiguous or its meaning uncertain, it should be construed in connection with the common law in force when the statute was enacted. This is the rule whether the statute is simply declaratory of the common law, or whether it abrogates, modifies or alters it in any way. And there is a presumption that the law-makers did not intend to abrogate or alter it in any manner, although where the intention to alter or repeal is clearly expressed, it must be given effect by the courts. Even where this intention appears, there is a further presumption that the law-makers did not intend to

alter the common law beyond the scope clearly expressed, or fairly implied. In fact, it may be set down, as a general rule, that a statute in derogation of the common law shall be strictly construed, although in some states this rule had been changed by statute. * * *"

Section 309 at page 629:

"THE INTENT OF THE LEGISLATURE.—Whether a statute, either in its entirety or in part, has been repealed by implication, as already stated, depends upon the intent of the legislature. It is the province of the court to ascertain this intent, from the terms and provisions of the later enactment. But the courts will not recognize an implied repeal, unless the intent to repeal clearly appears. It must be free from any reasonable doubt. And the courts will seek to avoid a repeal by implication by resorting to any reasonable construction or hypothesis. If by any fair interpretations all sections of a statute can stand together. there will be no implied repeal."

Section 310 at page 630:

"THE PRESUMPTION AGAINST THE IMPLIED REPEAL.—As is thus apparent, the courts do not look with favor upon implied repeals, and the presumption is always against the intention of the legislature to repeal legislation by implication. The absence of an express provision in a statute for the repeal of a prior law gives rise to this presumption, which is accentuated where the various statutes were enacted at the same session of the legislature. Consequently, as we have already indicated, the intent to repeal must clearly appear, and such a repeal will be avoided if at all possible.

"This presumption against the intent to repeal by implication rests upon the assumption that the legis-

lature enacts laws with a complete knowledge of all existing laws pertaining to the same subject, so that the failure to add a repealing clause indicates that the intent was not to repeal any existing legislation. This presumption, however, is overthrown if the new law is inconsistent with or repugnant to the old law, for the inconsistency or repugnancy reveals an intent to repeal the existing law. Similarly, when a statute specifically repeals certain acts or parts of an act, it will not be presumed that the legislature intended to repeal any act or any part of an act not mentioned."

The North Dakota Supreme Court in *Reeves and Co. v. Russell,* 148 N. W. 654 at page 659, quotes Endlich on Interpretation of Statutes, Section 127:

"The presumption against an intent to alter existing law beyond the immediate scope and object of the enactment under construction applies as well where the existing law is statutory as where it is promulgated by the decisions.

"The principle is recognized that an intent to alter the common law beyond the evident purpose of the act is not to be presumed. It has indeed been expressly laid down that 'statutes are not presumed to make any alteration in the common law further or otherwise than the act does expressly declare; therefore, in all general matters, the law presumes the act did not intend to make any alteration, for if the Parliament had that design, they would have expressed it in the act' that 'the rules of the common law are not to be changed by doubtful implication.' "

The Michigan Supreme Court in *Bandfield v. Bandfield,* 75 N. W. 287 at page 288, quoted a similar rule:

"In all doubtful matters, and when the expression is in general terms, statutes are to receive such a con-

struction as may be agreeable to the rules of the common law in cases of that nature; for statutes are not presumed to make any alteration of the common law, further or otherwise that is expressly declared in the act. Therefore in all general matters the law presumes the act did not intend to make any alteration; for, if the parliament had that design, they should have expressed it in the act."

Iowa submits that the foregoing applies to the 1943 Compact. The Legislatures were fully aware of the problems involving the Iowa-Nebraska Boundary, spent many years conferring before arriving at the terminology set out in the Compact, and the presumption arises that they expressed their intentions and the Court should not read into the Compact any intent that is not clearly expressed. (See Appendix I.)

III.

Nebraska's Proposition III is as follows:

"Riparian rights are vested property rights of which an owner cannot be deprived without the payment of just compensation. The Nebraska owner preserved his riparian rights in the bed of the Missouri River and these rights were not taken away by the transfer of jurisdiction to Iowa."

Iowa's Proposition III responsive to this is as follows:

Under Iowa's construction of the compact, no Nebraska riparian owner was deprived of any vested property right, and owners of land former-

ly in Nebraska, now ceded to Iowa, still become the owners of any accretions to such lands which have formed since the compact, or which may later form.

Plaintiff is stating that Nebraska riparian owners prior to the Compact had an expectancy in accretion and reliction. That this expectancy was a vested right under Nebraska law. The pre-Compact boundary was a moving boundary, always following the thalweg as it moved. The state boundary since the Compact is a fixed, permanent boundary. The Nebraska riparian owners' rights before the Compact were limited, by the state boundary, and they are still limited by the state boundary. Any vested right to accretion, reliction or to bed of the stream East of the fixed boundary must be determined by Iowa law, now, the same as it was prior to the Compact. Iowa, under her law, owns the bed of the Missouri River East of the state boundary, but riparian owners whose private boundaries accrete across the bed acquires the accretion. It is only when land accretes to the bed of the stream, and not the shore, that Iowa's sovereign right to ownership applies. This sovereign right extends only to the Iowa boundary, unless as plaintiff contends such title is extended into Nebraska by accretion.

However, this is not an action to determine private titles, but a complaint that Iowa violated the Compact. Iowa submits the two states at the time of the Compact believed that the boundary established by them was a fixed line in the exact center of a permanent, stabilized channel. That the center of the channel and the bound-

ary between the states would ever after be identical. This is why the boundary was described in such a general manner, except for Carter Lake. The erroneous assumption was a mutual error, both parties overlooking the possibility of changes by the U. S. Army Corps of Engineers. However, plaintiff would have this court place the responsibility for this error in judgment on Iowa alone, by declaring Iowa must suffer the imposition of Nebraska laws on a portion of her domain.

The case of *Maury v. Robison*, 56 S. W. 2d 438, cited by Nebraska in her argument, is not in point. It involved an area that included both banks of the Brazos River, as it existed prior to an avulsion in 1914, and as the river existed after the avulsion. It was not a boundary river. The titles to land were originally obtained from the Mexican Government while a part of Mexico, and under Mexican law the riparian owners obtained the title to the beds of avulsion-left abandoned channels, and the new bed was taken from the "dominion" of the prior owners, "by its being made public as the river and as the bed which is abandoned was." Both sides of the river were in Mexico and then became a part of Texas. The lands became part of Texas through Austin's colonization grants, where each grant recited "with all their uses, customs, privileges and appurtenances," for him, his heirs and successors. These rights "were sedulously preserved to the grantees by the constitution and laws of the Republic of Texas. The laws under which the grants were made, including the Mexican civil law, were continued in force by the Constitution of 1836," (as did the Constitutions of 1845 and 1876) and by the Treaty of

Guadalupe Hidalgo on March 2, 1836. Texas adopted the common law by legislative enactment in 1840 and it was argued that this repealed the rule of the Mexican law of 1836. The Court did not agree with this view, and stated:

> "We hold that the claimed rule of the common law was not adopted in this state as to our streams above the ebb and flow of the tide; but that the other clear rule of the common law, that abandoned river beds are the property of the riparian owners, regardless of navigability, should be applied to all our streams above tidewater, navigable in fact or in law; a rule in entire harmony with the Mexican civil law. This makes all our grants, whether Mexican or subsequent, subject to the same rule, and prevents confusion, inconvenience, and discrimination between owners of grants made prior to the act of 1840 and those made since that date."

The other cases cited by Nebraska to support Proposition III (*New Orleans v. U. S.*, 10 Pet. 662, and *County of St. Clair v. Lovingston*, 23 Wall. 46, 23 L. Ed. 59) are not in point. Neither involves any state boundary. Both simply hold that a riparian owner is entitled to his accretions, and with this we do not disagree. This is the law of both Nebraska and Iowa.

We don't believe that Nebraska is contending that Nebraska riparian law was applicable beyond the boundary and into Iowa before 1943. We don't deny that it was applicable to land in Nebraska. We simply say that since 1943, the same is true, i. e., the Nebraska law still applies in Nebraska, and the Iowa law still applies in Iowa.

The rule contended for by Nebraska would produce this result: The State boundary line fixed by the 1943 Compact would not be the private boundary line between the contiguous lands in Nebraska and Iowa any place except those few places where the thalweg of the river may happen to coincide with the state line from time to time. In other words, Nebraska contends that the thalweg still remains the private boundary. Iowa can't believe that any such result was intended by the two states when they entered into the Compact. Nebraska says that the Compact was intended to put at rest all disputes along the boundary. If Nebraska's interpretation were adopted, the effect would be that *no* title disputes were put to rest, nothing was settled, and probably the seeds of more title disputes than ever were sown.

Iowa believes that the clearly expressed intent of the two states was that henceforth, Nebraska sovereignty would extend to, but not beyond, the agreed line, and Iowa's sovereignty likewise would extend to, but not beyond, the agreed line. Titles to all ceded lands which were good in the ceding state would be good in the receiving state, and certainly, a Nebraskan's good legal title in Nebraska to some land which was ceded became a good legal Iowa title after cession.

Every Iowa land title there is or ever was, where the land is contiguous to navigable water, ends at the ordinary high water mark.

Nebraska's contention would result in the creation, in Iowa, of a select few land titles which would extend beyond the ordinary high water mark and into the nav-

igable water. It would force Iowa to recognize two types of land titles within its borders and sovereignty, one type ending at and bounded by the ordinary high water mark, the other type extending into the thalweg.

The State of Virginia thought, just as Nebraska now contends, that it had created some super-titles in Kentucky by insertion of the following language into the Virginia-Kentucky Compact of 1796:

> "All private rights and interests of lands within the said district (Kentucky), derived from the laws of Virginia, prior to such separation, shall remain valid and secure under the law of the proposed state, and shall be determined by the laws now existing in this state (Virginia)."

The Supreme Court of the United States, in *Hawkins v. Barney*, 30 U. S. 294, 5 Pet. 457, 8 Law Ed. 190, in deciding that Kentucky's "seven years' possession law" was effective as to the ceded lands, stated as follows:

> "* * * the *lex loci* must be the governing rule of private right, under whatever jurisdiction private right comes to be examined." (30 U. S., page 298.)

The Court's comments at 30 U. S., page 300, are particularly apropros in the case at bar:

> "* * * It can scarcely be supposed, that Kentucky would have consented to accept a limited, crippled sovereignty; nor is it doing justice to Virginia, to believe, that she would have wished to reduce Kentucky to a state of vassalage. Yet it would be difficult, if the literal and rigid construction necessary to exclude her from passing this law were to be adopted: it would be difficult, I say, to assign her a position higher than that of a dependent on Virginia. Let

> the language of the compact be literally applied, and we have the anomaly presented, of a sovereign state governed by the laws of another sovereign; of one-half the territory of a sovereign state hopelessly and forever subjected to the laws of another state. Or a motley multiform administration of laws, under which A. would be subject to one class of laws, because holding under a Virginia grant; while B., his next-door neighbor, claiming from Kentucky, would hardly be conscious of living under the same government. If the seventh article of the compact can be construed so as only to make the limitation act of Virginia perpetual and unrepealable in Kentucky; then I know not on what principle, the same rule can be precluded from applying to laws of descent, conveyance, devise, dower, curtesy, and in fact, every law applicable to real estate."

What Justice Johnson was saying here was that, even though a literal interpretation of the Virginia-Kentucky Compact would require a holding favorable to Virginia claimants, the Court would not do it, where the result would be the reduction of Kentucky to a state of vassalage and dependency.

If the Court in the instant case were to adopt Nebraska's Proposition III, the result would be reduction of Iowa to the same state of vassalage and dependency to which Justice Johnson was referring.

Nebraska states, on page 40 of its Argument, that the decisions reached in *State of Iowa v. Tyson*, supra, by both the Federal District Court and the Circuit Court of Appeals were wrong. It is true that the result reached in both decisions of said case were contrary to Nebraska's Proposition III. The *Tyson* case is authority that Nebraska's Proposition III should be rejected.

IV.

Nebraska's Proposition IV is as follows:

> **"Where a navigable river forms the boundary between two states, the thalweg or middle of the main channel, with certain exceptions, is the boundary. This is the steamboat channel or the channel used for navigation and is not necessarily the line of the deepest water."**

Iowa believes this to be a proper statement of the rule. However, we believe Nebraska is wrong where they state that the testimony of the most knowledgeable witness in this case proves that the boat track was east of Nottleman Island and along the eastern bank at Otoe Bend prior to the commencement of construction work by the Corps of Engineers. The greater weight of the evidence, the more convincing and acceptable evidence supports a contrary conclusion.

Purely and simply considering the testimony of the "old-timers" witnesses who testified as to where the few boats went past Nottleman Island, Iowa believes that the weight of testimony is in favor of a finding that most of the boats went west of the island. But the "old-timer" testimony is just part of the evidence. When the documentary evidence (maps, aerial photographs, ground level photographs, etc.) is thrown onto the scales, the scales are clearly tipped in favor of finding that the boat track (if there was sufficient boating to establish a track) was west of the island.

Nebraska, in the last phase of argument under Propo-

sition IV, seeks to down-grade the evidenciary value of reconnaissance maps and sounding maps offered in evidence by Iowa. They don't even mention the photographs and other maps. This tack by Nebraska in argument is understandable, because the documentary evidence, taken as a whole, absolutely destroys their claim on Nottleman Island.

Every court which ever confronted a problem such as the Court here confronts has relied most heavily on the Corps of Engineers' maps and records to determine the true history of the area involved. There can be no question that contemporary photographs are far better evidence than the recollections of "old-timer" witnesses. The Nebraska Supreme Court has recognized the value of Corps maps and records in *Burkett v. Krimlofski*, 167 Neb. 45, 91 N. W. 2d 57.

In Appendix J is set forth a resume of the exhibits that establish that both Nottleman Island and Schemmel Island formed east of the principal or main channel of the Missouri River. The west channel was, under the evidence produced, the widest, deepest and swiftest. It was where the "debris" floated, where the "boils" were, where a "snagboat" worked and where a greater number of the relatively few commercial boats were placed by the witness for going up and down the river. If the Court deems that there was insufficient commercial boating to establish a track, or the evidence insufficient to establish where the track was, then evidence as to the existence of a channel deep enough for navigation must be considered to establish the boundary between the states.

The Court is asked to accept the testimony of a boat captain who by his own testimony could "read" the river and follow the deepest channel, who "read" the west channel in 1915 as the deepest, but upon hitting a sandbar backed up and went up the east side, as against the testimony of numerous witnesses on both sides of the disputed island, whose testimony was substantiated by photos taken by them, and by the maps, aerials, and soundings of the U. S. Corps of Engineers.

In the Schemmel area the testimony of a fisherman familiar with the river should be accepted, as against the testimony of such knowledgeable witnesses as Albert Propp, Oscar Hays, James Givens, and Otto Hintz, who lived there right on the river all their lives and hunted, fished, made ice and farmed there fighting the river's destructive nature. We realize that other witnesses in addition to the boat captain and fisherman substantiated their story, but the parole testimony of Iowa's lay witnesses and experts substantiate the maps, aerials, and surveys, including the reconnaissance and sounding maps of the U. S. Army Corps of Engineers, and plaintiff totally failed to carry her burden as plaintiff, or overcome the presumption against avulsion. (See Appendix J.)

V.

Nebraska's Proposition V contains four sentences, each of which is really a separate proposition. The logical way for Iowa to make response is sentence by sentence.

Nebraska's first sentence is:

> **"When by natural, gradual and imperceptible processes of erosion and accretion, the navigable channel moves, washing away everything in its path, the boundary follows the stream and remains the varying center of the channel.**

Iowa believes the statement is accurate if amended to delete the third word "natural." It has never been any part of the law of accretion that the accretions must form "naturally" in order for the boundary to move with the stream and stay in the stream.

The Nebraska Supreme Court, in *Burkett v. Krimlofski*, supra, at page 57, said:

> "Reference will be made to the work of the U. S. Army Corps of Engineers in controlling the Missouri River and its effect on the creation of the problem here presented. The rule as to that is: The fact that accretion is due, in whole or in part, to obstructions placed in the river by third parties does not prevent the riparian owner from acquiring title thereto." *Ziemba v. Zeller*, 165 Neb. 419, 86 N. W. 2d 190.

In the recent case of *Louisiana v. Mississippi*, (No. 14, Original) where it was argued that man-made avulsions upstream caused rapid erosion and movement downstream, and that the downstream movement should also be considered avulsive, the Special Master in refusing to accept this theory stated on page 22 of his report:

> "* * * Whether the direct cause is natural or artificial or whether the related event is an avulsion is immaterial. Each change must on its own merits stand the test."

In the case of *County of St. Clair v. Lovingston*, supra, at page 66:

> "The proximate cause was the deposits made by the water. The law looks no further. Whether the flow of the water was natural or affected by artificial means is immaterial."

See also *Abolt v. Fort Madison*, 252 Iowa 626, 108 N. W. 2d 263; *Solomon v. Sioux City*, 243 Iowa 634, 51 N. W. 2d 472.

Thus we see that under Nebraska, Iowa and Federal case law the foregoing proposition is erroneous and must be corrected by striking the third word "natural."

Nebraska's second sentence is:

> **"However, when the navigable channel of the river moves or is moved without overflowing, excavating and passing over the intervening area, or without destroying the vegetation, this is in law an avulsion and the boundary becomes fixed in the abandoned channel at such point where the water ceases to flow."**

Iowa would amend this statement slightly as follows:

> **When the navigable channel of the river moves or is moved without overflowing, excavating and passing over a substantial body of identifiable land, this is in law an avulsion and the boundary becomes fixed in the abandoned channel at such point where the water ceases to flow.**

The *Ecklund* case cited by the Plaintiff in support of the foregoing statement is not in point. In that case

the main channel north of a large well-developed island, granted to the original owner by the Government, gradually dried up over 40 years and during the same period the channel south of the island developed into the main channel. The boundary between riparian owners of the island and the mainland remained the thread of the old channel. This was a case involving the Platte River, neither a navigable nor a State boundary river, and was a question of ownership of the old river bed.

In *Uhlhorn v. U. S. Gypsum Co.*, 366 Fed. 2d 211, case cited by the Plaintiff, the Eighth Circuit Court of Appeals in reversing the findings of the Special Master, stated on page 219:

> "* * * In most instances where a river changes by avultive processes, it has left intervening land above high water mark, but we do not think that the elevation of the land mass between an old channel and a new one that is cut by avultive processes is a decisive criteria for a change in a state boundary. * * *
>
> "We are also of the opinion that the rule of avulsion is applicable here. Massey Towhead was on May 6, 1938, *a massive land mass*, although *infrequently submerged* by some four feet when the river reached ordinary high water. Massey Towhead was not only massive, but *solid and compact*. It resisted all efforts of the Corps of Engineers to dredge a channel across it. Furthermore, after the Engineers abandoned their intensive efforts, it remained intact after the flood of 1937. It was not until after the revetment of the Tennessee side and the flood of 1938 that the river adopted the Pointway Channel. Massey Towhead remained as it was after the channel change. *It was as discernible, intact and identifiable after the channel change as it was before.* It did not suffer

> erosion. Under the facts, it would be completely illogical to conclude that the rule of avulsion does not apply simply because the identifiable land was not above the high water mark." (Italics added.)

Iowa counsel believe that *Uhlhorn*, as the Circuit Court noted in its opinion, is the only case of its kind. Judge Mehaffy states that

> "We have reviewed all cited cases with interest but find, as did the Master, that none of them involves the identical issue which the facts here present."

In *Uhlhorn*, there was an extension of the avulsion rule to a fact situation to which the avulsion rule had never been applied before.

The facts in *Uhlhorn* were that, prior to 1930, substantial accretions had formed to Brandywine Island in Arkansas and these accretions were known as Massey Bar; in 1931, 1932 and 1933, the Corps of Engineers conducted extensive dredging operations in Bendway Channel, around the bar, and deposited the spoil on the bar; in 1933, 1934 and 1936, the Corps attempted to cut across the bar by dredging Pointway Channel and the spoil from this dredging was deposited on the bar; by natural forces combined with Corps construction work, Massey Bar became "not only massive, but solid and compact." All of this transpired in Arkansas because undeniably, the old boat track and state boundary line remained through Bendway Channel through those years. "Following the flood waters of 1938" the river finally adopted Pointway Channel as its main channel. Massey Bar remained "discernible, intact, and identifiable after the channel change

as it was before." The Court found that the channel change was not "gradual" but "sudden," and that the boundary therefore did not move with the movement of the main channel to Pointway Channel, even though Massey Bar had not arisen above ordinary high water.

Iowa would point out, first of all, that even after *Uhlhorn*, the rule of "avulsion" still requires that the channel must still cross a massive, solid and compact land mass which remains discernible, intact, and identifiable after the channel change as it was before; and the channel shift must be sudden. Nebraska would extend this *Uhlhorn* rule further, so that whenever the main channel moves across a sand bar, regardless of elevation of the bar or the size of the bar, and regardless whether the movement be sudden or gradual, should be deemed an avulsion. This extension of the avulsion rule would lead to repeal of the rule of accretion; whenever the main channel of the Missouri River has moved within the river's main banks, it must move across underwater bars; in other words, the river bottom is never smooth. Carry this thought to its logical end and the only conclusion to be reached is that the boundary never moved unless and until accretions form to a bank line, thus causing the bank line to move.

Nebraska's third sentence is:

> **"There can be an avulsion between the banks of the river when the main channel is moved around an area which is below the high-water mark."**

Iowa would submit the following responsive proposition, to-wit:

> **In order for there to be an avulsion between the banks of a river, the main channel must move or be moved suddenly around a substantial body of identifiable land. without washing away such land or destroying its identity.**

Without going into the detailed facts of each case cited by Nebraska as supporting its proposition, Iowa simply states that none of them support the proposition. *Nebraska v. Iowa*, 143 U. S. 359, involved a neck cut-off, where the river suddenly made for itself an entirely new channel, leaving a substantial body of identifiable Iowa land on the Nebraska side; it was not a movement between the banks of the river. The facts in *Missouri v. Nebraska*, 196 U. S. 23, were similar, a neck cut-off, a sudden new channel, not between the banks of the river, stranding a very substantial body (McKissick's Island) of identifiable Nebraska land on the Missouri side. *Arkansas v. Tennessee*, supra, involved an event in 1876 "which both parties properly treat as a true and typical avulsion;" the event was: "the river suddenly and with great violence, within about thirty hours, made for itself a new channel directly across the neck." In *Louisiana v. Mississippi*, 282 U. S. 458, by 1912, an area 5 or 6 miles in length and several miles in width had been added to the Louisiana shore; in 1912-13, there was no controversy about the fact that the river suddenly made a short cut to the west of this area. In *Kansas v. Missouri*, 322 U. S. 213, Kansas claimed that the 2,000 acres in dispute formed

as either accretions to the Kansas shore or as an island on the Kansas side of the main channel and that the area was then cut off from Kansas by an avultive movement either in 1917 or 1927; the Court found that Kansas failed to carry the burden of proof which was on her as complainant, and held that no avulsion was proved.

In *Nebraska v. Iowa,* 143 U. S. 359, at page 365, the Supreme Court of the United States defined avulsion as:

> "* * * in the very uncommon case called 'avulsion' when the violence of the stream separates a *considerable part* from one piece of land and joins it to another, *but in such manner that it can still be identified,* the property of the soil so removed naturally continues vested in its former owner." (Italics added.)

This phrase was quoted with approval in the Federal District Court decision of *Uhlhorn v. U. S. Gypsum,* 232 Fed. Supp. 994, 1000.

Still, the only authority for the proposition that there can be an avulsion as to an area below ordinary high water is *Uhlhorn v. U. S. Gypsum Co.,* supra, and still it is Iowa's position that the rule of *Uhlhorn* should not be extended beyond the particular facts which existed in that case.

In *Louisiana v. Mississippi,* No. 14, Original, Oct. Term, 1962, Special Master Marvin Jones quoted with approval from *Nebraska v. Iowa,* supra, page 369, as follows:

> "There is, no matter how rapid the process of subtraction and addition, no detachment of earth from

> the one side and deposit of the same upon the other. The only thing which distinguishes this river from the other streams, in that matter of accretion, is in the rapidity of the change caused by the velocity of the current; and this in itself, in the very nature of things, works no change in the principle underlying the rule of law in respect thereto."

The fourth and last sentence of Nebraska's Proposition V is:

> **"There were avulsions all along the Missouri River wherever the Corps of Engineers dredged canals or moved the navigable channel around bars, islands, or intervening river bed."**

Iowa disagrees entirely with this general statement and would submit the following responsive proposition, to-wit:

> **Every location at which the main channel has moved must be studied separately to determine whether such movement was accretionary or avulsive. Each location must be judged on its own facts, and by application of the law of accretion, avulsion or island as the particular facts may warrant.**

Iowa does not believe that the Court can or should generalize on this subject at all. There is no sufficient evidence concerning what the Corps may have done "all along the Missouri River" to enable the Court to generalize concerning the legal result at any locations except Nottleman Island and Schemmel Island. As put by the Special Master Jones on page 22 of his report in *Louisiana v. Mississippi*, No. 14 Original, October Term, 1962, "Each change must on its own merit stand the test."

Furthermore, the Supreme Court of the United States has often said that it is not in the business of giving advisory opinions. See *Alabama v. Arizona*, 291 U. S. 286, 291-292, where the Court said:

> "This Court may not be called on to give advisory opinions or to pronounce declaratory judgments. *Muskrat v. United States*, 219 U. S. 346. *Willing v. Chicago Auditorium Assn.*, 277 U. S. 274, 288, and cases cited. *Nashville, C. & St. L. Ry. v. Wallace*, 288 U. S. 249, 261-262. Its jurisdiction in respect of controversies between States will not be exerted in the absence of absolute necessity. *Louisiana v. Texas*, 176 U. S. 1, 15. A State asking leave to sue another to prevent the enforcement of laws must allege, in the complaint offered for filing, facts that are clearly sufficient to call for a decree in its favor. Our decisions definitely establish that not every matter of sufficient moment to warrant resort to equity by one person against another would justify an interference by this court with the action of a State. *Missouri v. Illinois*, 200 U. S. 496, 520-21. *New York v. New Jersey*, 256 U. S. 296, 309. *North Dakota v. Minnesota*, 263 U. S. 365, 374. Leave will not be granted unless the threatened injury is clearly shown to be of serious magnitude and imminent. *Missouri v. Illinois*, supra, 521. In the absence of specific showing to the contrary, it will be presumed that no State will attempt to enforce an unconstitutional enactment to the detriment of another. Cf. *Ex parte La Prade*, 289 U. S. 444, 458. The burden upon the plaintiff states fully and clearly to establish all essential elements of its case is greater than that generally required to be borne by one seeking an injunction in a suit between private parties. *Connecticut v. Massachusetts*, 282 U. S. 660, 669."

See also *Trailmobile Co. v. Whirls*, 331 U. S. 40 at page 48.

At Nottleman Island, the preponderance of evidence establishes that prior to Corps work which was commenced in about 1934, the main channel was the channel west of the island, but it didn't quite fit the Corps design. The Corps design called for the river to remain in the west channel, but it was to be narrowed and formed to gently curve. The narrowing and curving were accomplished by pushing the banks in from both sides; there was no dredging; there is no evidence that any identifiable land, under water bars, or anything else was cut off or jumped across; the movement of the channel was gradual, not sudden; in law, the boundary must have moved as the channel was moved because the movement met all tests for an accretionary movement, and meets none of the tests for an avulsive movement.

At Otoe Bend, from 1934 through most of 1938, the Corps work was the same, i. e. they pushed the main channel into the designed channel and narrowed it there by building dikes from the both shores, keeping the main channel in front of the work. By mid-1938, they had accomplished moving of this main channel into the designed channel by this method, except along the extreme southwesterly part of the bend, the main channel had not gone entirely into the design. Only then (1938) was the canal dredging method employed. This canal was dredged so close to the then main channel that there was no substantial body of identifiable land between the two, and therefore, there was no avulsion by canal as claimed by Nebraska. Even if it be considered that there was an avulsion by canal, the boundary was left in the main channel as it was immediately before the avulsion, that is, just a short distance away from the canal.

VI.

Nebraska's Proposition VI is:

> **"Following an avulsion, the center of the old channel remains the boundary and this boundary remains subject to gradual change as long as the abandoned channel remains a running stream. When the water becomes stagnant, the process is at an end and the middle of the abandoned channel becomes fixed as the boundary."**

As an abstract proposition, Iowa agrees with this, but Iowa does strenuously say that this statement has no application at either Nottleman Island or Schemmel Island. There is no argument that the areas now occupied by both Nottleman Island and Otoe Bend Island were in Iowa on the date that Iowa was admitted to the Union, and they were still in Iowa when Nebraska was admitted. See Exhibits P-1691 with P-713 for Nottleman Island and Exhibits P-208 with P-233 for Otoe Island. There is no argument that the same areas are now within the State of Iowa. Starting with this premise, the decisions of our State and Federal Courts, including the Supreme Court of the United States, are in unanimous agreement that all lateral movements of a river, navigable or non-navigable, boundary or inland, were by erosion and accretion, and the party alleging an avulsive movement has the burden. Nebraska shouldered several burdens when commencing and prosecuting this case.

First, she shouldered the usual and ordinary plaintiff's burdens of proving her allegations by a preponderance of evidence, *Kansas v. Missouri*, supra.

Second, in suing a sister state, she shouldered the burden of proving *clearly* that Iowa has been guilty of wrongdoing.

In *Colorado v. Kansas*, 320 U. S. 383, Mr. Justice Roberts stated for the Court:

> "* * * Not every matter which would warrant resort to equity by one citizen against another would justify our interference with the action of a State, for the burden on the complaining State is much greater than that generally required to be borne by private parties. Before the court will intervene the case must be of serious magnitude and fully and clearly proved. * * *"

See also, *North Dakota v. Minnesota*, 263 U. S. 361. *Washington v. Oregon*, 297 U. S. 517.

Third, she shouldered the burden of overcoming the presumption that lateral movements of a boundary stream have been by accretion and not avulsive. This presumption will be discussed in detail under Proposition XIV of this Brief.

Fourth, she shouldered the burden of overcoming the presumption in favor of "present boundary lines," which is closely related to the presumption in favor of accretion and against avulsion, and which will also be discussed in detail under Proposition XIV.

In a nutshell, Nebraska has failed to prove in this case that the Iowa-Nebraska state boundary line was east of either Nottleman Island or Schemmel Island when said islands came into existence; she has failed to prove that any avulsion occurred at either island so as to leave

the state boundary in some abandoned channel east of either island. She has failed to prove these things which are absolutely essential to her case by "a preponderance of evidence", by "clear evidence", by "satisfactory evidence", by "convincing evidence" or by any other standard of evidence. She has failed to carry any of the several burdens which she undertook herein.

Therefore, her Proposition VI has no application at either Nottleman Island or Schemmel Island, and since the Court should not in this case render judgment concerning other locations, it has no application in the case.

VII.

Nebraska's Proposition VII is as follows:

> **"Regardless of how land along navigable rivers may have formed, long acquiescence by one state in possession of territory by another is conclusive of the latter's sovereignty over that territory. Lapse of time is particularly significant in boundary and jurisdictional disputes and the state raising claims should not be benefited by its own delay in asserting those claims. Equitable principles support a determination that will least disturb rights and titles long regarded as settled and fixed by the people most to be affected. The fact that officers and representatives of both states, as well as the inhabitants, recognized that both Nottleman Island and Schemmel Island were in Nebraska prior to the Compact should be controlling that these were Nebraska lands."**

Nebraska's above proposition contains four sentences, but Iowa believes all four are simply statements or re-statements of the same thing, to-wit: that in state boundary cases there is a rule commonly known as "acquiescence" or "prescription" and that it should be applied in this case in favor of Nebraska and against Iowa at both Nottleman and Schemmel Islands.

Iowa agrees that there is such a rule but denies that it has any application in this case. First, it has no application because there is no evidence of *long acquiescence*. Second, it has no application because there is no evidence of any knowledge, recognition or acquiescence by the *sovereign State of Iowa*.

Let us examine the periods of *long acquiescence* found by the Courts in the several cases cited by Nebraska under this proposition: in *Handly's Lessee v. Anthony*, 5 Wheat. 374, the decision did not turn on acquiescence; the Court merely remarked that its decision was in accord with what the inhabitants had thought for many years; the time period involved was apparently approximately 37 years. In *Indiana v. Kentucky*, 136 U. S. 479, the time period as stated by the Court was "over seventy years." In *Arkansas v. Tennessee*, 310 U. S. 563, the time period was about 112 years. In *Maryland v. West Virginia*, 217 U. S. 1, the time period was about 122 years (1787-1909). In *Rhode Island v. Massachusetts*, 4 How. 491, the time period was 125 years. In *Michigan v. Wisconsin*, 270 U. S. 295, the time period was about 76 years.

The most recent case involving acquiescence is *Illinois v. Missouri*, No. 18, Original, Oct. Term 1969, in which the Report of Hon. Harvey M. Johnsen, Special Master, was recently filed. Three tracts of land were in dispute called "Cottonwoods", "Roth Island", and "Beaver Island." Missouri claimed all three on the facts of how they formed and also claimed all three by prescription. Judge Johnsen determined that "Cottonwoods" and "Roth Island" had formed in Missouri and that "Beaver Island" had formed in Illinois. He then found that "Cottonwoods" was within Missouri's domain by prescription (this being an additional reason for awarding "Cottonwoods" to Missouri), but that neither prescription nor acquiescence had been proved against Illinois as to "Roth Island" or "Beaver Island." The facts regarding acquiescence are set out in some detail commencing on page 38 of Judge Johnsen's Report. The period of Illinois' acquiescence in Missouri's exercise of sovereignty over "Cottonwoods" was approximately 50 years, which Judge Johnsen says "is a shorter length of time than had ever been involved in the situations of the Court's previous decisions." During this 50 year period, Missouri had engaged in a realistic, systematic and progressive scheme of taxation upon the "Cottonwoods" area, both as the land developed and as its value became enhanced; Missouri built and maintained public roads in the "Cottonwoods" area; muniments of title were recorded in Missouri; when Illinois blocked the public road, Missouri arrested, tried, convicted and fined them for criminal trespass; the Illini officials sought damages from the Missouri officials and citizens for arrest beyond Missouri's

jurisdiction in Federal Court in Illinois, and their claim was denied after trial on the merits; the U. S. Department of Agriculture recognized "Cottonwoods" as a part of Missouri. Meanwhile, Illinois' manifestations of concern were of no substantial significance or weight in the situation. With regard to "Beaver Island" and "Roth Island", Judge Johnsen states that there was "no exercise of sovereignty of such character and for such period of time"; Beaver Island was first placed on Missouri's tax rolls in 1960 (the case was commenced in October, 1969, and the land had been on the rolls for 10 years); there was no evidence that Roth Island had been taxed in Missouri any earlier. Judge Johnsen's holding is that Illinois had not acquiesced in Missouri sovereignty over either Beaver Island or Roth Island.

Now, compare the facts in Judge Johnsen's case to the facts at Nottleman Island and Schemmel Island. Keeping our eyes on the target, the question is: In which state were these islands on July 12, 1943, immediately before the Compact?

The first taxation of Nottleman Island in Nebraska was in 1934, after the Fitch Survey had been made in 1933, so it was taxed in Nebraska only 10 years; it is not material that it remained on the roll in Nebraska until 1952, an additional period of nine years after the Compact. The taxation in Nebraska was not a realistic, systematic or progressive scheme. The first muniment of title recorded in Nebraska referable to any part of the island was in 1937 (Exhibit P-460), only 6 years before the Compact. There was no road building or road main-

tenance on the island whatsoever at any time, nor any public improvement on the island of any kind by Rock Bluff Township, Cass County or the State of Nebraska. The first Court action in Nebraska relating to the island was in April, 1940, Exhibit P-462. The actual period of acquiescence by Iowa (if it may be termed acquiescence in the absence of any knowledge by Iowa or any responsible officials of Iowa) was 10 years (1934-1943). Judge Johnsen held that this was not long enough to establish prescription rights or acquiescence; and Iowa believes that this is good law.

At Otoe Bend, Schemmel Island is established by the evidence as having formed and come into existence either shortly before or shortly after commencement of Corps construction work in 1934. The oldest tree on the island, according to Dr. Weekly, started growth in 1932; the same tree, according to Dr. Bensend and Dr. McGinnis, started growth in 1936. The 1930 aerial photo establishes that there was no island in 1930. Nebraska says at page 63 of its Argument that Nebraska commenced taxation on the island in 1895. How can that be? It may be that Nebraska was taxing some land in that spot under the sky in 1895, but it was not Schemmel Island; it was not the same identical land. Nebraska also mentions a survey in 1895 and tax deeds and quiet title actions which occurred around the turn of the century; none of these related to Schemmel Island because Schemmel Island did not exist at that time. As a matter of a fact, the spot under the sky where Schemmel Island was later to come into existence was only on the tax rolls in Nebraska prior to 1932 through the inadvertence, mistake and negligence of

the Otoe County officials; as the land was washed away, it should have been removed from the rolls. Similar to Judge Johnsen's description of Illinois' purported taxation of "Cottonwoods" (Page 40 of Special Master's Report, *Illinois v. Missouri,* supra), Iowa states that Nebraska cannot be said to have exercised or manifested any such revenue interest as to the area. While the plat which had existed of the area before the time the land was washed away was continued to be carried forward upon the records of Otoe County, Nebraska, this appears to have been done in Courthouse routine and not in any sovereign revenue concern or action as to the rebuilt land. Concerning the same matter, Judge Johnsen remarks (Page 41):

> "And taxes upon avulsionarily destroyed property would seem, in both sovereign and taxpayer incidence, to be so unusual as to rather suggest that it probably was due to a lack of checking by the taxpayer, and thus represented a mistake which had simply been perpetrated through the years, and which then was later conveniently seized upon and sought to be magnified in relation to the present action."

The evidence establishes that Schemmel Island was not taxed in Nebraska before 1932 because it didn't exist before 1932; Iowa believes that the better evidence is that it was not taxed in Nebraska before 1936 because it didn't exist before 1936; neither period (1932 to 1943 or 1936 to 1943) is a sufficient period to generate prescriptive rights or rights by acquiescence. The first muniment of title recorded in Nebraska relating to any part of Schemmel Island was in 1938; the first court action was

in 1940. As at Nottleman Island, no public roads were built or maintained nor any other public improvement. The purported taxation was not realistic, systematic or progressive.

In this case, the ruling must be against Nebraska on the issue of acquiescence. At both islands which are at issue, the maximum evidence of Nebraska purported exercising of dominion is something less than 15 years. Never has a state been found to have acquiesced in less than 35 to 40 years; the time period here is not sufficient.

Additionally, Nebraska must lose on the issue of acquiescence for the reason pointed out by the Honorable Gunnar H. Norbye, Special Master in *Arkansas v. Tennessee,* No. 33, Original, in the Supreme Court of the United States, in his Report to the Court filed 29th of July, 1969, pages 11 & 12:

> "It is not necessary to discuss in detail the evidence regarding the alleged exercise of dominion and sovereignty of Arkansas as to the lands in question. There is evidence that as to certain parcels of land in the disputed area taxes thereon have been paid to the State of Arkansas by a limited number of individuals. And it is readily evident that certain individuals, mainly those who are residents of Arkansas, have considered that these lands belonged to Arkansas rather than Tennessee. Hunters and fishermen living in the State of Arkansas have procured Arkansas licenses to carry on such activities. Others have procured Tennessee licenses. There is evidence that officials of the State of Arkansas in enforcing the game and fishing laws have patrolled these lands in behalf of the plaintiff. Tennessee game wardens also have considered this area their territory. Some

crop raising and timbering have been carried on by Arkansas residents. *But there is a total lack of evidence that the State of Tennessee as a sovereign State has ever recognized or acquiesced in the claim of sovereignty of these lands by the State of Arkansas or its residents.*" (Italics added.)

Vermont v. Young, 46 Vt. 214, was a criminal case in which the question was whether the alleged crime occurred in Vermont or in New York. In order to facilitate construction of a bridge, the local residents in 1834 straightened the boundary stream "by shoveling and boring", thus cutting off a bit of Vermont and putting it on the New York side. The Court relates (page 215):

"The local authorities of both states appear, for about thirty-five years after the change, to have treated this place as a part of the State of New York, for the purposes of taxation and the record of private titles. * * * These facts constitute the acquiescence relied upon. There is no doubt but political boundaries as well as those of private property, may be established or changed by acquiescence of proper parties. *Corinth v. Newbury*, 13 Vt. 496; *Rhode Island v. Massachusetts*, 4 How. 591. And these acts by these authorities would, doubtless, have been sufficient and long enough continued to change this boundary and establish it in this new place, if the constituencies of the authorities had been the only parties that were to be affected by the change. But these were merely the local town authorities, acting so far as they did act, for their respective towns and not for the states; and a change of the boundary between these two states, could be directly made, only by the states themselves, acting in their sovereign capacities, and probably not by them even without the sanction of Congress, expressed by act, or perhaps by acquiescence. These towns could not by any action they

or their authorities might take, affect the state boundary at all, directly; and it is plain that they could not do indirectly, by acquiescence, what they could not do directly, by action."

VIII.

Nebraska's Proposition VIII stating:

> **"A Compact entered into between states and approved by Congress is a contract which is binding upon the legislative, executive and judicial branches of the states as well as their citizens. As such it should not be subject to unilateral determination by only one of the states."**

is acceptable as a general rule. Neither state can determine the State boundary to be other than where it was placed by the Compact. It is also apparent from the record that either state, in this case, can locate the Compact boundary at any point or at any time they desire, and the boundary as such, has not caused any conflict between the states. The Compact is a Boundary Compact, and has transferred a meandering boundary into a fixed boundary. This Court should not expand the Compact beyond this apparent and expressed limit.

However, if Nebraska is not referring to the Boundary line, which was, as we stated, the purpose of the Compact, but was referring to the jurisdiction of the Iowa or Nebraska Courts to determine land titles within their respective states, then we disagree. The States of Iowa and Nebraska having distinctly different title laws, their respective Courts must of necessity approach the question of titles under different rules of law. This does not constitute a unilateral determination by either State, or their

respective Judicial branches of government, as there is no terminology in the Compact that can be construed or interpreted to change the internal title laws of either state. Iowa would further point out that the Supreme Court of the United States has stated it has no power, jurisdiction or authority to write a Compact between States, nor will it under the guise of interpretation or construction extend a Compact beyond its expressed term.

Nebraska states: "The two states, rather than determining their existing rights in and to lands along the Missouri River by judicial proceedings, instead entered into a Compact to compromise and adjust these rights." They can mean by this only jurisdictional rights, as the State of Nebraska owned no land along the Missouri River. Admittedly, in both the Nottleman Island and Otoe Island cases, Iowa used the jurisdictional line as the westerly boundary of its claim, for the simple reason that under the laws of Iowa, including the terms of the Compact, the true and proper westerly boundary of its claim is also the State boundary or Compact line. Admitted, that in the Rock Bluff Bend area the Iowa surveyor did not take into account the narrowing of the channel by the U. S. Corps of Engineers after the date of the Compact, and its formal claim was 50 feet in error, but this was in the flowing stream. The evidence is clear that either State can locate the Compact line with all the certainty that any reasonable person would require, the attention of the U. S. Supreme Court is not required, and should not be invoked for such trivial differences that might exist in fact. For all practical purposes, this is not a boundary dispute.

The *Tyson* case has been covered previously in this Brief, but Iowa again points out that the Court did not use the Compact line to cut off riparian rights of Nebraska land owners, as alleged. The decision was based on facts indicating that Tyson had no riparian accretions, and the Court set out the rule that riparian rights are controlled by the law of the State in which they formed, as dictum, but still did not intimate riparian rights would be denied, when valid, under Iowa law.

Any dispute prior to the work of the U. S. Corps of Engineers with regard to boundary or land ownership that arose would have been in all probability resolved by the action of the river before it could be litigated. Both states were misled by the optimism of the U. S. Army Corps of Engineers, who had concluded that the river was controlled, and to avoid future difficulties, such as this litigation, agreed on a permanent boundary. Nebraska would like the Court to believe that the long history of Iowa-Nebraska Legislative Boundary Commissions was motivated by the problems presented to the Court today. To argue the Compact must mean more than it says, when in fact Carter Lake, Iowa, and its citizens were the principal subject of the Boundary Commission conversations.

Immediately following the Compact, the Nebraska Courts accepted jurisdiction of title disputes involving lands ceded to Nebraska by Iowa, some of which were owned by Iowa as a Sovereign State. In accepting jurisdiction of the subject matter of these litigations, the Nebraska Courts would of necessity have had to determine the location of the State boundary, and in many in-

stances they determined, to their satisfaction at least, the pre-Compact State Boundary, as they did in the *Krimlofski* case, supra, which was admittedly land formed in Iowa, ceded to Nebraska, and adversely possessed by squatters. The courts of Nebraska invoked the title laws of Nebraska existing at the time of the Compact to lands ceded by Iowa. Should not the Courts of Iowa be allowed to invoke its title laws at the time of the Compact to lands ceded by Nebraska? Does not Iowa have the right to own land the same as the other 49 states? Why does Nebraska contend that an identical action by Iowa, as a title holder, constitutes a unilateral interpretation, or a violation of the Compact by Iowa? If Nebraska Courts can determine the pre-Compact boundary are not the Iowa Courts competent to do the same? Why does Nebraska fear such decisions by the Iowa Courts? Why should the State of Iowa be denied the right to defend its property rights when sued in Federal and State Courts, or when its property is being destroyed and occupied by others?

Interpreting this Section 3 of the Compact, taking interpretation of this to mean simply giving the legal meaning to language within this Section, its meaning seems to encompass little more than its literal meaning. It specifies that titles, mortgages, and other liens derived and good under the law of Nebraska *applying to the lands Nebraska ceded to Iowa*, shall be recognized and upheld by Iowa. It also sets out the extent to which titles derived under the law of Nebraska shall be recognized in Iowa. The parties have made such specific provisions in

this section that all their intentions must be considered to be encompassed in the agreement.

Thus, the real question is what is the meaning of this Section construed in the light of the applicable rules? Does this section mean something more than its literal language implies when so construed? Does this section indicate that the law or legal process of Nebraska be extended to determine title to lands formed in Iowa and never under Nebraska jurisdiction? Iowa believes that Nottleman Island and Otoe Island formed in Iowa and were never in Nebraska. But assuming this not to be the fact, should the State of Nebraska be allowed to interfere with a judicial determination of that fact by the Iowa Court of Original Jurisdiction? Or should this Court interfere with the determination of that fact by the Iowa Courts?

In *Hawkins v. Barney,* supra, this Court stated:

> "If the seventh article of the Compact can be construed so as to make the limitation act of Virginia perpetual and unrepealable in Kentucky, then I know not on what principle the same rule can be precluded from applying to laws of descent, conveyance, devise, dower, curtesy, and in fact, every law applicable to real estate." 5 Pet. at 466.

Another case interpreting a similar Compact section is *Kentucky Union Company v. Kentucky,* 219 U. S. 140 (1911).

A sound argument for contending that it need not mean more than its language implies, is the fact that in an agreement of such gravity and importance, the parties would be likely to propound in detail all phases of the

agreement, and the relationship resulting therefrom, in order to avoid any ambiguity or later difficulty.

In the analogous area of international law, an area of the law is recognized as one of the bases for construing interstate Compacts, such a usage is prevalent. For, as pointed out in *United States v. Arredondo*, 31 U. S. Sup. Ct. 462, 6 Pet. 691, 712 (1832):

> "* * * it is the usage of all the civilized nations of the world, when territory is ceded to stipulate for the property of its inhabitants. An article to secure this object so deservedly held sacred, in the view of policy, as well as of justice and humanity, is always required and is never refused." *Henderson v. Poindexter*, 12 Wheat. 535.

It is noteworthy in this regard that, even though such rights are recognized under the general law, they have been specifically provided for in a number of interstate Compacts. Examples of this are found in the Massachusetts and Rhode Island Boundary Settlement of 1859; New York and Connecticut Boundary Agreement of 1879; Virginia and Tennessee Boundary Agreement of 1901; New Jersey and Delaware Agreement of 1905; Massachusetts and Connecticut Agreement of 1914; and New York and Connecticut Boundary Agreement of 1911-1912.

Thus, it seems to be seen that such a provision is common in treaties and has, on numerous occasions been placed in interstate boundary Compacts without, it appears, extending its literal meaning.

The decision in *Green v. Biddle*, supra, cited by Nebraska, supports the position of Iowa and not Nebraska.

A careful examination of this decision will reveal that: (1) there was no Compact between two states, but a cessation of territory to the United States, and the creation of Kentucky by Federal Government; (2) Kentucky adopted a constitution which incorporated the conditions of the Virginia Cessation, which stated Virginia land titles in the new state should be recognized according to the laws of Virginia *existing* at the time of the cessation; (3) The occupying claimants law subsequently passed by Kentucky made such Virginia titles less secure than they were under the laws of Virginia existing at the time of cessation, and (4) they were therefore unconstitutional under the Kentucky Constitution (not the U. S. Constitution).

In *Green v. Biddle,* Justice Washington states at Page 84:

> "* * * If the article of the compact, applicable to this case, meant anything, the claimant of land under Virginia had a right to appear in a Kentucky Court as he might have done in a Virginia court if the separation had not taken place, and to demand a trial of his right by the same principles of law which would have governed his case in the latter state. * * *"

There has never been any suggestion in the case at bar that Iowa has denied or denies the right of Nebraskans to come into the Courts of Iowa and demand trial of their rights in ceded lands the same as they could have done in the Nebraska Courts if the land had not been ceded.

Differing from the facts in *Green v. Biddle,* Iowa and Nebraska were both established states; with complete systems of property law. Since the legal systems were

already established, it is likely that conflicts would arise not between subsequent laws, but between those already established. If the parties to the Compact intended to require in effect, that two different sets of laws would apply within a sovereign state, they would have so stated in unequivocal terms.

Can it be argued that the Compact in the case at bar intended to have such a meaning? In *Green v. Biddle*, the Court did not ascribe any meaning to the articles of cessation beyond the literal meaning of the words used. The States of Iowa and Nebraska both undoubtedly desired that rights of titles, mortgages, and other liens acquired under the law of their state should be recognized in the receiving state. The desire that these rights should be specifically recognized in order to avoid doubt and controversy is a sufficient reason for Section 3.

This section further provides that any pending suit or action concerning the ceded lands may be prosecuted to final judgment in the ceding state. This provision clears away doubt as to whether the ceding state has the right to try these cases to completion, and probably amounts to an extension of the general rule. Further, the two provisions taken together amount to a statement of the extent of what rights acquired under the law of the ceding state shall be recognized and also the extent to which the legal process of the ceding state shall be available in determining these rights, even after the cession. They extended the legal process beyond what it would have been under the general principle requiring recognition of private rights. That in so doing not only

has the extension of the ceding state's legal process been provided, but also the limit. This seems to be a case where the rule applies, as set out in *Green v. Biddle*, supra, commencing on page 89, that:

> "* * * where the words of a law, treaty or contract, have a plain and obvious meaning, all construction, in hostility with such meaning is excluded. This is a maximum of law and a dictate of common sense; for were a different rule to be admitted, no man, however cautious and intelligent, could safely estimate the extent of his engagements, or rest on his own understanding of a law, until a judicial construction of those instruments had been obtained."

These conclusions are buttressed by the general rules applicable in interstate Compacts. The first of these, pointed out in *Massachusetts v. New York*, 271 U. S. 65, 89 (1926), is that:

> "* * * all grants by or to a sovereign government as distinguished from private grants, must be construed so as to diminish the public rights of the sovereign only so far as is made necessary by an unavoidable construction. *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 544-548, *Shively v. Bowlby*, supra."

Although the grant in our case is one both by and to a sovereign, the purpose of this rule appears clearly to be to keep sovereign rights inviolate. It appears that the intent of this rule, as applied to our case, would be to prevent the diminution of that sovereignty, except where it was made necessary by an unavoidable construction. Certainly this rule, so applied, in conjunction with the literal meaning of the statute and sound reasoning, indicate that the Iowa Courts should be allowed to exercise

their jurisdiction to determine if a specific area was ceded, as asserted by a claimant, being bound to apply the law of Nebraska in determining title to any lands ceded, existing at the time of cessions.

The intention of the parties to a Compact must govern and such intention must be gleaned from words used in their ordinary significance, and only if the words of the instrument be ambiguous may the circumstances surrounding their drafting be then considered. The defendant submits that the Iowa-Nebraska Boundary Compact of 1943, its words, terms and phrases should not be lightly determined ambiguous and subject to judicial construction.

The Court, in *Virginia v. Tennessee*, supra, also points out that a Compact meets the vital requisite of an agreement or contract. The Court states on page 520 that:

> "* * * The legislative declaration will take the form of an agreement or compact when it recites some consideration for it from the other party affected by it, for example, as made upon a similar declaration of the border of contracting state. The mutual declarations may then be reasonably treated as made upon mutual considerations. * * *"

The mutual consideration in our Compact of 1943 is the establishment of a fixed boundary for the mutual benefit of the contracting parties. Under Iowa law, the State of Iowa owns the beds of all navigable rivers and on the date of the Compact owned valuable areas in and along the Missouri River, and there could be no mutuality of considerations in Iowa giving up the titles to these

lands, as contended by Nebraska. What word or phrase in the Compact requires that Iowa disclaim all of her trust lands in the Missouri Bottoms? Nebraska gave up no lands, either to Iowa or to Iowa citizens, as she did not own any of the land ceded.

There is a fundamental principle of equality among the States of the Union, which seems to underlie, and be basic, in all the decisions involving interstate controversies. In the light of the history of the Compact, its terms and the equal sovereignty of the signators, Nebraska should not at this late date, be permitted to challenge the right of Iowa to exercise dominion over her territory. The Compact being part of the law of Iowa, any protection therein granted owners of the Nebraska land ceded to Iowa by the Compact, has been and will be recognized by the Courts of Iowa.

Iowa submits that the boundary line can be located and is identifiable, that the Compact should not be construed to deprive the State of Iowa of lands it owns any more than it should be construed to deprive individuals, either Nebraskans or Iowans, of lands they own; that it is entirely possible to determine whether disputed land is ceded land, or land that always was in one state or the other, or was land that came into being subsequent to 1943 in one state or the other. Iowa would have no right as a Sovereign State to give up the trust lands of its citizens, or any other property, without adequate consideration. We must not forget the community has rights, as well as individuals.

IX.

Nebraska's Proposition IX states:

> **"Provisions of Compacts became the law of the contracting states and state statutes or laws which conflict with an interstate Compact are invalid and unenforceable."**

It is certainly true that a state which has incurred certain obligations by Compact with a sister state cannot thereafter adopt a statute which would impair any obligation so incurred. But even in such a case, the courts will not find the later statute invalid as violative of the prior Compact unless the evidence is clear. In *Green v. Biddle*, supra, this was the situation being considered, and the Court said on page 92:

> "* * * that the duty, not less than the power of this Court, as well as of every other Court in the Union, to declare a law unconstitutional which impairs the obligation of contracts, whoever may be the parties to them, is too clearly enjoined by the Constitution itself, and too firmly established by the decisions of this and other Courts, to be now shaken; and that those decisions entirely cover the present case. * * * "* * * If we have ventured to entertain a wish as to the result of the investigation which we have laboriously given to the case, it was that it might be favorable to the validity of the laws; our feelings being always on that side of the question, unless the objections to them are fairly and clearly made out. * * *"

The situation in the case at bar is different from that in *Green v. Biddle*, supra; there is no claim here that Iowa has adopted any statute or changed her common law

since the Compact so as to impair the obligations which she entered into by the Compact; the claim by Nebraska is that the Iowa common law to the effect that all navigable river beds and all accretions thereto within the state are owned by the state was repealed by the Compact, or at least partially repealed so that it no longer applies in the vicinity of the Missouri River.

We have heretofore argued that implied repealers are not favored. See Division II of this Brief. At the risk of being repetitious: We again say that there are no words, clauses or phrases in the Compact which can be stretched to mean that the Compact was a repealer of any internal land title law of either Iowa or Nebraska; and this is true whether the Compact be construed liberally, literally, restrictively, or in the light of surrounding circumstances. To construe the Compact as a repealer or partial repealer of the Iowa doctrine concerning ownership of beds of navigable rivers within the state would constitute legislating by the Court, a function which the courts have always refused to perform. As stated by Mr. Justice Davis in *U. S. v. Union Pacific R. R. Co.*, 91 U. S. 72, a case cited by Nebraska, at pages 85 and 86:

> "* * * But this is extending the operation of words by a forced construction beyond their natural and ordinary meaning which is contrary to all legal rules. Courts cannot supply omissions in legislation, nor afford relief because they are supposed to exist. 'We are bound', said Justice Buller, in an early case in the King's Bench, 'to take the Act of Parliament as they have made it; a casus omissus can, in no case, be supplied by a court of law, for that would be to make laws; nor can I conceive that it is our province

to consider whether such a law that has been passed be tyrannical or not.' Jones v. Smart, 1 Term. Rep. 44-52. *Lord Chief Baron Eyre, in the case of Gibson v. Minet (1 H. Bl. 569-614), said: 'I venture to lay it down as a general rule, respecting the interpretation of deeds, that all latitude of construction must submit to this restriction, namely; that the words may bear the sense, which, by construction, is put upon them. If we step beyond this line, we no longer construe men's deeds, but make deeds for them.' This rule is as applicable to the language of a statute as to the language of a deed. * * *"

Iowa submits that if the Court were to construe the Compact as requested by Nebraska, it would really be jumping from the frying pan into the fire. If it be held that Iowa did relinquish and disclaim all of its state owned river beds and lands in the vicinity of the Missouri River by her adoption of the Compact, then the Court comes face to face with this question: Who will be the owners of these formerly state owned areas? In other words, who were the grantees of these gratuitous relinquishments and disclaimers?

Nebraska proposes three answers to these questions in paragraphs I, II and III of her prayer in the Complaint filed herein: In paragraph I, she asks this Court to say that the grantees were those private citizens who have "settled and occupied or as to which the incidents of ownership had been exercised all prior to" the Compact. In paragraph II, she asks this Court to say that the grantees were those persons who held "titles, mortgages and other liens" which had been *"recognized"* in Nebraska prior to the Compact. (It is noteworthy that at this point, Nebraska isn't satisfied to have Iowa re-

quired to acknowledge the validity of *good* Nebraska titles; she wants Iowa required to acknowledge the validity of titles *recognized* in Nebraska, whether good or not.) In paragraph III, Nebraska asks the Court to say that the grantees were all persons in whose names lands had been taxed in Nebraska prior to 1943. What is the Court to do about all those lands for which there were indicia of title or taxation in both states prior to 1943?

And, with total inconsistency, Nebraska prays in paragraph V that the Compact be enforced "so as to give full effect to its intention to settle completely ownership rights to land along or in proximity to the Missouri River and its abandoned river channels."

Without going into further detail concerning the perplexities which would necessarily arise from adoption of Nebraska's construction of the Compact, Iowa simply says: First, Nebraska's proposed construction would result in a totally inequitable and unfair distribution of public lands to private parties having no *good* or *valid* claim to them. Second, Nebraska's proposed construction would reopen myriad title questions along both sides of the boundary, which have long been considered as laid at rest, sufficient to keep the Supreme Court of the United States and the lawyers practicing near the boundary busy for years determining what private individuals are to be the beneficiaries of Iowa's largesse. Third, adoption of Nebraska's proposed construction would be like firing the starting gun for a race, the racers being all private parties desiring to own some river land, the prizes being the thousands of acres along the river not now in private

possession or taxed, and the millions of losers would be the general public, including generations yet unborn.

Nebraska counsel state on page 75 of their Brief and Argument that:

> "The law of Iowa is what the Compact determines it to be, not what Iowa officials and Iowa Courts might declare it to be without regard to the Compact."

This oft repeated insinuation that Iowa Judges and officials are either parochial, prejudiced, or are in some manner being corrupted, demeans the great State of Nebraska in view of the fact that they have not introduced one iota of evidence to support such statements. Iowa Courts and officials have always recognized the Compact terms. True, they recognized it for what it is, a very simple unambiguous agreement as to the boundary between the two states, and private titles have been protected. See *Dartmouth College v. Rose*, and Appendix I.

Iowa agrees with the Nebraska statement that "the Compact was the result of years and years of controversy and uncertainty". But Iowa denies that the Compact was a recognition of many cut offs; it was a recognition, among other things, that there were some cut offs; but there is no evidence that there were many. We must also add at this point that Nebraska land owners did not hesitate to protect their rights when their land was isolated on the Iowa side of the river, such as at Nebraska City Island, Brower's Bend, California Bend, Winnebago Bend, and others. Nor did the State of Nebraska hesitate to exercise sovereignty over Iowa areas isolated on

the Nebraska side of the river. She even attempted to exercise sovereignty over Carter Lake, Iowa. (*Nebraska v. Iowa,* supra, 1892.)

Nebraska counsel have gone to great lengths to emphasize the wild, rampant, eroding characteristics of the Missouri River and the long history of negotiations between the States. This merely supports the contention of Iowa that after so many years of negotiations and consultations, the document finally drafted and adopted would contain the entire intent of the contracting parties, and if the Compact were to abrogate or invalidate any statutes or rules of law, of either state, it would have been spelled out in the document. It is a concise, unambiguous document, and should not be altered under the guise of interpretation.

Good titles to lands located within the territorial boundaries of Nebraska prior to the 1943 Boundary Compact, and under the Compact terms ceded to Iowa's jurisdiction, should be recognized by the State of Iowa and Iowa Courts in accordance with the principles of law of the State of Nebraska as of the date of the Compact. Titles to lands never in the State of Nebraska, either before or after the Compact, should be recognized under rules of law of the State of Iowa. The foregoing is axiomatic, and under the decisions of this Court, as well as the Courts of the various states, follows irrespective of whether a title dispute arises between the State of Iowa and a private citizen or between two or more private citizens. Title to many of the areas claimed by Iowa as State trust lands are not in dispute: some have been obtained by purchase: some have been decided by courts

of competent jurisdiction (both for and against the state): and others are being challenged in courts of competent jurisdiction. Each parcel claimed has a unique history and unique fact situation. There are no typical areas and a decision as to one disputed parcel will not be determinative of any of the other disputed areas.

Nebraska would have this Court enjoin the State of Iowa from protecting its trust lands along the Missouri River from adverse claimants, apparently on the broad assumption that the present boundary is uncertain, and ergo, it is impossible to determine if any specific parcel was ceded, ever in Iowa, or ever in Nebraska. The evidence reveals this broad assumption does not apply to those areas now claimed by Iowa, nor to those areas disputed by Nebraskans. The truth of the matter is that Nebraska and a few Nebraskans would like to be able to prove that certain lands along the river were in Nebraska before 1943 and that these lands were therefore ceded; this they cannot do because, as a matter of fact, the lands were not in Nebraska before 1943 and are not ceded lands. In the extremity of their dilemma, they want this Court to treat all lands in the vicinity of the river as if they had been ceded, drawing a demarcation line somewhere back east of the boundary, and telling Iowa to "keep hands off" thousands of acres acknowledged to be within Iowa's sovereignty and dominion. If this had been the intent of the parties when adopting the Compact in 1943, they should have located the new boundary some two or three or more miles east of the middle of the designed channel. The fact that they didn't do so is proof positive that they intended no such

interpretation of the Compact as Nebraska seeks in this case.

The aspect which Nebraska would overlook and have this Court overlook is that Iowa, in addition to being a sovereign signatory to the Compact, was also a land owner of thousands of acres of land and river bed along the river in and prior to 1943. Yet, Nebraska would have this Court say that the Compact was designed to preserve and protect only *private* titles. This would mark the Iowa Governor and legislators who were charged with protecting and preserving the public interest as mental retardates or worse.

There is nothing in the Compact, or in the "history leading up to the Compact", or "in the state of things existing at the time and the circumstances under which the agreement was made", or in "the practical construction placed upon" the Compact by the parties, which can entitle Nebraska to the Compact interpretation and construction which she seeks.

The loss of Iowa's trust lands would be a loss not only to the State of Iowa, as such, but to the people of Iowa and under expressed plans for recreational development, a loss to the people of Nebraska and other neighboring states as well. As stated in *Charles River Bridge v. Warren Bridge*, 11 Pet. 420 at 431:

> "While the rights of private property are sacredly guarded, we must not forget that the community also have rights, and that the happiness of and well-being of every citizen depends on their faithful preservation."

It is unconscionable to think that the responsible officials of Iowa in 1943 were utterly derelict in their duty to protect the public interest. And now, as then, it is the duty of Iowa officials to defend the titles to its trust lands, whenever and wherever they are attacked, and this Court should support Iowa in these endeavors. Future generations will thank us, not castigate us, for our effort.

X.

Nebraska's Proposition X states:

> **"General rules of construction apply in the interpretation and meaning of agreements between states. Such agreements are to be interpreted with a view to public convenience and the avoidance of controversy and the great object where it can be distinctly perceived, ought not to be defeated by those technical perplexities which may sometimes influence contracts between individuals. Considerations which govern the diplomatic relations between states require that their obligations should be liberally construed so as to effect the apparent intention of the parties to secure equality and reciprocity between them."**

And Iowa has no quarrel with the broad principles set out, but we do not agree with Nebraska's application of the principles to this case.

The proposition set out under X alludes to rules of construction, but the argument set out under X is concerned with acquiescence by Iowa in not attacking the claims of interlopers immediately after the Compact. They appear to say Iowa's actions indicate acquiescence

in the claims of individuals: How do they square this with the undisputed fact that Iowa was on the scene at Nobles Lake asserting its ownership and rights in 1944?

Iowa is criticized for not taking possession of the islands and abandoned channels which came to be hers as they formed. We respond that Iowa did take possession in the only way the public can do so, when public use of the various areas commenced; to build fences around them and thus to prevent public use would have stopped their use by the very people who owned them, in addition to destroying their utility as wild and natural areas.

Complaint is made that Iowa's so-called long delay in asserting her claims at Nottleman Island and Otoe Island placed the adverse claimants at a disadvantage. We ask, why should Iowa bear all blame for this passage of time? What was preventing the individual claimants from quieting their so-called titles at any time they wanted to? They can't get by with saying they didn't know that their claims were flimsy and weak. Something was awry when various parts of Nottleman Island were changing hands by Quit Claim Deed for considerations ranging from $2.00 to $3.00 per acre, without abstracts, and on one occasion at least, "sight unseen". Why did Babbitt, Watts, O'Brien, Sargent, et al, retain Whitney Gillilland in about 1952 to find out whether or not Iowa claimed the island? Why didn't Mr. Gillilland do the normal thing for a lawyer to do under the circumstances and commence a quiet title action in their behalf? Could it be that Mr. Gillilland knew his clients had brought a losing case to his office? Perhaps, with Mr. Beckman asleep in his office in far away Des Moines at that time, the maneuver

might have worked. Why did Mr. Henry Schemmel start writing letters, as Deputy County Treasurer of Otoe County, Nebraska, to the County Recorder of Fremont County, Iowa, in 1939, if he had full confidence that Otoe Island was in Nebraska and his property under Nebraska law? Why all the elaborate maneuverings with tax sales and tax deeds at both islands, with wives and daughters purchasing and acquiring the tax deeds? These things should be recognized for what they are: the classic methods of lifting yourself by your own boot straps; the time worn methods of creating the appearance of a chain of title where there really is no title. See Appendix K for evidence concerning knowledge of claimants.

In argument for her Proposition X, Nebraska quotes from *Handley's Lessee v. Anthony* and *Massachusetts v. New York*. We note that the South Dakota Supreme Court had occasion to consider how these two cases might affect the 1905 Nebraska-South Dakota Boundary Compact in the case entitled *Dailey v. Ryan*, 71 S. D. 58, 21 N. W. 2d 61 (1946). At page 64 of 21 N. W. 2d, Judge Smith, considering the same two quotes set out out by Nebraska, spoke for the Court as follows:

> "These authoritative expressions must be read in the light of the fact that the court was interpreting treaties and grants which employed broad general terms to describe a boundary line. They furnish a guide in the exercise of judicial power in construing ambiguous compacts between states. They are not authority for the proposition that a court may substitute its notions for the judgment of the high contracting parties to an unambiguous boundary compact. In dealing with such a compact a court, we think, has no

other function than to declare and enforce its clear and definite terms."

And the Court rightly and properly refused to embark upon any interpretation or construction of the Compact there at issue. It was held that the 1905 Nebraska-South Dakota Compact described a boundary clearly and certainly, although the description was simply that the boundary would be the middle of the Missouri River as it ran in 1905. Compared with the boundary description in the 1905 Compact, Iowa submits that the boundary description in the 1943 Iowa-Nebraska Compact is a jewel of definiteness and preciseness.

Before leaving our discussion of *Dailey v. Ryan,* we must remark that it was there claimed that Nebraska had acquiesced in a boundary other than the boundary fixed by the 1905 Compact, and the South Dakota court held that there was no acquiescence by Nebraska because no knowledge had been proved.

Nebraska's argument, as we understand it, is that the Compact of 1943 had this effect:

In every instance where Iowa has reason to believe it owns land in the vicinity of the Missouri River, it is required, as a preface to inquiry into ownership by judicial proceedings, to ascertain whether any individual had any indicia of title to such land in Nebraska. This whether the land was ever in Nebraska or not. If Iowa finds any indicia in Nebraska referable or possibly referable to a spot under the sky now occupied by the tract in question, she must stop, and acknowledge that she has released and relinquished her ownership of that tract. This

whether the same identical land existed in that spot under the sky or not. To hold that the Compact had this effect would be truly monstrous. It would mean that during the time when the boundary was moving as the thalweg of the river moved, it moved in only one direction: east, never west; with every eastward movement, Nebraska gained, but she never lost, even when the river moved westward; with every eastward movement, Iowa lost, but she never gained, even when the river moved westward. It would mean that every spot under the sky which had any indicia of title pertaining to it in Nebraska prior to 1943, was conclusively in Nebraska on July 12, 1943, and therefore ceded to Iowa by the Compact. "Once in Nebraska, always in Nebraska", is the law, says Nebraska. More precisely, "Once taxed in Nebraska, or once quitclaimed in Nebraska, or once probated in Nebraska, always in Nebraska", is the law, says Nebraska. The courts have always said that the common law of accretion, reliction and avulsion is equitable and fair because the parties riparian have the chance of loss to offset the chance of gain. Nebraska's proposals would remove all equity and fairness from the picture.

Any indicia of title, Nebraska says, constitutes title good in Nebraska; and no inquiry may be made. Never mind that the tract may never have been in Nebraska. Never mind that it may not be the same identical land. Never mind that the indicia may be something less than good.

Nebraska took the position at page 24 of her Supplemental Brief in Support of her Motion for Leave to File

Bill of Complaint that this Court should take jurisdiction in this case for the purpose of protecting "certain rights of its citizens * * * (in) land * * * being transferred to another jurisdiction * * *." Iowa agrees that it is precisely these lands—those "transferred to another jurisdiction"—which are the subject of the reciprocal promises made in the 1943 Compact. Nebraska seems to be saying now that because of Iowa's failure to abide by the Compact with reference to Nebraska lands ceded and the failure of both states to provide for the identification and description of lands transferred, all lands along the river must be treated as transferred. She complains that her citizens are being subjected to a "unilateral determination" by Iowa courts as to whether certain lands were transferred or ceded land. She conveniently declines to recognize the patent injustice of a construction of the Compact which would permit an individual Nebraskan or Iowan to quiet title in himself to riparian lands merely by paying taxes on it to a Nebraska county or causing it to be listed on the tax rolls some place. This would constitute "unilateral determination", by an individual that he owns land, and any such self-serving determination by an individual is certainly not as credible as a decree by an Iowa court in a formal proceeding in which all claimants to the land appear. Nebraska would foreclose inquiry; Iowa would inquire, and has done so.

Nebraska would have the Court hold Iowa responsible for the problems created, not by the Compact itself, but by a disintegration of the factual structure on which that Compact was predicated. This disintegration has made inquiry a necessary preface to justice for all

affected parties. The Compact was entered into at a point in time when the Corps of Engineers had placed the Missouri River in its "proposed stabilized channel", and had surveyed the Missouri River, run control lines on both sides of their proposed stabilized channel, erected check points on said control lines and prepared detailed maps of the river setting out the "proposed stabilized channel". The boundary line was defined in the Compact with all definiteness possible without an actual survey. After describing the line around Carter Lake, the boundary running northerly was:

> "* * * produced to the center of the channel of the Missouri River; thence up the middle of the main channel of the Missouri River to a point opposite the middle of the main channel of the Big Sioux River."

Running southerly from Carter Lake to the Missouri's northern boundary, the new boundary was described in the same language. Then this language was added:

> "* * * The said middle of the main channel of the Missouri River referred to in this Act shall be the centerline of the proposed stabilized channel of the Missouri River."

Obviously both states considered the river permanently confined, or on the verge of a certain confinement, within a stabilized channel. No longer were both states and the citizens of both states to be plagued by the problems of a wildly vagrant river.

Both states were wrong, largely for reasons over which they had no control. World War II was in progress. Funds and manpower were diverted; stabilization

of the river escaped the grasp of the Army Corps of Engineers, and the river, untended, fled in many places from the designed channel. After the war, the Corps found it more practical not to attempt to place the river back into the designed channel in all places. So, they redesigned a different channel upstream from Wilson Island, and now the actual river channel and the boundary as defined are not identical in all places.

During the period of time that the river escaped the grasp of the Army Corps of Engineers, it behaved as it had historically; it eroded its banks, washing away land; it added to land by accretion; it subtracted from what some riparian owners owned and added to what others owned; it moved suddenly from its channel in at least one place (Soldier Bend) by avulsion; it spawned sandbars, some of which became islands. All of the ancient consequences of unconfinement reasserted themselves. Neither state was responsible for this or anticipated this; indeed both acted on a presumption that the river was no longer wayward. Retrospectively, it can be argued that the states should have provided in the Compact for such contingencies.

Is it a judicial function now to supply the Compact clauses which the states did not supply? Iowa thinks not. More particularly, is it the Court's function now to enjoin and restrain Iowa from even causing judicial determinations to be made concerning ownership of these newly formed areas? Iowa thinks that would be the rankest form of injustice. If omissions were made in the 1943 Compact, Iowa submits that they can only be supplied

by another Compact between the two states, negotiations for which are already underway. It is a political matter, not a judicial matter. The Court is limited to interpretation or construction of what was written in 1943 and declaration of the common law of accretion and avulsion insofar as applicable.

XI.

Nebraska's Proposition XI states:

> **"In construing Compacts and agreements and in ascertaining their meaning, it is proper to look to the practical construction placed upon them by the parties. Want of assertion of power by those who presumably would be alert to exercise it is equally significant in determining whether such power was actually conferred."**

Iowa submits that the foregoing statement is an attempt by Nebraska counsel to state the *doctrine* of *estoppel* without using the word *estoppel.* But regardless of what words are used or not used, the theory here put forward is that of *estoppel.* We have heretofore stated and argued that estoppel is not an issue here. (See pages 16, 17 and 18 of this Brief.)

Nebraska summarizes the facts which she relies on to sustain Proposition XI at page 84 of her Brief, but we must look to the record for the facts.

The facts of record as regards Nottleman Island are: that Iowa didn't commence the case of *Iowa v. Babbitt, et al.*, until 1963, but she was prosecuting her rights and

defending herself at other locations, in state and federal courts, commencing in 1947; that Mr. Ray Beckman, an employee of the Iowa Conservation Commission, wrote a letter in 1951, without the knowledge or consent of the Commission or any member thereof or any other responsible official of Iowa, stating that Iowa didn't own Nottleman Island; that Mr. Whitney Gillilland, as attorney for Babbitt, Watts, Sargent and O'Brien inquired of the Iowa Attorney General whether or not Iowa claimed Nottleman Island, erroneously stating that the island had been in Nebraska and had come into Iowa by cession; that without independent investigation and in reliance on the correctness of Mr. Gillilland's statement of the facts, the Attorney General took no action; that the county officials of Mills County recorded muniments of title and entered the island on the tax rolls commencing in about 1948 after having been commanded to do so by Writ of Mandamus issued in a case to which Iowa was not a party; that no Iowa governmental agency was keeping a record of state owned lands, river beds, or abandoned river beds along the Missouri River; that Iowa didn't prosecute some quiet title actions which counsel for Nebraska thinks she should have.

The facts of record as regards Otoe Island are: that Iowa didn't commence the case of *Iowa v. Schemmel, et al.*, until 1963; that the county officials of Fremont County started recording muniments of title and entering the island on the tax rolls in about 1949. (See testimony of Winifred Rhoades, Appendix K.)

Wherein did the sovereign State of Iowa do something or fail to do something to indicate that she was

placing some "practical construction" on the Compact, which now bars her from owning land in the vicinity of the river? Is the fact that *Iowa v. Babbitt, et al.*, and *Iowa v. Schemmel, et al.*, were filed in 1963 construable that the power to commence said cases did not exist? We think not, especially in consideration of the surrounding circumstances appearing of record.

The facts of record are that the Corps of Engineers had assured both Iowa and Nebraska in 1943 that the wild Missouri River had been or soon would be entirely tamed and confined to a certain designed channel; that the disasterous floods were a thing of the past. Both states discovered, almost before the ink was dry on the 1943 Compact, that the assurances by the Corps could not and were not being kept. The river that had been tamed went wild again. The second highest flood stage ever recorded on the river was recorded in 1952, and this 1952 flood was the worst in history in terms of dollar damage. At about this time, the Corps began redesigning the "designed channel" but nobody knew what the redesign would look like for several years; nobody knew where the river would be, what lands would be destroyed, what lands would remain, where the abandoned channels would be, what new lands would be formed, or where new ox-bow lakes would be made. Even after the redesigned channel was on paper, nobody knew how the Corps would do the work, whether there would be a few canals, many canals, or no canals; nobody knew whether the relatively narrow and deep navigation channel would again be attained by gradually pushing the river banks inward as had been done in the 1930's; nobody knew

whether the Corps would permit the ox-bow lakes to remain as lakes or whether they would be filled and made into land. The only practical policy for Iowa to adopt during this period of uncertainty was a policy of "wait and see". Then, as the material facts began to emerge, Iowa acted. Investigation extended over several years and culminated in the publication of Part I of the Missouri River Planning Report in January, 1961; Iowa was in Federal Court defending her rights at Tyson Bend in 1958; she was in court asserting her ownership of Deer Island in 1959; she was in court protecting her rights at Omadi Bend before November 3, 1958; she was settling her boundary at Wilson Island in 1960; her men were erecting signs and building fences. How this conduct by Iowa can be twisted into a "practical construction" of the Compact that Iowa had relinquished all her trust lands along the river is more than we can see.

Additional answers to Nebraska's Proposition XI are:

Concerning the acts of Mills and Fremont County officials, it has been held that the acts of the agents of one governmental body cannot be imputed to another. In *In re Morrison County*, 120 Minn. 147, 139 N. W. 286 (1912), it was held that an admission made by a county attorney in a pleading to the effect that a prior judgment for taxes was valid was not binding on the State, so as to estop the State to claim further taxes. The Court said, at 139 N. W. 289:

> "The alleged admission of the county attorney is not, however, clearly shown; but we predicate our de-

> cision on the rule that public officers cannot bind the state by acts which, as to individuals, might constitute an estoppel. (Cases cited.)"

Erroneous or wrongful collection of taxes by taxing officials do not work an estoppel against the city, county or state. The lands in question are islands and accretions, and as such, are the property of the State of Iowa. Iowa Code Section 427.1 (1) provided:

> 427.1 Exemptions. The following classes of property shall not be taxed:
>
> 1. Federal and State property. The property of the United States and of this State . . .

Thus, the land in question, belonging to the State of Iowa, was improperly and illegally levied upon by county officials. It has been uniformly held throughout the country that States shall not be estopped by the unauthorized conduct of their officials. See *Arkansas State Highway Commission v. MacNeil*, 222 Ark. 643, 262 S. W. 129 (1953); *State ex rel. Com'rs of Land Office v. Frane*, 200 Oklahoma 650, 199 P. 2d 212 (1948). In Iowa, this doctrine has also been approved. See *Independent School District of Ogden v. Samuelson*, 222 Iowa 1963, 270 N. W. 434; *Board of Park Commissioners v. Taylor*, 133 Iowa 453, 108 N. W. 927. In the latter case, the defendants contend, among other things, that plaintiffs were, by virtue of the levy and collection of taxes upon property, estopped to claim any interest therein. The Court said at 133 Iowa 464-465:

> "There is some contention on behalf of defendants as to adverse possession and estoppel. But, as against the State, holding title to the beds and banks of nav-

igable rivers for the public, there can be no adverse possession.

"As to estoppel it is sufficient to say that the State and plaintiff claiming under the State, could not be estopped by acts of city officials. *Simplot v. Chicago, M. & St. P. R. Co.*, (C. C.) 16 Fed. 350 (5 McCrary 158). And in general, to the effects that unauthorized acts of officials will not estop a municipal corporation. (Cases). Thus, the levy of and collection of taxes on property will not estop a city from asserting title to the property for the public."

Accord: *State v. Ball*, 90 Neb. 307, 133 N. W. 912. *Howard County v. Bullis*, 49 Iowa 519 (1878), contains the following language:

"The acts of the county were done by its officers. If these acts were in violation of law, they can have no effect to bind the county setting up the invalidity of these acts. This proposition is obvious. If it be not true the county can have no protection against the unlawful acts of its officers. The lands, being county property, were not taxable. The assessments, sales, and deeds were therefore, void. A void act is no act; it is binding for no purpose. How can it be said, then, that the void acts of the county officials will operate to bind the county through representation which the law will infer therefrom? In truth, these acts, being in violation of law, have no force for any purpose."

Levy and collection of taxes by agents of the county was illegal. Under the above authorities, it is submitted that the State cannot be bound or estopped by the acts of county or state officials, which are done in excess of their authority.

Where a party having suffered a detriment seeks to invoke the doctrine of estoppel, it must be shown that the detriment was incurred in reliance upon certain conduct of his adversary which might reasonably be anticipated to *induce* reliance. Nebraska contends that the collection of taxes and acts of officials constitute such conduct. The authorities demonstrate that the law is otherwise.

Plaintiff here seeks her desired interpretation upon the basis of collection of some taxes, fencing of some of the land, use and occupancy, and isolated acts of State officials, but not possession of the land over a considerable period of time or the construction of valuable improvements. The equities in favor of complainant are insubstantial, subtle and tenuous. They have no persuasive force. All cases cited in this Brief and numerous others deleted for brevity, may stand together as examples of various factual situations affected by the same principles of law. An examination of these authorities indicates that each case in which a party seeks an estoppel (which Nebraska's argument is in fact) against the State must be viewed upon its own facts, and a decision rendered in accordance therewith.

Payment of taxes is not of great probative value as to ownership, even under Nebraska law, as demonstrated by the Nebraska decisions in following cases:

In *James v. McNair*, (Neb.) 81 N. W. 2d 813, the Nebraska Court said quoting:

"*Lantry v. Parker*, 37 Neb. 353, 55 N. W. 962, at page 963. 'The law does not require that possession

shall be evidenced by complete enclosure, nor by persons remaining continuously upon the alleged land and constantly, from day to day, performing acts of ownership thereon. It is sufficient if the land is used continuously for the purposes to which it may be, in its nature adopted.' We think the evidence adduced by the appellees discloses that they and their predecessors in title have, for more than 10 years, maintained such an actual, continued open and exclusive possession of the land they are now claiming that they are entitled to have their title thereto quieted and confirmed. In this respect, we have not overlooked the fact that appellants, and their predecessors in title paid taxes on part of this land over a period of years, as did appellees. Such payment while indicative of a claim of ownership, does not overcome the actual ownership of appellees obtained by adverse possession. As to the effect thereof, see *Purdum v. Sherman*, 163 Neb. 889, 81 N. W. 2d 331."

In the *Purdum v. Sherman* case, infra, the Nebraska Court said:

"The plaintiffs claim that they had asserted their title to the disputed tract by paying the taxes, placing a mortgage on the land, by executing an oil and gas lease, and in securing a permit for a railroad crossing in 1948. The taxes, mortgage and mineral lease included the disputed acreage only by the use of the description of the Northeast quarter of the Southwest quarter of Section 31, as it appeared in their Deed. They indicate nothing more than the deed itself."

In *Worm v. Crowell*, 87 N. W. 2d 384 (Neb.), the Nebraska Supreme Court on Page 392 said:

"The official tax records of DeSoto precinct in Washington County, wherein this land is situated,

> also evidences the fact that the river, at some time changed its course and washed away almost all of the land patented to Constance Cochelin because, for a long period of time, only a fractional part (3 acres) of appellees' south 40 was assessed for taxation purposes. Considered the way in which this land was assessed over the years herein involved, we do not think the payment of taxes thereon by either the Woods or appellee to be very significant."

Insofar as the opinion of a State Conservation official that the Nottleman Island area was not claimed by Iowa in 1951, or not listed as State-owned lands by those having a duty to list them as such, it has been long-established and accepted that neither a County, State or Federal government can be bound by the acts of its officers when they depart from the requirements of the law. See *Howard County v. Bullis*, supra, holding that not even the county is bound by the unlawful acts of its own officials.

In *Moffatt v. United States*, 112 U. S. 24, at page 31, the Supreme Court of the United States states:

> "* * * The Government does not guarantee the integrity of its officers nor the validity of their acts. * * *"

Nebraska would have the Court overlook the very important fact that Iowa became the owner of most of the areas which she owns along the Missouri River by the facts of how, where and when the areas came into existence and by the operation of law upon those facts. No overt act by any state official was necessary in order for these areas to become state owned. Iowa submits that if land formed east of the Iowa-Nebraska Boundary

as accretion to the State-owned river bed, it became Iowa property, and as a Sovereign State, its land titles were not subject to adverse possession and not subject to taxation. The areas were used primarily for public fishing, hunting and recreation until about 1934 at Nottleman and 1953 at Schemmel, and were not truly permanent prior to those dates. Assertion of power by the State of Iowa the next day after the 1943 Compact was finalized would not have created a better or greater title in Iowa, and failure of the State of Iowa to establish the islands as state-owned lands would not have created a title in the claimants. Iowa submits it has always protected its land titles whenever they have been attacked, and whenever adverse claims become apparent, such as occupancy and conversion to private use.

XII.

Nebraska's Proposition XII is as follows:

> **"Boundaries between states are of solemn importance and should not be subject to change by man-made works where the United States Army Corps of Engineers arbitrarily created a new designed channel for the Missouri River and then, by construction and dredging, moved the river into that designed channel."**

Iowa's responsive Proposition is:

> **Whether or not a particular lateral movement of a boundary stream was accretionary or avulsive has never and does not depend on whether such movement was natural or resulted from the works**

of the U. S. Army Corps of Engineers or some other third party, if the Corps moved the channel by a method which meets the tests of accretion, the same legal results flow from the movement as would flow from a naturally accretionary movement; if the Corps moved the channel by a method which meets the tests of avulsion, the same legal results flow from the movement as would flow from a natural avulsion. Each movement must be studied and judged on its own particular facts.

Iowa does not wish to be misunderstood as saying that the Corps of Engineers never created a man-made avulsion on the Missouri River. Certainly, St. Mary's Cut-Off, DeSoto Bend Cut-Off, California Cut-Off and Peterson Cut-Off were man-made avulsions. These are examples which come to the writer's mind at the moment.

But Iowa does deny that all movements of the channel by the Corps should be judged avulsive so that the boundary never moved after the Corps began laying their hands on the Missouri River.

The principal reason for Iowa's taking this position is that Nebraska's proposition is not and never has been the law; the cases cited by Nebraska as supporting their proposition do not support it. In *Florida v. Georgia*, 17 How. 478, the Court was considering the question of whether or not the U. S. Attorney General could properly intervene in a boundary dispute between two states. In *Whiteside v. Norton*, supra, an island had formed in the St. Louis River on the Wisconsin side of the thalweg, in Wisconsin, and had become the property of Whiteside un-

der the Wisconsin law. The Corps of Engineers, under its power to improve the river for navigation, shifted the thalweg, by dredging, to the other side of the island, without destroying the island or its identity. The Minnesota riparian owner claimed that, *because the avulsion was man-made,* the private and state boundaries moved to the new channel. The Court held no, that the man-made avulsion had the same legal effect as a natural avulsion, and the boundaries remained in the abandoned channel and Whiteside remained owner of the island. This case is authority for Iowa's Proposition XII, not Nebraska's. *State v. Bowen,* 149 Wis. 203, 135 N. W. 494, is another "island" case as stated by Nebraska in the second line on page 90 of her Brief and Argument, and the Court held again, that an avulsion is an avulsion, whether man-made or natural. In *James v. State,* 72 S. E. 600 (Ga. App.), 601, the Court noted that the boundary was "fixed and determined" by the treaty of Beaufort, and that the treaty of Beaufort fixed a "permanent boundary line between the two states, subject to be changed only by the subsequent joint action of the two states." It was held that works by the Corps of Engineers to improve navigation could not move the boundary which the states had specifically said in the treaty could only be changed by their subsequent joint action. In *Southern Portland Cement Co. v. Kezer,* 174 S. W. 661 (Tex. Civ. App.), the holding was that venue should be determined on the basis of where the boundary was before the wrongful placing of an obstruction in the river, and not on the basis of where the boundary was eight years later when plaintiff's land was flooded as a result of the obstruction.

In *Uhlhorn v. U. S. Gypsum*, supra, the Court found that the channel movement was a natural avulsion and that the boundary therefore remained in the abandoned channel.

Contra to Nebraska's Proposition XII and supporting Iowa's responsive proposition, there are literally hundreds of authorities in dozens of jurisdictions. Iowa will here limit its citations to Iowa, Nebraska and Federal cases.

A leading case on the subject in Iowa is *Solomon v. Sioux City*, supra, where the Court said (243 Iowa, page 639):

> "In an exhaustive annotation in 134 A. L. R. 467, 468, dealing with riparian owners, it is stated as a general rule that 'a riparian owner is not precluded from acquiring land by accretion or reliction, notwithstanding the fact that the accumulations brought about partly by artificial obstructions erected by third persons, where the riparian owner had no part in erecting the artificial barrier.'
>
> ". . . the land . . . was created . . . by the dikes or jetties built by the government."

See also *Abolt v. Fort Madison*, supra.

A leading case on the subject in Nebraska is *Burkett v. Krimlofski*, supra, a quotation from which is set forth at page 41 heretofore in this Brief. In *Frank v. Smith*, 138 Neb. 382, 293 N. W. 329, 134 A. L. R. 458, where a bridge had been built and dikes and obstructions placed for the purposes of narrowing the river, the Nebraska Court wrote at length on the subject as follows (134 A. L. R. pages 463, 464 and 465):

"The facts in the instant case fail to disclose avulsion, in any particular; rather, the process was gradual and imperceptible by the deposit of the solid material called by alluvion. Such deposits attached to plaintiff's land. The additional effect of the obstructions during the course of time caused the land to become uncovered by the gradual subsidence of the water. This would be reliction, and the same law applies to both of these forms of addition to real estate which are held to be the property of the abutting landowner. See R. C. C. 226, Sec. 1.

"'Where the water of a river gradually recedes changing the channel of the stream, and leaving the land dry which was theretofore covered by water, such land belongs to the riparian proprietor.' *Topping v. Cohn*, 71 Neb. 559, 99 N. W. 372; followed in *Conkey v. Knudsen*, 135 Neb. 890, 284 N. W. 737. *That the accretion or reliction was caused by other than natural causes does not affect the rule of accretion.*

"In the case of *County of St. Clair v. Lovingston*, 23 Wall. 46, 23 L. Ed. 59, the question involved was the right to accretion which had been formed by reason of obstructions placed in the river, the contention being that the accretion was caused wholly, by such obstructions, and that the rules upon the subject of alluvion would not apply. The Court said (23 Wall. page 66, 23 L. Ed. 59): 'The proximate cause was the deposits made by the water. The law looks no further. Whether the flow of the water is natural or affected by natural or affected by artificial means is immaterial. * * *'

"In 1 RCL 233, Section 7, it is said: 'But if the accretion is indirectly induced by artificial conditions created by third parties it would seem that the right of the riparian owner to such accretion would not be affected, and such appears to be the holding of a majority of the cases.' In support of the foregoing are cited *Lovingston v. County of St. Clair*, 64 Ill.

56, 16 AM Rep. 516, and note (*County of St. Clair v. Lovingston*, supra); *Adams v. Frothingham*, 3 Mass. 352, 3 AM Dec. 151, and other authorities.

• • •

"The evidence in the instant case shows that the land involved was formed by accretion by the river receding from its former south bank in a gradual process, brought about purely by the construction of irrigation works, dikes and the fills for bridges. There was no rapid and sudden change of channels and the seeking of a new bed, as required in avulsion. We believe that, under the circumstances and evidences disclosed, plaintiffs are entitled to the land in controversy, and as described in their petition, by accretion and that in such respect the trial court did not err." (Italics added.)

See also: *Heider v. Kantz* (1957), 165 Neb. 649, 87 N. W. 2d 226; *Ziemba v. Zeller* (1957), 165 Neb. 419, 86 N. W. 2d 190.

Perhaps the leading case on the subject of man made accretions by the Supreme Court of the United States is *County of St. Clair v. Lovingston*, supra, cited by the Nebraska Supreme Court in the above quotation from *Frank v. Smith*.

Most recently, Special Master Marvin Jones in *Louisiana v. Mississippi*, No. 14 Original, October Term 1962, cited *County of St. Clair v. Lovingston* with approval and followed the rule in his Report; said Report was "in all things confirmed" by the Supreme Court of the United States on April 18, 1966. 384 U. S. 24, 16 L. Ed. 330, 86 S. Ct. 1250.

Again, at this point, Iowa must remark on the inconsistencies in Nebraska's positions and arguments. These inconsistencies are called to mind by two paragraphs in her Argument under Proposition XII. First, there is the paragraph immediately following the quotation on page 87. If it is really unthinkable that the state boundary should not follow movements of the channel caused by Corps of Engineers construction, isn't it even more unthinkable that county officials and local residents should have the power to change the boundary, which, as Nebraska says, can only be changed by agreement of the states and with the consent of Congress? Second, in the last paragraph commencing at the bottom of page 92, Iowa submits that Nebraska is contending for a rule which would create absolutely insoluble problems all along the boundary from Sioux City downstream to the Iowa-Missouri line; Nebraska asks this Court to say that neither the state boundary nor any private boundaries moved as a result of any channel movements caused by the Corps of Engineers construction. When would they put this rule in force? When the Corps first worked on a few bends back in the 19th century? When the Corps returned to the river and went to work on it in earnest in the early 1930's? When they drove the first piling in the particular bend in question? When they first went to work in the bend immediately upstream from the bend in question? How about the man-made construction of other agencies than the Corps of Engineers, such as the railroads and highway authorities, who tinkered with the channel at every bridge-site? How about levee and drainage districts up and down the river who tinkered with the channel in their efforts to protect the lands from

floods? Why should the Corps of Engineers be singled out as the one third party agency whose works didn't affect or change the boundary? How does one determine precisely where the thalweg was immediately prior to Corps construction? Nebraska would eliminate the use of Corps soundings, etc., for this purpose, leaving the Court to determine where the preconstruction boundary was on the basis of the recollections of old-timers witnesses as to where the steamboats went.

In the same Brief, while proposing this utterly unworkable rule of law, Nebraska asks that the 1943 Boundary Compact be so construed as to lay at rest all problems of the Missouri River Valley. (See last paragraph, Nebraska's Brief, page 104.)

XIII.

Nebraska's Proposition XIII is:

> **"A state which acquires land in another state can claim no sovereign immunity or privilege with respect to this land and the state holds this land as a subject and not as a sovereign. The same principles should apply to lands on both sides of the Missouri River and Iowa should not be entitled to assert rights or claims merely because the Compact placed the lands within the jurisdiction of Iowa."**

Iowa would correct the first sentence of the above proposition and state:

> **A state which acquires land in another state by consent or agreement with the other state can claim whatever immunities or privileges permit-**

ted by the agreement or the laws of the state in which the land is located.

Our courts have consistently held that when one State owns property in a sister State, as a general rule, the title is held as private owner, subject to the laws and dominion of the State in which it is located. The courts have just as consistently held that sister states can by agreement circumvent this general rule.

The very general rule set out in the first sentence in Nebraska's proposition above is correct, but there are exceptions to most rules, including this one. There is nothing in the line of decisions cited by Nebraska that prevents states from contracting any type of title they require to accomplish the purpose of their compact. This is pointed out in 81 Corpus Juris, Section 104, page 1077:

> "(1) *Land situated in another state.* A state can not hold land in another state if the latter state objects thereto, but it may do so with the consent of such other state. Where a state has acquired land in another state with the tacit consent of the latter, its title can be divested only by some proceeding by that state in the nature of office found, and it can not be impeached by a private individual in the absence of any action by the state." * * *

In the case of *Phillips, et al v. Moore*, 100 U.S. 212, 25 L. Ed. 603, a portion of a grant of land in Texas had been conveyed to a resident and citizen of Mississippi, contrary to laws of Mexico and Texas prohibiting aliens and non-residents from holding land in Texas. There the Court stated on page 212:

> "(2) By the common law, an alien can not acquire real property by operation of law, but may take it

by act of the grantor, and hold it until office is found; that is, until the fact of alienage is authoritatively established by a public officer, upon an inquest held at the instance of the government. The proceeding which contains the finding of the fact upon the inquest of the officer is technically designated in the books of law as 'office found.'" * * *

Again in *Hauenstein v. Lynham*, 100 U. S. 484, 25 L. Ed. 628, the Court stated at page 484:

"(3) By that law 'Aliens are incapable of taking by descent or inheritance, for they are not allowed to have any inheritable blood in them.' 2 BL. COM., 249. But they may take by grant or devise though not by descent. In other words, they may take by the act of a party, but not by operation of law; and they may convey or devise to another but such a title is always liable to be divested at the pleasure of the sovereign by office found. In such cases the sovereign, until entitled by office found or its equivalent, can not pass the title to a grantee. In these respects there is no difference between an alien friend and an alien enemy. *Fairfax v. Hunter*, 7 Cranch 603."

In *City of Louisville v. Babb*, 75 Fed. 2d 162 at page 167:

"Where the law of other States has made the purpose for which property is used the test of whether it should be exempted from taxation, it has been held ownership is not material."

(Question: Could Kentucky Municipal Bridge between Kentucky and Indiana be taxed by Indiana in light of her constitutional exemption of property from taxation that is used for "Municipal" purposes. Court held Indiana constitution exempted bridge as it was used for public and hence municipal purposes.)

In *Dodge v. Briggs*, 27 Fed. Rep. 160 at pages 171 and 172, Court states:

> "An alien may hold lands in Georgia and while the comity which exists between States of our Union, will not, in my judgment, legalize the purchase and possession of lands by one State in another State, as a general proposition, *still it will permit a State of the Union to authorize or tacitly sanction such a transfer of the title to lands in its territory to a sister State as will prevent the latter from loss.* In order to vitiate the title of the State of Indiana, some proceeding in the nature of 'Office Found' must have been adopted. It must be understood also that when the State of Indiana bought these lands it came as a subject, and not as a sovereign. It is to be presumed that the State of Indiana got the lands for a legitimate purpose. It is to be further presumed that the State of Georgia would have objected had it seen proper to enforce its political and exclusive rights." (Italics added.)

It is apparent from the foregoing that if it were the intention of the contracting states that by virtue of the 1943 Compact Nebraska land titles were to retain all appurtenances and riparian expectancies, existing under Nebraska law at that time, after their being ceded to Iowa, even where contrary to Iowa title laws existing at that time, then it must follow in logical sequence, that Iowa land titles ceded to Nebraska must also retain all appurtenances and immunities existing under Iowa law at that time, even though not in conformity with Nebraska law. It would also follow that if two different sets of title laws are to be imposed by the Compact upon Iowa, then two different sets of title laws are imposed upon Nebraska.

Nebraska's second sentence in this proposition of their Brief should read:

> **"The same principles should apply to lands on both sides of the Missouri River, and neither Iowa nor Nebraska, or their citizens should be entitled to assert rights or claims not allowed by the laws of the ceding state merely because the compact transferred the lands to a different jurisdiction."**

Nebraska solemnly covenanted in the Compact to hold Iowa's land titles "ceded" to Nebraska inviolate. But according to the evidence Nebraska courts have entered quiet title decrees against the State of Iowa, without having jurisdiction of Iowa, the real party in interest, and this would be so even though, as Nebraska contends, Iowa held the land only as a subject. The Nebraska courts did this without determining in most cases whether the land was ceded by Iowa, or where they so found, they ignored the fact, as in the *Krimlofski* case, supra, in which the Nebraska Court went to the ultimate end by holding that the land was formed in Iowa as an island, and had been adversely possessed by Krimlofski, as he used it for hunting and fishing, which was its highest use. We find no other case in which a State or a Federal court has held that wild, natural lands can be adversely possessed by using it for hunting and fishing, and especially where the state holds it for the use of its citizens as a hunting and fishing preserve, as does Iowa, with no evidence that Iowa was aware of the claimed adverse occupancy.

Thus, all lands owned by Iowa as a sovereign state and ceded to Nebraska by the Compact are still the property of the State of Iowa, and all Nebraska tax deeds and Quiet Titles Decrees issued or entered of record with regard to these lands since the Compact are void. Lands owned by the sovereign State of Iowa before the Compact were not subject to taxation or adverse possession, and therefore, would not be after the Compact. Applying Nebraska's argument to Iowa's titles, these attributes would be vested property rights, more so, we believe, than the Nebraska owners "expectancy" in accretion and reliction. Thousands of acres have accreted to Iowa lands and islands owned by Iowa before the Compact and now on the Nebraska side of the fixed boundary.

All of these have been possessed and occupied, contrary to Iowa's title, and are now being taxed under Nebraska law. Now if title to accretion land in Iowa shall be controlled by Nebraska law, shall not Iowa's titles, which were exempt from taxation and not subject to be adversely possessed, before the Compact, retain those attributes, even though contrary to Nebraska law?

Speculation as to what Iowa would do had the river run differently than it did and been thus controlled in a different position by the Corps of Engineers would be an exercise in futility. This is so, as evidence in the case at bar was rather clear and convincing, that the islands both above and below Rock Bluff Bend and Otoe Bend formed in Nebraska, and as previously stated, Iowa only desires property belonging to the people of Iowa. Title to the areas above and below the disputed areas have

already been determind by the Nebraska courts without interference by Iowa.

The Nebraska courts have quieted title to lands within their jurisdiction. What Nebraska is really saying under this proposition is that it was just and fair that Nebraska courts determine ownership of lands west of the 1943 boundary, whether ceded or not, but Iowa's position that Iowa courts should determine ownership of lands within their jurisdiction is untenable and unfair. The Iowa court decisions between private claimants and those between the State of Iowa and private claimants, demonstrates the shallowness of this statement.

XIV.

Nebraska's Proposition XIV is as follows:

"It is neither fair nor equitable for Iowa to rely upon any legal presumption that past movements of the Missouri River were gradual and not by avulsion."

Iowa purely and simply denies this proposition. It is most interesting and illuminating to note that, in this proposition, Nebraska virtually admits that there is a presumption of accretion as against avulsion. Nebraska only asserts that it is unfair and inequitable for Iowa to rely on it. Let it be said here and now that counsel for Iowa know of no case or authority in any jurisdiction holding that a party litigant, who has a presumption operating in his favor, is barred from relying on it for any reason. Counsel for Nebraska apparently have found no authority for their proposition; at least, none is cited:

U. S. Gypsum Co. v. Grief Brothers Cooperage Corporation, 389 F. 2d 252, is not in point.

In this cited case (*Gypsum Co. v. Grief Bros.*), the presumption concerning accretion and avulsion was not involved, but the question of whether it had been determined by prior litigation between the same parties. Also, after criticizing the conduct of the State of Arkansas and the Gypsum Company concerning their manipulations of the "island deed" in the language quoted by Nebraska at pages 97 and 98 of her Brief, it should be noted that the Court held the "island deed" good and valid because the land had in fact formed as a state-owned island and title to it must be determined under the law of Arkansas, the state within which it had formed.

Iowa counsel's analysis is that really, the "presumption in favor of accretion and against avulsion" and the "presumption in favor of a permanency of boundary lines" are but two ways of saying the same thing. And the result of the application of either presumption in any particular case is the same, to wit: *Wherever a boundary (public or private) is described as being "the middle of the river," it is presumed that from time to time and at all times, the boundary is "the middle of the river."*

In the present case, it is undisputed that, on July 12, 1943, the effective date of the Boundary Compact, the river was flowing in the designed channel; presumably that was where the boundary was (except at Carter Lake); the Boundary Compact placed the agreed boundary in this same channel; therefore, presumably, the boundary was simply changed from the thalweg to the center of the

designed channel. The above statements are applicable at both Nottleman Island and Schemmel Island.

Special Master Marvin Jones dealt with a similar matter in *Louisiana v. Mississippi*, No. 14 Original, Oct. Term 1962, commencing at page 19 of his Report:

> "The Special Master's study of the applicable case law leads to the conclusion that there are but two rules—or rather one long-standing general rule and its exception—which can be applied to river boundary changes. The general rule is that the boundary follows the changes in the main navigable channel. The exception is that when there is a cutoff, natural or artificial, the old bend that has been cut off remains the boundary in that particular area. Louisiana contends that since the cutting of the new deep-water channel was not altogether a gradual process of erosion and accretion, it must be an avulsion.
>
> "This contention is untenable. All case law and all reasoning behind these rules point to the opposite conclusion—that the general rule of the 'live thalweg' is preferable and will be applied *in all cases, unless there has been a clear and convincing avulsion.* This avulsion must be sudden and perceptible. It is conceivable that the term 'sudden' should be applied in a more flexible sense than its use in ordinary conversation. But even conceding the strength of this argument, we have been unable to find any case, with facts similar to the instant case, in which an avulsion has been found by the Court where the river remains in the same bed of the stream. In all such cases, the new channel was formed when the river 'suddenly leaves its old bed and forms a new one. * * * ' *Arkansas v. Tennessee*, 246 U. S. 158, 173.
>
> "Unless suddenness and perceptibility are not thus clearly established, the general rule must be applied." (Italics added.)

In the very recent case of *Illinois v. Missouri*, in the Supreme Court of the United States, Original No. 18, Oct. Term 1969, Special Master Harvey M. Johnsen dealt with similar problems in the following language (Page 18):

> "*As to the argument that the erosions and depositions occurring in connection with high waters and flood stages cannot be recognized as a basis of accretion rights along a stream, I know of no such rule of law. The conditions are natural and regular incidents in the history of most midwestern rivers.* Notably they have been thus recurrent in the case of the Mississippi River, as the experts of both parties agreed generally in their testimony. The volume and the force of the water during such stages increase of course the actions of erosion and deposition. *But neither the acceleration of the stream's processes nor the greater extent of results produced thereby in themselves remove such a situation from the operation of the law of accretion. Erosions and depositions are not on that basis recognized as avulsions. The distinction between accretion and avulsion lies not in the extent of a stream's natural processes, but in the character of or type of its actions.*" (Italics added.)

Judge Johnsen cites *Jeffries v. East Omaha Land Co.*, 131 U.S. 178; *County of St. Clair v. Lovingston*, 23 Wall 46 and *Nebraska v. Iowa*, 143 U.S. 359, and quotes the Court's ruling from these cases extensively, which we will not repeat here.

In *Shopleigh v. United Farms*, 100 F. 2d 287, the Court chose to quote and apply the rule as it is stated in 9 C. J. 271:

> "The presumption is in favor of present boundary lines, and the burden of proof is on the party alleg-

ing the location of the line to have been changed by the forces of nature."

In *Plummer v. Marshall*, 59 Tex. Civ. App. 650, 126 S. W. 1162, the Court expressed the thought at page 1163 as follows:

> "The party who asserts that the channel of a water course recognized as the boundary line is not in fact, at the point of controversy, the true boundary, resting his contention upon a sudden shifting of the course of the channel, assumes the burden of proving that fact."

After reviewing the evidence, the Court stated:

> "Verdicts can not rest upon guess or conjecture * * * a court that is left without knowledge of a fact after exploring to the full every channel of information must needs decide against the litigant who counts upon the fact as an essential of his claim. *Shopleigh v. Mier*, 299 U. S. 468; 81 L. Ed. 355. (Justice Cardozo)."

The Florida Court, in *Municipal Liquidation v. Tench*, 153 So. 728 at page 731, cited *Gubser v. Town*, 202 Or. 55, 273 P. 2d 430, as authority for the pointed statement that:

> "And there is a presumption of accretion or erosion as against avulsion."

The Florida Court also quoted with approval from 93 C. J. S., Waters, Section 83 as follows:

> ". . . therefore, the law seems clear as to these principles of law; in the event of erosion or submergence, the title to the land covered by water reverts to the State; erosion is presumed over avulsion; and the burden of proof is upon the party alleging avulsion."

In *Wyckoff v. Mayfield,* 130 Ore. 687, 280 Pac. Rep. 340, the Oregon Court chose to say it like this:

> "In presumption in favor of a permanency of boundary lines, the burden of proof is on the one alleging that the location of the line has been changed by the action of the forces of nature.
>
> "Plaintiffs having alleged that the gravel pit in question was their property, the burden of proof to establish that allegation is theirs. Plaintiffs rely for their evidence for that purpose upon the claim that the presumption is that the channel of the Rogue River was changed by some sudden, violent force sometime prior to 1877; but as we have seen from the authorities, the presumption is to the contrary—that is, the presumption is, following the rule of the value of natural movements or fixed boundaries, that if any change occurred at all, it was by accretion and not by a sudden and violent force. Consequently, plaintiffs failed to adduce any evidence upon their material allegation of ownership."

Iowa has chosen to set out the foregoing quotations from the courts of several jurisdictions so the Special Master here may be advised that the rule we are here discussing is not just a peculiarity of Iowa law; it is not even a minority rule; it is the general rule in every jurisdiction which has had occasion to meet the problem.

It is even the law of Nebraska. In *Bouvier v. Stricklett,* supra, the Nebraska Supreme Court cited Gould, Waters, Section 159, which cites Vattel (page 121, Book a, C. 22, Section 268):

> "For if I take possession of a piece of land declaring that I will have for its boundary the river which washes its side, or if it is given to me on that footing, I thus acquired beforehand the right of alluvion; and

> consequently I alone may appropriate to myself whatever additions the current of the river may insensibly make to my land. I say 'insensibly' because, in the very uncommon case called 'avulsion' when the violence of a stream separated a considerable part from one piece of land, * * *."

The Supreme Court of the United States subscribed to the same author, inserting the above quote in *Nebraska v. Iowa*, supra, and continued the balance of the quotation from Vattel as follows:

> "In case of doubt, every territory terminating on a river is presumed to have no other boundary than the river itself, because nothing is more natural than to take a river for a boundary when a settlement is made; and wherever there is a doubt, that is always to be presumed which is most natural and most probable."

The Iowa Supreme Court was not one bit out of order when it stated in *Kitteridge v. Ritter*, 172 Iowa 55, 151 N. W. 1097, 1098, that:

> "The land being concededly on the east side of the Missouri River, is presumed to be in Iowa."

The Court was simply following and applying the general rule.

In order to do justice to the Iowa Court, its reasoning should be set forth in more detail. The paragraph on page 1098 from which the above sentence was extracted is as follows:

> "On behalf of defendant it is claimed that in 1881 there was a sudden avulsion whereby the channel of the river was changed so as to cut off a body of land which had theretofore been upon the west side

of the river, and that the land in question is part of such detached body. We have only to do, therefore, with the weight of the evidence as bearing upon these two contentions. There are two or three important presumptions which aid the plaintiff greatly, and which impose a considerable burden upon the defendant: (1) The land, being concededly on the east side of the Missouri River, is presumed to be in Iowa. (2) Inasmuch as the land concededly lies between the riparian lots as surveyed by the government and the present east bank of the Missouri River, it is presumed to be the result of accretion and not of avulsion. *Coulthard v. McIntosh*, 143 Iowa 389, 122 N. W. 233; *Coulthard v. Stevens*, 84 Iowa 241, 50 N. W. 983, 35 Am. St. Rep. 304; *Jefferis v. East Omaha Land Bank Company*, 134 U. S. 178, 10 Sup. Ct. 519, 33 L. Ed. 872; *Mitchell v. Smale*, 140 U. S. 406, 11 Sup. Ct. 819, 840, 35 L. Ed. 442; *Hardin v. Jordan*, 140 U S. 371, 11 Sup. Ct. 808, 838, 35 L. Ed. 428; *Nebraska v. Iowa*, 145 U. S. 519, 12 Sup. Ct. 976, 36 L. Ed. 798; *State of Iowa v. Illinois*, 147 U. S. 1, 13 Sup. Ct. 239, 37 L. Ed. 55; *St. Paul & P. R. R. Co. v. Schurmeier*, 7 Wall 272, 19 L. Ed 74; *Missouri v Kentucky*, 11 Wall 395, 20 L. Ed. 116; *Nebraska v. Iowa*, 143 U. S. 359, 12 Sup. Ct. 396, 36 L. Ed. 186."

Nottleman Island, in 1943 just before the Compact, was concededly on the east side of the Missouri River, and it was therefore presumably in Iowa. Schemmel Island was the same. Iowa does not assert that this presumption is not rebuttable, and that it therefore solves this case automatically; but Iowa does say that Nebraska's evidence adduced to support its claims of avulsions at both locations, when balanced against Iowa's evidence adduced to support its claim of accretionary movement at both locations, falls far short in both quality and quantity of what is required to rebut the presumption.

XV.

Nebraska's Proposition XV is as follows:

"Iowa ignored the lands along the Missouri River until they became valuable. The misapplication of a common-law principle concerning the title to the beds of streams in disregard to the Compact constitutes a taking of private property by the State of Iowa without compensation to the land owner. Iowa is not justified in this course of conduct."

Iowa's responsive proposition is as follows:

Iowa has not ignored her trust lands along the Missouri River. Iowa does not misapply its common law principle that the state owns the beds of all navigable rivers in the state. The Compact should not, indeed cannot, be construed as repealing Iowa's doctrine that the state owns navigable river beds within her borders. Iowa seeks only what lands are rightfully hers, and this cannot be termed a taking of private property without compensation because we seek to take no private property from any private land owner. Iowa is not only justified, but she is obligated as trustee for the people to preserve state ownership of her public lands.

The evidence in this case fully and completely establishes (although it was not Iowa's burden) that the first sentence of Nebraska's proposition is incorrect and untrue. Iowa has always been interested in the areas to which it holds title, whether they be abandoned channels

filled with water, sand dunes and pot holes, islands of little value or islands of substantial value.

The Iowa Conservation Commission by its very nature and purpose is and always has been vitally interested in all wild, natural and undisturbed areas in the State without regard to their commercial or agricultural value. True, these areas on the Missouri River are invaluable to the citizens of the Middlewest for recreational purposes, and many would have great dollar value to those privileged few who would acquire title should Iowa's titles be denied. However, the statement that Iowa ignored these lands along the Missouri River until they became valuable is not only irrelevant and immaterial to any issue involved, but it is contrary to these facts as established by the evidence. See Appendix I.

When Nebraska accuses Iowa of "misapplication of a common-law principle" she must have reference to the doctrine applied in Iowa since 1856 that the state owns the beds of all navigable streams within its boundaries, all accretions thereto (islands) within its boundaries, and all abandoned beds (which became abandoned as result of avulsion). Apparently, Nebraska feels that we misapply the doctrine whenever we seek to apply it in the vicinity of the Missouri River; the doctrine is still all right with Nebraska when applied to the Mississippi; the Des Moines, the Cedar, the Iowa and all other navigable streams in or bordering Iowa; but we misapply it when we seek to apply it in the vicinity of the Missouri. And this remarkable partial repealer, resulting in the creation of two sets of title laws in Iowa, they would have us believe, came about by the 1943 Boundary Compact. No

claim is made that the Compact says any of this; but, they say, it should be construed that way because of some hazy and isolated circumstances surrounding adoption of the Compact.

Why is there no thought that, if somebody's law had to be repealed by the Compact, perhaps it might have been Nebraska's? Why is it that the people of Iowa must suffer all the loss and the individuals who have tried to gain these public lands by trespass (Iowans, Nebraskans, and non-residents of both) are secure with their plunder?

Iowa does not disregard the Compact. She recognizes the *good* Nebraska titles which were held by private parties in Nebraska City Island, California Bend, Soldier Bend, Winnebago Bend and Browers Bend. She believes that she recognizes the *good* Nebraska titles to all ceded lands which were in Nebraska before the 1943 Compact.

Iowa does not take away or propose to take anybody's private property without compensation. After all, if Iowa has owned any particular parcel of land ever since it came into existence, she can't very well be taking it from somebody else.

Only two cases are cited by Nebraska as supporting her proposition XV. Neither of them supports Nebraska's proposition, and both of them support Iowa's responsive propositions.

In *Hilt v. Weber*, 252 Mich. 198, 233 N. W. 159, the Michigan Court acknowledged that it had been wrong in holding that the boundaries of riparian lots along the Great Lakes were the meander lines as surveyed when

the lots were originally laid out; this erroneous rule had been laid down in the *Cavanaugh* cases; the Court held that "The waters themselves constitute the real boundary" (233 N. W., page 161).

As noted in the quotation at page 99 of Nebraska's Brief, it was argued by the riparian owners that the Cavanaugh rule had been depriving them of valuable rights of riparians without compensation. The Court responded that this was true and that changing the rule would return these rights to them.

It was argued by Michigan that changing the rule would deprive the public of valuable "financial and recreational benefit." The Court's answer to this was that changing the rule would not deprive the state or the public of anything it rightfully owned.

The other case cited by Nebraska is *Peck v. Alfred Olson Construction Company*, 216 Iowa 519, 245 N. W. 131. It was held that the state owned bed of Lake Okoboji is "trust land" and that, as such, it was not only the right, but also the duty of the state to maintain and promote the navigable lake, even though such works may impair or destroy a contiguous lot owner's right of access to the lake. The brief quotation from the Court's opinion at page 100 of Nebraska's Brief is used out of context; to show the Court's thinking more fairly and fully we quote further immediately following Nebraska's quote, as follows:

> "* * * The state came under the burden of maintaining the navigable lake and promoting it. The dominion thus conferred upon the state was subject to the

power and duty of the national government to regulate interstate commerce. In all other respects the dominion of the state is supreme. The question here is, which is paramount, the right of access of the riparian owner, on the one hand, or, on the other hand, the title and trusteeship of the state? The question is not a new one. It has been considered and debated by the courts of many of the states and by the United States Supreme Court. The question has never been directly passed upon in this state. *The United States Supreme Court has held definitely that the riparian owner of land in such a case takes the incidents of his titles, such as right of access, subject to the navigability of its waters and subject to those incidents of navigability, which look to its maintaining and promotion;* that the right of the government to maintain and promote navigation by whatever reasonable means it may is paramount to the right of *ingress and egress of a riparian owner.* When the national government has occasion to assert its power over navigation in the regulation of interstate commerce, it holds the riparian right of access as subordinate to the power of the government to promote navigation.

"One brief quotation from *Scranton v. Wheeler,* 179 U. S. 163, 21 S. Ct. 48, 57, 45 L. Ed. 126, will suffice to indicate the doctrine established by the Supreme Court:

" 'Whether the title to the submerged lands of navigable waters is in the state or in the riparian owners, it was acquired subject to the rights which the public have in a navigation of such waters. The primary use of the waters and the lands under them is for purposes of navigation for the public is entirely consistent with such use, and infringes no right of the riparian owner. *Whatever the nature of the interest of the riparian owner in the submerged lands in front of his upland bordering on a public navigable water,*

> *his title is not as full and complete as his title to fast land which has no direct connection with the navigation of such water. It is a qualified title, a bare technical title, not at his absolute disposal, as is his upland,* but to be held at all times subordinate to such use of submerged lands and of the waters flowing over them as may be consistent with or demanded by the public right of navigation.' " (Italics added.)

The Court then sustained the Trial Court's dismissal of the lot owner's prayer for an injunction to enjoin the construction of the wharf; it was not any taking of the lot owner's property without compensation.

The very point that Iowa attempts to make throughout the case at bar is that she has a *duty* to the people of Iowa (and to the general public, too, for that matter) to preserve and protect all public lands and waters within the state for public use and against the depredations of all trespassers or squatters who would gather these areas into their own private domains to the exclusion of any public use. Nebraska says, in the last sentence of her Proposition XV, that: "Iowa is not justified in this course of conduct." Iowa submits that she is not only "justified"; she has a duty and obligation to pursue this course of conduct.

———o———

CONCLUSION

At first glance, the first paragraph of Nebraska's CONCLUSION, commencing on page 101 of her Brief and Argument, would seem to be a harmless assembly of

platitudes with which nobody could possibly disagree. For instance, Nebraska asks the Court to construe the Compact so as to "avoid injustice, oppression or absurd consequences." To this, Iowa says "Amen". But in the next sentence, Nebraska wants the Compact "construed to protect the rights of individuals along the river." What happened to the rights of that very substantial group of individuals who constitute "the State of Iowa" and is sometimes known as "the general public"? We submit that the Compact cannot be construed so as to avoid injustice, oppression or absurd consequences unless the court keeps in mind that the construction must also protect the rights of the public. In truth, it might just be possible that the public interest in this matter is paramount, and should be uppermost in the Court's mind. *Peck v. Alfred Olson Const. Co.*, 216 Iowa 519, 245 N. W. 131, a case cited by Nebraska, is authority that the public interest is paramount.

We have been trying to say throughout this Brief that adoption of Nebraska's proposed construction of the Compact would trample the rights of the public in lands along the river and would lead to absurd consequences. In the paragraph commencing on page 102, Nebraska wants Iowa "obligated to accept as good and valid all claims to lands along the Missouri River deriving from a Nebraska title or indicia of ownership prior to the * * * Compact, including private claims to all areas over which Nebraska was exercising jurisdiction at or prior to 1943." What happened to the language of the Compact that "Titles, mortgages, and other liens good in Nebraska shall be good in Iowa as to any lands Nebraska may

cede to Iowa * * *?" Iowa submits that the difference between these two statements is monumental. Iowa acknowledges that she is obligated to the Compact language, but she certainly does not acknowledge obligation to Nebraska's substitute language. The Court has no jurisdiction to delete the Compact language from the Compact and substitute Nebraska's language in lieu thereof.

Even if the Court had jurisdiction to make this substitution, it should refuse to do so. According to Nebraska, we are trying to avoid "absurd consequences". Yet, the consequence of this substitution would be that every parcel of land which ever had an "indicia of ownership" in Nebraska would be held to be in Nebraska on July 12, 1943. This, regardless of whether the land was ever actually in Nebraska or not. This, whether it is the same identical land or not. Every time the river moved eastward, Nebraska gained; but Nebraska never lost. This consequence would be not only absurd, but weird.

It is the words and phrases of the Compact which lead to justice and fair consequences. There is no reason to tamper with them, change them, construe them, delete them, or add to them, and there are no words or phrases in the Compact, no established fact, acceptable testimony or exhibit in the record, and no law of Iowa, Nebraska or the United States to support Nebraska's conclusion on page 102 of their Brief and Argument to the effect that Section 3 of the Compact obligates Iowa to accept as "good" a claim of title based upon indicia of ownership, unless the land involved was actually within the State of Nebraska and such indicia of ownership establishes a

title "good" under Nebraska law; that obligates Iowa to waive her Sovereign right to determine land titles to any land within her boundaries; that obligates Iowa to relinquish all title to her trust lands along the Missouri River; that repealed Iowa's common law ownership of navigable river beds and lakes within her borders; or that waived, relinquished or contracted away all claims which she has or may have to islands, bars, or lands not marked or registered.

Iowa submits this Court should state: That the Nebraska riparian owners have the same rights in Iowa that any Iowa riparian owners have, no more, no less. That Iowa riparian owners have the same rights in Nebraska that Nebraska riparian owners have, no more, no less. That the rights of riparian owners west of the Compact line must be established under Nebraska law, and riparian rights east of the Compact line must be established under Iowa law. The sovereign rights reserved by the States of the Union will permit no other interpretation.

Nebraska's conclusion that the specific lands in the Nottleman and Otoe areas were formed in Nebraska and ceded to Iowa by the Compact is not supported by the record, and particularly considering the burden undertaken by plaintiff as previously set out herein. Further, assuming for sake of argument that such conclusion was supported by the clear and convincing evidence required, the Iowa Court would not be precluded to determine conflicting claims to the areas, such as that interjected by the witness James Givens who stated "and if it doesn't

belong to us * * * it has got to belong to the State of Iowa" (R. V. XXII p. 3164). The Compact should not be construed to deny Iowa or Nebraska any principle of sovereignty. It was not intended by the parties and cannot be read into the Compact.

Nebraska cannot have her way in this case without prevailing upon this Court to literally shatter the law of accretion and avulsion. In her extremity she must request this Court to deny Iowa the benefit of a long-accepted legal presumption of avulsion, that is based on sound and sane reasons, as stated by Nebraska Supreme Court in the first *Kinkead* case, and imposing an *irrebuttable presumption* that any lands east of the Compact line over which Nebraska exercised jurisdiction, were ceded by Nebraska to Iowa. An irrebuttable presumption is not a presumption, it is a rule of law. Such a holding by this Court would change the title laws of Iowa insofar as the Missouri River lands are concerned, creating a conflict in Iowa title laws and only add to the confusion and problems along the boundary. Iowa would be entitled to an *irrebuttable presumption* that any lands west of the Compact line over which Iowa exercised jurisdiction (or ownership), were ceded by Iowa to Nebraska. Thus all lands owned by Iowa prior to the Compact would still belong to Iowa, and the many Quiet Title Decrees entered by the Nebraska Courts voided. Not all the uncertainty would lie on the Iowa side of the river as blandly stated by Nebraska in their last sentence of their Brief and Argument.

In the first case of *Nebraska v. Iowa*, supra, Nebraska was claiming that because of the peculiar nature

of the Missouri River, the way in which the channel moved and particularly the rapidity with which it moved, the usual and well-recognized rules of accretion and avulsion should not apply to it. Now, again, Nebraska is contending the very same thing except present capable and ingenious counsel have come up with new and different reasons. They say that the boundary didn't move when the thalweg moved unless the thalweg movement was natural. They say the presumption of accretion as against avulsion shouldn't apply. They say that Iowa's doctrine of state ownership of navigable river beds was or should be repealed as to the Missouri River (while claiming that Nebraska's law was and should be left intact). They say that whenever the thalweg moved or was moved from one locale in the river bed to another locale in the river bed, such movement should be termed an avulsion, so that the boundary didn't move.

Nebraska's contention in this case, if adopted, would make a shambles out of that substantial body of law which has long been referred to as the law of accretion and avulsion. Again, as in 1892, Nebraska is saying that the time-honored and well-recognized rules be discarded along the Missouri River. Again, as the Court did in 1892, the Court should reaffirm that these good, fair and equitable rules are still in effect and operating.

It is Iowa's position that the Compact of 1943 between Iowa and Nebraska is not ambiguous and is therefore not subject to interpretation. That it must be accepted according to the ordinary meaning of its words and phrases, and this Court should not attempt to rewrite the Compact entered into by the legislative branches

of the two states and approved by Congress of the United States. That Iowa has recognized titles to the lands ceded to Iowa by the Compact and should do so in the future; that the title laws of the contracting states remain unchanged; that the Compact is a binding statute of both states and should be so considered by the Courts of both states; that the Compact did not affect the titles to lands in Iowa or in Nebraska prior to the Compact; that the State Boundary can be located by the parties without the assistance of this Court; that Nebraska has not overcome the evidenciary burdens assumed by her as plaintiff or the legal presumptions imposed upon her as a matter of law, and has not established a violation of the Compact by her sister State, and the Complaint should therefore be dismissed.

Respectfully submitted,
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In the

Supreme Court of the United States

October Term, 1964

No. 17, Original

STATE OF NEBRASKA, *Plaintiff*,

vs.

STATE OF IOWA, *Defendant*.

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In the

Supreme Court of the United States

October Term, 1964

No. 17, Original

STATE OF NEBRASKA, *Plaintiff*,

vs.

STATE OF IOWA, *Defendant*.

APPENDIX TO DEFENDANT'S BRIEF AND ARGUMENT BEFORE THE SPECIAL MASTER HONORABLE JOSEPH P. WILLSON

INTRODUCTORY STATEMENT

This Appendix is an effort, on the part of counsel for Defendant, State of Iowa, to provide a handy reference guide for the Special Master to those portions of the record which sustain the statements of fact made and contained in Defendant's Brief and Argument. It is our judgment that some of the exhibits and much of the testimony in the record have only gossamer connection, if any, with the issues now before the Court, and such exhibits and testimony are omitted from this Appendix for purposes of brevity and also to the end that the Court will have a manageable reference guide to those matters of record which bear on the issues.

APPENDIX "A"

Evidence Bearing upon Whether or Not the State Boundary Established by the 1943 Iowa-Nebraska Boundary Compact Can Now Be Located

PAROL TESTIMONY

WILLIS BROWN, Nebraska State Surveyor:

These construction maps that we are looking at here now today deal as to directions the lines were run. Give control points by number, length of structures. They are very much in detail as to where the structures were built, the location of the structures, the width of the river, all of their construction information or that they have on a plat, I should say, is here.

One other thing I should point out here, that by inquiry from the Corps, that they have found that the dikes as built are not exactly as they are shown on this map. This is what we would call a preliminary survey. They are not as built. In other words, these don't show where the structures were built. They are within reason. As they drove the dikes, the driver may have veered off a little bit from the center line so the structure itself isn't exactly as it is portrayed on this map or any of the Corps maps.

The AP maps are made from uncontrolled mosaics away from the river.

From the AP maps alone, from that information alone, I would say it is an impossibility to locate the boundary because this AP map is drawn from uncontrolled mosaics, meaning they had no control. They didn't know the distance between points. For instance, road intersections, corners, houses, buildings, anything like this. This is all uncontrolled. It is more or less like a road map. They give no calls on it,

no distances, no information for the surveyor to accurately locate the state boundary.

Q. What is the fact, Mr. Brown, as to whether it is possible or impossible to locate with pin point accuracy the Nebraska-Iowa border as set forth in the 1943 Compact for its entire length? Can you do it?

A. Well, only if you make a lot of suppositions. Supposing that this construction map represents what is on the AP map. You have to assume that this is the same construction that appears on the AP map, and so this is a great, big assumption. To be able to stand up on a witness stand and say, "This is the state line as appears on the AP map, you can't do it."

LAWRENCE H. HART, retired surveyor for the U. S. Army Corps of Engineers, now deceased, testified by deposition as follows:

That he was Registered Land Surveyor in both Iowa and Nebraska. That he was a Corps of Engineers employee from 1932 to his retirement in 1965. That after retirement from the Corps, he engaged in business as a surveyor at Onawa, Iowa, and among other things, did surveying work for Monona County, Iowa, and the State of Iowa.

From early 1937 to 1965, I had charge of all surveys and construction surveys on the river, staking construction and making any survey ordered from Ponca, Nebraska to Omaha. Laying out construction, the control consisted of horizontal control of traverse along both banks of the river, and these traverses are tied into the triangulation net which was established either in 1929 or 1930, and around 1890, and from this triangulation control the traverses on both sides of the river, and then the course of the channel line was laid out between these two lines wher-

ever it was decided it should be, and then the construction was laid out and the dikes and revetments were tied into the control on the east side of the river so that it would be possible to know the width of the river, and so forth.

The triangulations were generally on high ground on the right bank. On the left bank away back second order stations were put in in 1890, and then later in 1929 and 1930, there was another net where additional stations were put in along the river so that these stations would be closer to the river to work from. We usually found these stations, a few washed away. Most of them were put quite aways back from the river. Much of our surveying and staking was done on solid land (R. V. XX pp. 2965-2967).

The field notes never went to Omaha. The information was put on maps and sent down there to them. Rarely were the notes ever sent in. The field offices did most of that. I have had occasion to search for the field notes and can find anything you want. Most everything is there since 1932. Maps are destroyed, notes never, they are still there. About 1965 they destroyed some records, but they kept the record called 8411, that shows the length of the dike, where the root started and what the penetration was and whether it was a two row or three row dike and the beginning and the end of it. All those were maintained and are still there (R. V. XXI pp. 3108-3109).

I do not agree with the factual statement in Mr. Huber's letter for the U. S. Army Corps of Engineers' office that the state boundary cannot be located from maps in their files, written in February, 1963.

Because you have your alignment and you have your '40 maps and you have your reports and field notes, there are some changes. There are changes made in the traverse, and new controls established, but by

taking the field notes and the construction reports that were dated, you can come up with a solution for it on a greater part of it. There might be places where there might be difficulty, but it is not something that couldn't be resolved between the surveyors on the ground.

There are two places where there could be a little sliver and two chords in Monona left to run, and with those exceptions it is my opinion all of the Iowa-Nebraska border is either surveyed or in the present channel (R. V. XXI pp. 3114-3118).

RAYMOND L. HUBER, retired civilian design engineer for the U. S. Army Corps of Engineers, Omaha office, testified as follows:

That sometimes, if the designed channel is running along a bluff, there are structures on only one side. In these places, the center of the designed channel would be mid-point between the end of structures and the bluff.

That "the ends of the structures," in the case of pile dikes or stone dikes would be the riverward terminus, or the farthest point they project into the stream. In the case of a sloping bank, the end of structure "is the point where the structure meets the "construction reference plane," commonly known as "C. R. P.", which can be located in the field from construction maps (R. V. X pp. 1455-1456).

JACK VIRTUE, resident of Onawa, Iowa, a Registered Land Surveyor in Iowa and licensed Engineer, testified as follows:

That for about four years, on a part time basis, he and Lawrence H. Hart were jointly engaged in a project for Monona County, Iowa, to survey all land in Monona County in the vicinity of the Missouri River so that all land could be placed on the tax rolls. We extend Congressional land lines from the

existing record available to the ordinary high water mark or the 1943 Compact line.

Q. How far complete is that survey?

A. 95 per cent, I would say (R. V. X p. 1361).

R. J. LUBSEN, Ames, Iowa, Civil Engineer and head of the department of land surveying at Iowa State University, testified, as follows:

I made a detailed study and investigation concerning the location of the state boundary line fixed by Compact in 1943 at Rock Bluff Bend. The boundary can only be computed and cannot be surveyed in that area because it is in the present channel of the Missouri River.

I have made a study and investigation as to why the Nebraska State Surveyor's computation of the State Boundary at Rock Bluff Bend and Mr. Windenburg's computation of the State Boundary there and my computation of the State Boundary there are not the same. All three lines diverge, but nevertheless all stay within the designed channel as the designed channel now exists. The maximum divergency between my computation and the Nebraska State Surveyor's computation is about 140 feet.

The Court:

Is your line in the middle of the channel as it is laid out there?

The Witness:

That is correct. Mine is midway between the banks of 1940.

I would like to eliminate the Windenburg line as being erroneous, because he put his line in a channel that was only 600 feet in width. He has a constant error of approximately 50 feet throughout his entire length

on his own assumption. The Nebraska State Surveyor's line and mine are almost the same down to structure 627.0. From 627.0 to the South we have a diverging line because as near as I can tell and from my own research, Mr. Brown used a line that was constructed in 1942.

Q. Mr. Lubsen, you have just produced a second sheet of paper and Mr. Wolcott has marked it "D-1161." Would you tell us what that is?

A. This is a portion of the boundary, the river at the south part of Nottleman Island, drawn to the same scale as D-1160, but this time I left the left bank as it was in 1940 and according to the record that should be correct, but on the right bank I plotted the revetment 627.85 which was constructed in 1942, which moved the right bank to the west. Most of the movement occurs starting with structure 627.4 on the right bank. It starts with a small 0. At 627.2 it is approximately a foot change. At 627.0 it has a change of approximately 17 feet. On the structure 626.8A it cut off at Station 10 plus 45 instead of 21 plus 57 so that would be approximately 1,112 feet, to structure 626, which again cut off about 194 feet, and came back on to the 1940 channel at Station 27 plus 30 on structure 626.4A.

Q. You mean the divergence of the 1942 channel line as distinguished from the previous designed channel line disappeared down here?

A. At 27 plus 31 on Structure 626.4A. That revetment was built in 1942.

Q. How do you know that?

A. I have notes, the records from the Corps of Engineers.

Q. Do you have those notes with you? What do they look like? (R. C. XV p. 2201)

A. Yes. I have them from the beginning of time on the river until 1967 of all the structures from 630.95 up river to 623 south of Nottleman Island.

Q. Does the Corps keep a copy of all that?

A. They keep the original copy in their Omaha office.

Q. Do those records show you, tell you when the construction of a certain dike commenced?

A. That is correct; the day it was completed, the length, the ties to the Corps Survey Control, and it has the signature of the inspector that was in charge during construction.

Q. And coming on down to date, do they show you if the structure was ever damaged?

A. Generally, yes. If there were any repairs on it.

Q. Do they show you repairs that may have been made?

A. That is correct.

Q. Additions?

A. Any extensions, yes.

Q. I was thinking more of additions like putting rock rather than extending or something like that. Does it show things like that?

A. If there is anything done under contract, it would appear either on the face or on the back side of this document which means that if we Xeroxed it I would have two sheets. They are river stabilization structures, but then they are labeled by dike number, identification number or revetment number.

Q. They are both revetment numbers and dike numbers?

A. That is correct.

Q. From those documents can you ascertain, for instance, when this revetment number 627.85 was started and when it was finished?

A. In 1942 and completed in 1942 from station 0 plus 00 to station 52, which is on structure 626.8, and later on to 27 plus 31 on structure 626.48. (R. V. XV pp. 2201-2204)

Q. Do you know whether the Corps keeps, has kept as part of their permanent files the dike records and revetment records for all of their dikes and revetments from Sioux City to the Missouri line similar to these which you have brought to Court which relate to the Nottleman Island area?

A. Mr. Burnett of the Corps told me on Monday this was their Bible. These were to be always kept on record, that they have not thrown away any of their records from the office.

Q. Do you know of any reason why the State Boundary Line established between Iowa and Nebraska by the Compact cannot be either computed or surveyed with reasonable accuracy?

A. I do not. (R. V. XV pp. 2210-2211)

EXHIBITS

LOCATING THE COMPACT BOUNDARY

YEAR	DESCRIPTION OF EXHIBIT	EXHIBIT NO.
	Complete set of Corps Construction Maps showing designed channel referred to in 1943 Boundary Compact at scale of 1" = 400', also showing Corps control lines and points on both sides, and location of structures	D-426 thru D-430 D-525 thru D-528 D-1145 D-702-A D-702-B

YEAR	DESCRIPTION OF EXHIBIT	EXHIBIT NO.
		D-702-C
		D-1143
		D-1144
		D-529
		D-530
		D-531
		D-417
		D-1137 thru
		D-1142
		D-532
		D-1131 thru
		D-1136
		D-533 thru
		D-544
	Plats of surveys of miscellaneous areas made by L. H. Hart for Iowa Conservation Commission wherein various segments of boundary fixed by Compact were either surveyed or computed	D-1205 thru D-1220
	Plat of survey of Deer Island where segment of boundary was computed by I. H. Windenburg	D-1204
	Plat of computation of 1943 Compact boundary line at Nottleman Island by Prof. R. H. Lubsen showing his computation, I. H. Windenburg's computation, and Willis Brown's computation	D-1160 P-746
	Plat by Lubsen showing 1942 design change which makes his boundary computation correct	D-1162
	Certified copies of AP maps as filed in Iowa Secretary of State's office	D-1
	Certified copies of AP maps as filed in Nebraska Secretary of State's office	P-1770

APPENDIX "B"

The U. S. Corps of Engineers Placed the Designed Channel Where the River Tended to Go as Much as Possible

PAROL TESTIMONY

GENERAL HERBERT B. LOPER, 72, Retired Major General, U. S. Army, Corps of Engineers, testified:

A. As I pointed out a moment ago, many of the curves we took as they existed or approximately existed. Some did. Others had to be fitted between the banks of the river and this precluded the use of a standard length and radius.

Q. Did the theory of the construction of the permeable dike always work out in practice?

A. As I mentioned, it didn't work out in the upper Mississippi River.

Q. On the Missouri, I mean.

A. Yes; it worked out in practice.

Q. Would you describe for us how these dikes were driven out from the bank, or what the effect of the driving of the dike would do?

A. It is necessary to select where there is sufficient water. The dike system for any bend starts on the concave side and directs the current across the river to the opposite side, creating a concave bend there. Therefore, at the point of beginning you must have deep water; otherwise your river will scour the bank out from under you; that is, the take-off dike at the beginning of a system. Those dikes are driven by floating pile drivers. However, as one moves downstream on that same system you run into sand bars between the high bank and the place where you are going to put

the river, and across those sand bars you frequently use a skid rig, a pile driver which you drag along. If it is a low sand bar, you may wash or dredge or cut through that bar deep enough to float a driver through. This is just a matter of cost, which way is the most economical to build that dike that necessarily goes over one or more sand bars before it reaches the designed channel location. (R. V. XIV pp. 1894-1895)

Q. Now, the designed channel in Otoe Bend, as I understand it, was to be a left curve, a curve to the left in the bend. Would that be a correct statement?

A. Looking downstream, it would be to the right. We always call that the right. Let's say it was to go from the Iowa shore to the Nebraska shore so that the apex or center of the bend would be on the Nebraska shore, yes. On the Nebraska side. I don't know whether you would call it right or left bend. It depends on which way you are going.

Q. Was your entire designed channel in Otoe Bend designed to be within the existing mile-and-a-half wide river at that point?

A. No. To get the proper curvature, I believe there was some encroachment on what is called high bank here (indicating). There was some, I am sure, encroachment on the high bank in order to get the curvature of the bend and the correct width.

Q. The encroachment you are talking about would be on the Nebraska bank?

A. Right. I might interpolate here, if I may, that the reason why this bend was designed this way

was probably due to the fact that the water appeared to be trending this way at that time.

Q. Trending which way do you mean?

A. Towards this (indicating). Toward the Nebraska side at that time.

Q. It was trending toward the Nebraska side at that time?

A. Right. At the time this hydrographic survey was made and the superstructures were imposed on it at a later time, 1933. I don't know that that had anything to do with the decision to make the bend this way. It may have. That is all I can say.

Q. When you say it was trending that way, what do you mean?

A. That was where the map showed it to be. That map doesn't show, nor do I think there was anything that could indicate whether it was going to continue this way (indicating) or go this way (indicating).

Q. By trending that way, do you mean that it was—the main channel was moving that way naturally?

A. No, no; I wouldn't mean that at all. That would be an unwarranted assumption on what nature does.

Q. Well, I don't precisely understand what you mean by trending.

A. I have used the wrong word. The better expression would be to say that it was actually located closer to the Nebraska bank than it was toward the Iowa bank.

Q. I see. As you said, a consideration in designing the river was to use the river as you found it as much as possible. I suppose?

A. That is right. (R. V. XIV, pp. 1921-1923)

RAYMOND L. HUBER, retired civilian design engineer for the U. S. Army Corps of Engineers, Omaha office, testified as follows:

Q. What did the Corps consider an optimum curve above Kansas City would be?

A. A curve with a radius of a minimum of about 6,000 feet to about 9,000 feet was the optimum or ideal radius of curvature.

Q. What were the considerations which governed laying out these curves and which way they would go and where they would be?

A. Actually, there were several considerations. One the flow of the river, how much discharge would be available on completion of the work, the slope of the river, the location of fixed hard points such as bluff contacts, existing bridges and cities, the location of the channel at the time of construction, and of course the trace which would provide the most economical accomplishment of training the river into the designed channel and holding it there, and which also would provide a minimum of maintenance on completion. (R. V. XXIII p. 3272)

Q. (By Mr. Murray) When this designed channel, Mr. Huber, was being laid out down at Kansas City, were there any cutoffs or canal cutoffs in the design?

A. There were none.

Q. What was the original design for the river at St. Mary's Bend, for instance?

A. At St. Mary's, the channel there was designed to the east around the existing west bank of the river shore which extended out in the form of a rather sharp point at that area, and it contemplated bringing it far to the east and then back again to the west side or Nebraska side.

Q. Would you say that the original design at St. Mary's bend, the designed channel would have been in the bend as it was?

A. Yes, sir; at that time as it was, generally, yes.

Q. State whether or not that would also be true at California Bend.

A. That was true at California Bend also.

Q. Wasn't that also true at Winnebago Bend?

A. It was.

Q. How about Peterson Bend?

A. It was also true at Peterson Bend. (R. V. XXIII pp. 3359-3360)

YEAR	DESCRIPTION OF EXHIBIT	EXHIBIT NO.
1931	U. S. Army Corps of Engineers 1931 Hydrographic Survey Map.	D-291-A
1943	U. S. Army Corps of Engineers Construction Map showing 1943 Design Channel.	D-427

COMMENT

Comparison of the above two exhibits illustrates what the Corps did in Otoe Bend area re putting river where it tended to flow.

1931	U. S. Army Corps of Engineers 1931 Hydrographic Survey Map.	D-371-A
1943	U. S. Army Corps of Engineers Construction Map showing 1943 Design Channel.	D-1044-A

COMMENT

Comparison of the above two exhibits illustrates again what the Corps did in Rock Bluff Bend area re putting river where it tended to flow.

1940-41	Alluvial Plain Maps of 1940-41 by U. S. Army Corps of Engineers.	D-1151 thru D-1160

COMMENT

These exhibits cover the entire boundary and show wide, natural river in many areas merely confined into the Designed Channel.

———o———

APPENDIX "C"

The River Was a Straight Reach from Frazer's Bend to Below Hamburg Bend, Prior to Work of U. S. Army Corps of Engineers

PLAINTIFF'S TESTIMONY

HERBERT B. LOPER, age 74, Major General in U. S. Army, Corps of Engineers, retired, testified:

> After the river came together at the lower end of Frazer Island, it was wild for about six miles. And it was too straight. —it was really one long bend. The river at that point was far too wide. It would be about two miles. It was a series of small channels—there was no well-defined, single channel in the river below there. Otherwise we could hardly call it a wild river. There were several channels there. Low bars between the principal channels. Not as substantial an island. I don't know how high one would say the maximum height of the land between the Iowa side and the designed channel may have been, but it was certainly at least what we would call a high bar.
>
> Exhibits D-291 and D-292 are 1931 hydrographic maps, and exhibits D-427-A and D-428A are construction maps of the same area.
>
> And they also contain some information updating the bank lines after 1931. —Note a line which is designated "Bank Lines July 3, 1933".
>
> Therefore, this would appear in general it approximately leaned a bit toward the Nebraska side of the middle of the river at that time. —and the channels of the river that are marked "Shallow" in that hydrographic survey or topographic, I guess it is called, were to the Iowa side generally in Otoe Bend. (R. V. XIV pp. 1917-1920)

DEFENDANT'S TESTIMONY

LUCIEN M. BRUSH, Jr., Princeton, New Jersey, 159 Hartley Avenue, age 39.

I am an associate professor of hydraulics in the Department of Civil and Geological Engineering at Princeton University, Princeton, New Jersey. I was born in Pittsburgh, Pennsylvania, and received my secondary education in Pittsburgh through high school. I attended Princeton University as an undergraduate; received a Bachelor of Science Degree in geological engineering in 1952; attended Penn State University for two years and transferred to Harvard and obtained a Ph.D. at Harvard University in geology in 1956 with a specialization in geomorphology.

I went full time with the United States Geological Survey in 1956 in the water resources division. I was classified as a geologist (watersheds). First in Washington, D. C. then Denver and California for a little bit, and then back to Washington, D. C. In 1958, I joined the staff of the Iowa Institute on Hydraulic research at Iowa City and I held title of assistant professor in the Department of Mechanics and Hydraulic Engineering or Research Engineering, I left in 1963.

In the summer of 1963 I joined the department of Geological Engineering and Department of Civil Engineering at Princeton University. The department is now—Civil and Geological Engineering.

Hydrology is the study of water and its distribution on the earth, including certain fundamental phases of meteorology and climate. Water in its relation to the earth. Say the hydrologic cycle is certainly in the domain of hydrology. Rainfall-run-off relationship. Floods. (R. V. XX pp. 2914-2918)

I studied 16 small streams in the State of Pennsylvania ranging in size, none of them were nearly as

large as the Missouri. They were in a completely different geological environment.

I made measurements in these streams of their width, their depth, their flows, their slopes, particle size of material in the bed.

Following that I went and studied fairly extensively a large stream in Wyoming called "Muddy Creek". In this particular stream, I studied the terraces, the sediments while I was employed by the United States Geological Survey. I studied probably more casually four or five other streams in the area.

Then I studied some of the streams in northern California. I think I have seen almost every foot of the Susquehanna River in Pennsylvania and New York.

I studied maps of numerous streams. While I was at the University of Iowa I made several model studies of streams, one quite a large meandering stream. It was a flume or a channel built in the laboratory that was over a hundred feet long and had several bends in it, and the reason I chose the particular sinuosity or curvedness of this particular stream was based on a map study of the average or typical meandering loops in the Missouri River as well as the Mississippi River.

I made another model study in an alluvial bedded channel—I should say a sand channel while with the USGS at the University of Maryland in a small flume we constructed. That particular study was oriented in order to try to understand the relationship between discharge, slope, and channel width in a naturally formed channel.

While I was in Alaska working for the United States Geological Survey, I really was studying some other streams, but I had occasion on numerous occasions to travel down many of the Alaskan streams, some of which are braided and some of which are not.

I made model studies of channel stabilization work. I visited numerous other geomorphologists in the field while they have described their findings on particular streams. I worked with Leonard Leopold and George Wolman who at that time were with the United States Geological Survey. Leonard Leopold still is. Visited many of the streams they studied in Wyoming and Colorado, so I would say it was a fair response I have seen quite a few streams in rather large areas of the United States, ranging in size from the Missouri down to the tiny laboratory channels.

Q. Now, Dr. Brush, did you study this matter first of all as to what the proper descriptive words for the Missouri River are in your business?

A. Yes. I did actually three things in regard to this. I looked in the literature for discussions concerning the general area of the Missouri River, say in the vicinity from Sioux City down to Rulo, Nebraska, and any information that is available on the plat. I also examined maps, particularly the maps that interested me were the maps, the earlier maps, the 1879, 1890 maps which presumably predated most of the man-made works that have gone on on the river.

I also visited the area that has been described in the last couple of days here, visited the field area and stood on some of the scarps and stepped down on some of the lower levels, walking across the fields there. In the presence of some of the other scientists here, I saw them take samples and test them for carbonates leaching or the presence of carbonates. I visited the general area I will say on foot.

The Otoe Bend area in the vicinity of Schemmel Island.

I read the Ruhe-Fenton preliminary report. (R. V. XX pp. 2922-2926)

WITNESS: Let me say that my concept of the river, as I see it, from north of the Platte's mouth to Sioux City which is as far as I have examined in this particular case, I would call it a typical meandering channel. The Platte, I think everyone recognizes it a typical braided stream. In fact, it is a very good example of a braided stream.

The reach from the Platte's mouth south extending perhaps to Rulo, Nebraska, shows the combined influence of the braided stream coming in from the left or joining the Missouri at the right bank as a combination of braiding and meandering. However, when I say it is not a typical meandering stream, I say this because I made some measurements from the maps of a quantity called the sinuosity of the river. The sinuosity is really a ratio of the total thalweg length over the access of the meander belt and on the basis of this number, and there is other supporting evidence, but on the basis of this number, based on the USGS professional paper written by Leopold and Wolman, who established the sinuosity ratio of more than 1.5 as characterizing a meandering stream, a sinuosity of less than 1.5 therefore does not qualify as a meandering stream.

The reach of the Missouri River above the Platte's mouth has a sinuosity ratio in excess of 1.5 and the reach below has a sinuosity less than 1.5 so on this one criterion, which is supported in the literature, one would say that the stream does wander, does go through bends from the Platte's mouth on to Rulo, it does so at a reduced fashion over a typical meandering reach such as that above the Platte's mouth.

The influence of the Platte's mouth is the following and gives the reach between the Platte's mouth and Rulo also a braided characteristic, and this is the summary of the previous workers in this area, and I will quote them just by name then. In the Mis-

souri River document presented to Congress by Prof. Strua, then of the University of Minnesota, he describes the influence of the Platte River on the Missouri itself, he describes how there is an increase in bed load that comes in as a result of the Platte River joining the Missouri. There is an increase in suspended load. He describes in that report actually how the channel is less serpentine downstream from the Platte's mouth, has numerous bars and islands in the channel itself, and thereby he doesn't actually say it takes on a braided look, but he doesn't use any descriptive word except that it meanders and serpentines less than it did before.

In another document by another very well known geologist, J. Hoovin Macklin, in the paper that he published in the Geological Society of America bulletin which is a very old reputable geology society, the bulletin from it, he more or less makes the same kind of description of the influence of the Platte River on the Missouri River, causing the Platte's mouth reach to change drastically from what the Missouri was above the Platte's mouth.

Thereby other scientists, including one from the Journal of Lewis and Clark, written by Clark, pointing out how the influx of sediment from the Platte River chokes the Missouri channel with numerous sand bars and islands, or words to this effect, without actually quoting the actual citations.

Now, with regard to the braiding characteristics of the stream, there is also another paper written fairly recently by Dr. Bryce. It is a USGS Professional paper, published document available to everyone, called "Channel Patterns and Terraceability of the Loop Rivers in Nebraska." In this publication he describes a braiding index that he uses to classify streams with regard to braiding or whether they are not braiding, and in this particular index is the ratio of the total bore, island length, the sum of all these

lengths multiplied by 2, divided by the length of the channel gives you a ratio. The ratio that he said indicated braiding was the ratio of greater than 1.5. Now, he used two kinds of braiding indexes, one that was a total braiding index in which he included bars and islands. He didn't actually call them islands. He called them stabilized bars indicating the presence of vegetation. If you measure everything in the channel, then you come up with a total braiding index. If you just measure the stabilized bars, you come up with a stabilized braiding index.

I measured from the 1890 map these ratios and, yes, the Platte River comes up with a value much greater than 1.5. The Missouri River above the Platte's mouth comes up with a very low braiding index and the Platte's mouth to Rulo, Nebraska, reach of the Missouri River has a total braiding index which is greater than 1.5 so on the basis of Dr. Bryce's classification of braided streams, I would say that that reach between the Platte's mouth and Rulo has characteristics of a braided stream.

I would say also that it has some of the characteristics of a meandering stream still left over from the joining of a typical meandering stream and a typical braided stream formed together to really give you something halfway in between. It inherits some of the characteristics of each of these two streams.

The earlier records, well documented—there is no problem in this respect—the heavy influx of sediments from the Platte River, particularly in the bed load, causes the channel to widen considerably downstream from the Platte's mouth, causes the slope to steepen, which is well documented in all the literature on the subject, and it is quite a few miles downstream before these effects really die out and the Missouri returns to somewhat more of a typical meandering pattern. The influence of heavy sediment loads, particularly bed load, which is traveling on the bed (R. V. XX, pp. 2926-2930).

Another consequence then of what is going on is that there tends to be deposition in places along that reach downstream from the Platte's mouth that are not associated with a typical meandering stream, and you can look at the map and see numerous locations along the length of that channel and see where there is deposition on the outside of the bends indicating that deposition doesn't always occur on the inside of the bend or the point bar but also can occur at least in this reach of the river, and frequently does, toward the outside of the bends or toward the outside of the curves in the river, and my point in this case is that that reach is not a typical meandering stream also for this point.

It is also suggested therefor that it is possible for this deposition on the outside of a bend to actually move away from the outside of the bend or cause the river to move away from the outside of the bend. It is probably the river moving over and the bend keeping up with it or the deposit in the bend keeping up with it.

Q. (Murray) Now, Dr. Brush, in a braided stream, what does cause the depositions to be where they are?

A. The characteristics of a braided stream is that it tends to form islands. The islands can form either because of heavy bed load or because of coarser bed material, and if the stream is not able to carry all this material rapidly as bed load, it deposits it as islands. Furthermore, this depositional pattern is not really very predictable. It is actually quite random and rather haphazard over the length of the channel, which can also therefore cause deposition to occur to the outside of some of the bends as well as the inside of some of the bends. I am not saying it only occurs on the outside. It occurs throughout the reach of the Missouri from Plattsmouth to Rulo.

This has been shown in laboratory studies as well.

Q. Now, when the stream which is of the nature of the Missouri below the mouth of the Platte deposits bed load in the form of an island or in the form of a bar, does that have any effect on the banks?

A. Yes, during the course of the year or a flood event or the presence of an obstruction or an island in the middle of the channel obviously causes the channel to try to widen and therefore perhaps erode the banks on both sides of the river at the same time. Perhaps, since it has come out before, sort of like Schemmel Island, as I understand it, in the 20's where the right bank and the left bank both started to go further and further apart. This would be a characteristic of a braided channel. It would tend to be wider, steeper, perhaps bank cutting on both sides. Assuming the rock is not terribly resistant on one side or you don't hit a hard spot. That there would be at least the opportunity there.

Q. Would the formation of an island in the stream or a bar in the stream, whichever you call it, where the stream is bounded on one side by limestone hills tend to cause anything to happen to the other bank?

A. You mean assuming the other bank is less resistant?

Q. Yes, assuming the other bank is not limestone or anything like limestone.

A. Obviously, if it meets very resistant rock on one side, if it is going to widen it is going to widen in the direction of the weaker material or less consolidated material. The same would be true

if it couldn't eat through the bed and if it hit a limestone part of the bed, it might tend to widen out in response to its inability to cut down (R. V. XX pp. 2931-2933).

Q. (Murray) Now, I believe you stated you have read the Ruhe-Fenton preliminary report.

A. Yes.

Q. On the basis of that, do you reach any conclusion? Do you have any opinion as to how the main stream of the Missouri River moved out of its channel which we call the Iowa Chute channel and back to the westward from that?

A. Yes; I have an opinion (R. V. XX p. 2934).

Q. Is it possible that that right bank of this chute could be a scarp marking a former right bank position of the Missouri River?

A. Not in my opinion.

Q. (Murray) On the basis of your observations out there as you have described them, and on the basis of your study of the Ruhe-Fenton preliminary report, and on the basis of your experience and education in this general field, do you have an opinion as to how the main channel of the Missouri River moved westerly from its location when the left bank of the Iowa Chute was its left bank? (R. V. XX p. 2938).

A. In my opinion, the channel moved slowly west, but obviously came to some halts long enough at least to form some of these minor scarps that exist there, so whatever the date is for the bank near the Iowa Chute to the date where the scarps run out and we start picking up where the river really was at a later time in 1905, that the river moved apparently gradually, depositing material on the outside of this bend as it had done at

least evidenced by the earlier maps, but there are obvious standstill positions where the river at least stayed in one place long enough to leave a small scarp.

Court: It came west by stages, you think?

Witness: By stages, yes (R. V. XX p. 2941).

Court: Sure, do you see any avulsions along there, Doctor?

Witness: No, I did not.

Court: I guess from what you have said, you have looked at the reports of Lewis and Clark on their ascent of the Missouri River.

Witness: Yes, journals written by Clark.

Court: Do you find anything in there that speaks of any channel in the Missouri River or how did they go up there, with flatboats pulling, and so on?

Witness: They describe how terribly difficult it was to go up the Platte, but they didn't describe in this partirular section I read what boats they were using going up the Missouri, but they noted they had a terribly difficult time getting by the mouth of the Platte because it was choked with these sand bars.

Court: I remember that. Did they say anything about the current in the Missouri River as compared with the Platte?

Witness: They mentioned the velocity and they also described the very high velocity of the Platte River coming into the Missouri.

Court: At the junction?

Witness: Yes (R. V. XX pp. 2942-2943).

Q. I believe you testified that you stood on the scarp and saw the other experts, and I assume you refer to Dr. Ruhe and Dr. Fenton, take samples. Did they take some kind of samples in May 1969?

A. They were showing me what was going on, yes, and they did several things. They had a hand auger and dug down and showed me the color and texture of the material and described it to me on the high part of the older material on the left and put acid on various parts of the sample as they pulled it up.

Q. Did you take any of that information into consideration in reading your conclusion, sir?

A. Just as part of the general picture. I would say. I notice there was a difference between that land. There was a topographical difference. They showed me with acid tests the difference there and they showed me texturally another difference (R. V. XX pp. 2945-2946).

EXHIBITS

YEAR	DESCRIPTION OF EXHIBIT	EXHIBIT NO.
1930	Corps of Engineers aerial mosaic taken 1930 with outline of Otoe Island superimposed by Bartleman	D-1092-A
1930	Corps map prepared from 1930 aerial photos with island superimposed by Bartleman and thalweg superimposed by Huber	D-1123
1931	Corps Hydrographic Survey of 1931 with island superimposed by Bartleman and thalweg superimposed by Huber	D-291-A
1931-45	Corps Construction Map used from 1931 until retired in 1945 with island superimposed by Bartleman	D-427

APPENDIX "D"

Otoe Bend Island Formed in the Iowa Half of the Wide Channel

PLAINTIFF'S TESTIMONY

GENERAL HERBERT B. LOPER—see appendices "B" and "C".

DEFENDANT'S TESTIMONY

JAMES M. GIVENS, age 53, Hamburg, Iowa farmed opposite Schemmel Island, ran bench measure on river in 1932, knew river well 1922 thru 1936.

I was born and raised on the home place, a little over a mile north and a little west of where Albert Propp now lives. Wherever the river has been in times past, the farm has run westward to the river. The South boundary of that farm lays adjacent to Albert's. The east part of it. That road which runs east and west past Albert Propp's farm buildings is the boundary line between the two farms. The south boundary line would run right straight out into what they call the Schemmel Island. It would intersect the north end of Schemmel Island. I lived there until 1936 (R. V. XXII pp. 3138-3141).

Q. When would you say your first recollection is of going out to the river?

A. Oh, about 1922.

Q. At some point while you were living out there, did you have occasion to go to the river for other purposes?

Yes. I ran a bench measure for the Government. I can't remember exactly what year it was. I think it was in 1932, but it would be on their records. Checking the rise and fall of the river in feet and tenths that bench measure was roughly a quarter of a mile south of our north line. I will say roughly. It might not have been quite

a quarter.

Q. How often would you have to go out and check the bench measure?

6 o'clock every morning and 6 o'clock every evening. I ran that bench measure for the government; fall and up into, you know, late summer and early fall until it froze up (R. V. XXII, pp. 3142-3143).

Q. What year would you say you could first describe for the Court how the river ran past the west edge of the Givens farm?

A. It would be at least 1924 that I can remember it.

The Court: You would be eight years old?

The Witness: About that, yes, sir. I would be nine.

The farm ran a mile north and south and on the north line it ran to the southwest, it didn't run straight, it swung to the southwest. What I am trying to say is that I am not going to say it ran true southwest. It might have swung back just a little, but roughly it was the same on the south boundary as it was on the north boundary. It ran southwest yet, yes (R. V. XXII, pp. 3144-3145).

Q. Opposite your farm back in the 20's was the river running in a single channel to the west of it or in more than one channel to the west of it?

A. That is according to what time of year it was. There was a main channel and then you had the chutes off of it, and if the river was high there was a lot more. See what I mean? The main river, yes, was more or less stable. Do I understand the question now?

Q. Well, are you saying there was one channel when the river was high and more than one channel

when it was low, or vice versa?

A. No; there was a main channel and then when the river got up it filled these chutes, and I guess bayous, whatever you want to call them. I would call them chutes, sloughs. But there was one —

Q. When the water was low, do I understand correctly that you are trying to say there was one channel?

A. One channel, yes.

Q. Is that the channel you have been describing as running generally southwest?

A. That is right.

To the s o u t h w e s t. Swung a little southwest and then straightened back up more or less south, almost straight south, a little southwest. It would be almost identical channel you have got now, as I remember it. I will put it that way (R. V. XXII pp. 3145-3146).

Q. Now, you have been describing, as I understand you, in 1924.

A. Yes.

Q. As you continued to be there and observe it in 1925, 1926, 1927, 1928 up until the Corps started work on it, was there any change in the general situation that you have been describing?

A. Oh, when the river would get the June raises or ice would go out, it might vary back and forth some. It cut some one place and filled another. It wasn't stable.

Q. When the Corps started work in that area around the south boundary of your farm, was the situation of the river any substantial difference from what you have described?

A. You mean after they put their trail dikes in?

Q. No, just before they put their trail dikes in.

A. Not too much. About the same, I would say.

Q. Did you observe the effect the Corps work on the trial dikes had on the river?

A. Yes.

Q. What effect did it have?

A. Well, it narrowed the channel down and kind of meandered it, I guess you would call it, switched it back and forth a little. In other words, instead of having long bends it shortened the bends and filled in some spots and took out some.

Q. In the area at the south end of your farm, the south boundary of your farm where it intersected the river, did the Corps trail dikes change where the river had run theretofore in any respect?

A. It shoved the main channel over west some, yes, or I won't say it shoved it over. It confined it. That would be more like it.

The Court: When did you leave that homestead, that farm?

The Witness: In 1936.

The Court: You lived there until 1936?

The Witness: Yes.

The Court: Let me ask you a question. You have mentioned you are acquainted with the Schemmel Island, is that right?

The Witness: I haven't been over it. I know where the north end is.

The Court: You know where it is?

The Witness: Yes.

The Court: What is your earliest recollection of it being an island, that mass of land called an island?

The Witness: A sand bar.

The Court: No; I mean what year are we talking about? When did it change from a sand bar to an island or when did it start as a sand bar? Tell us about that.

The Witness: I would say along 1936, '35, '36, somewhere along in there as far as I can recollect.

The Court: Would you call it an island as of 1936?

The Witness: It was forming as an island, yes.

The Court: Any vegetation on it?

The Witness: Willows.

The Court: Willows.

The Witness: Then there were places out there, there was some pretty good-sized trees on too.

The Court: Cottonwoods?

The Witness: Yes.

The Court: You are speaking now in 1936?

The Witness: Yes, sir (R.V. XXII pp. 3146-3149).

The Court: What is your recollection of that mass of land when you are speaking of being eight or nine years old? Do you remember anything out there then in those days?

The Witness: I was never over that part of it. I remember a bar being out there.

The Court: But it has no firm recollection?

The Witness: No.

The Court: You have no firm recollection.

The Witness: No, just a willow patch across the chute. That is all it meant to me then. It looked like a pretty good place out there at that time (R. V. XXII p. 3149).

OTTOE HINZE, see Appendix "J".

ALBERT J. PROPP, see Appendix "J".

THOMAS E. FENTON lives at 1226 Arizona, Ames, Iowa, and is 35 years of age.

I am an associate professor of agronomy at Iowa State University and was born in Zabrey, Illinois. I received a Bachelor of Science Degree from the University of Illinois in 1959, a Master of Science in Agronomy from the University of Illinois in 1960, and a Ph.D. from Iowa State University in 1966 in soil genesis and classification. I came to Iowa State in 1960 as a graduate student, and was instructor from 1960 until 1964. From 1964 to 1966 I was a research associate and did no teaching, and since receiving my Ph.D. Degree I teach one course, graduate level, in soil genesis and classification. (R. V. XX, p. 2845).

Agronomy is broken down into soil science and crop science, and soil genesis and classification would be a subdivision of soil science.

The major portion of my time is devoted to a co-leadership in a project which is called soil mapping, classification and correlation of Iowa soils — a project going on all over the state. The soil survey program is a cooperative program between the Federal Government, the Soil Conservation Service, and the Agricultural Experiment Station in each of the states, and as part of the duties assigned to agronomy

department, I am representing the Experiment Station in the work of soil genesis, classification, and correlation.

What we call the modern soil survey was begun in Fremont County in 1960 and was completed in 1966. (R. V. XX, p. 2846).

In our investigation of Otoe Island, we took and studied core samples on the Nebraska side of the river, on the Iowa side east of the Iowa Chute, between the Iowa Chute and the island, and on the island. Exhibit D-1233 shows where these core samples were taken (R. V. XX, pp. 2847-2868).

Q. What are your conclusions as a result of taking those samples and studying them?

A. That the soils that occur in that area are calcareous at or near the surface and are highly stratified with little or no indication of genetic soil development having taken place. The pattern on the soil map for the area shows that on the outer edges of the island there are coarser textured sediments that grade to heavier textured sediments toward the center of the island. The number 146 and 156 would indicate soils that are silty clay to clay in texture in the center of the island. (R. V. XX, pp. 2868-2869).

Q. I think maybe we got interrupted at the point I had asked you what your conclusions as a result of having taken these four samples on a traverse across the island, in our layman's language. I think you answered that question in your language, but I am trying to get it in our language.

A. Again, the soils and the materials from which the soils formed in this area on the island are similar in kind to those that occur west of the Iowa Chute and over to the river. The pattern

of distribution is different if you compare the Schemmel Island body with this other area out in here (indicating) just by looking at the soil types that occur in the surface texture that there is a trend in pattern that separates the two areas in terms of combination of the units that you get and the relationship one to the other.

As pointed out before, around Schemmel Island the outer margins tend to be coarser textured with the heaviest texture occurring right in the center of the island.

Q. Does that mean something or anything as to how the island formed?

A. No; not as to how it formed as a result of the time that land first appeared where the island now is.

The Court: In other words, you can't date the island by what you see in the soil, is that it?

The Witness: In other words, if you over lay, say, the present-day soil map on the map that Dr. Ruhe used in showing the date that land first appeared here, there isn't necessarily any correlation between where land first appeared and present-day soil pattern, but, due to the sedimentation pattern on here (indicating), it would appear that the present-day soil characteristics that we have are related to over-bank flow and deposition of material that you have here on the island.

In other words, when it would overflow you would expect to get the coarser textured material on the outer margins with subsequently finer material being deposited in the farther interior from this, so that is a hard question—(R. V. XX, pp. 2874-2875).

ROBERT V. RUHE, 1710 Maxwell, Ames, Iowa. 51 years old. Senior staff geomorphologist of the Soil Conservation Service, United States Department of Agriculture. I am also a professor of soils at Iowa State University. Bachelor of Arts degree in geology from Carlton College, Northfield, Minnesota; Master of Science degree from Iowa State University at Ames and a Ph.D in geology from the State University of Iowa at Iowa City.

Geomorphology pertains to the study of land formation, their descriptions and explanations of their origins; specialized field in geology.

While taking my advanced degrees, I was a Pleistocene geologist with the Iowa Geological Survey at Iowa City. Since getting my Doctorate, I have been a geomorphologist with the Department of State in the Belgian Congo. I was employed by the Soil Conservation Service beginning January 11, 1953. Between 1963 and 1965 I was chief of the soil geomorphology group on the Washington staff of the Soil Conservation Service. I worked on the Rio Grande and the areas adjacent to it from 1957 to 1960. Have been based at Iowa State University. I worked in Hawaii on short-term assignments each year 1959 to 1965. Worked in Alaska — summer I was in Australia, and this summer I will be in France.

I do no formal teaching. Have published more than a hundred technical articles, bulletins, and recently my first book. — Quarternary Landscapes in Iowa. The Iowa State University Press. Fellow of the Geological Society of America — fellow of the American Association for the Advancement of Science. — Soil Science Society of America, a member of Sigma Phi — research fraternity — member of Phi Kappa Phi — scholarship fraternity. — On the executive council of the American Association for Quarternary Research.

The duties of the Department of Agriculture are

fundamentally to determine what we would say is the geomorphology of a given area. This would be the landscape, the hill slope, the streams, to fit these things within some kind of a chronological history, and a concurrent part of our studies is to map and study the soils and then to determine what effect the evolution of the landscape, the geomorphology aspects of it, has in the formation of soils.

A representative of the State of Iowa requested me to make a study in the Otoe Bend area. I was assisted at all times by Dr. Thomas Fenton, and we had two graduate student assistants with us in our work each time we worked there, so we had a field party of four. Dr. Fenton and I did the assembly work, and the laboratory studies that were done were done by a graduate student who did not do the field work. We did our first studies in June of 1967, and we did additional work in November 1967, and we had two field conferences with members of the legal staff.

We were asked to undertake the study to try to determine the positioning of the Missouri River through an historic period. In various points of time.

We did a study of available maps and area photographs in trying to determine the position of the river from a historic sequence, the maps of 1852 and 1856, the map of the Suter survey of 1879, the map of the Missouri River Commission in 1890, map of 1895, the survey of the right bank from Otoe County,—the Gregg map of 1895 from the County Surveyor of Fremont County. (R. V. XIX pp. 2723-2731).

The map of 1903 from the "Report of Geology of Fremont County, Iowa," by Udden, which is an Iowa Geological Survey annual report of 1902; the 1905 map, Nebraska City quadrangle; a map of 1919, and it also comes from this Court record; a map showing sand bars on the Missouri River in Township 67 North, Range 43 West, Fremont County, Iowa, dated

August 21, 1919, by the County Surveyor of Fremont County, Iowa; the map of 1923, a Corps of Engineers map; map of 1926, Corps of Engineers map; 1928 Corps of Engineers map; 1930 Corps of Engineers map; 1940 Corps of Engineers; 1946-47, sheet No. 59, the tri-color, Corps of Engineers; also a map 1946-47, an index map of the reach of the Missouri River from Rulo, Nebraska, to Yankton, South Dakota; aerial photographs, 1925, 1930, 1936, 1937, 1938, 1939, 1941, 1944-45, 1947, 1960, 1966. The 1960 and the 1966 air photos are ASCS photographs of the United States Department of Agriculture. All the others, insofar as my knowledge, are Corps photographs. We went through the procedure of overlay, taking the chronological change that could be seen of different positions of the river as indicated by the dates of the maps and photographs. Used the transparencies discussed previously here, then I constructed overlays as accurately as I could and made comparisons from my own construction. The purpose was to try to determine where the left and right bank of the Missouri River was at certain times in history in the Otoe Bend area. (R. V. XIX, pp. 2734-2736).

Q. (By Mr. Murray). Well, what are your conclusions derived from the matters you have just been pointing out on the maps?

A. If you take the right bank which is developed by the transparency of Mr. Brown, the right bank and the left bank during this period were operating independently. The right bank was generally moving to the right, or toward Nebraska, and the left bank was generally moving toward the left in this area. Schemmel Island is in that portion of the channel, the current Schemmel Island, so we had a general bulging of the Missouri River in the southern part of this Otoe Bend area in 20's.

A. The right bank moved right, the left bank moved left.

Q. And the left bank left?

A. So the stream widened.

The Court: How do you show the right bank?

The Witness: From the transparencies which are made from the Corps of Engineers map.

The Court: The Corps kept moving it through.

Mr. Murray: What?

The Court: The Corps was moving it to the right.

Mr. Murray: Not in the 20's.

The Court: I mean in the 30's. That is what its object was, wasn't it? Was there anything shown there before the Corps started working on it, Doctor, that you found? You started talking about the left bank and then all of a sudden you started talking about the right bank.

The Witness: The right bank is shown from Corps maps. It is shown from the Corps maps. The right bank is not on these maps. It is developed in my report, showing the displacement of the right bank to the right and left bank to the left in the latitude of area known as Schemmel Island.

Q. (By Mr. Murray). Do you mean that this bulging you have been describing occurred during Corps work, commencing in 1943, or before the Corps work?

A. Before the Corps work.

Q. Well, since we are at that point, does your study enable you to reach some conclusion as to what

the effect of the Corps work was starting 1934? (R. V. XIX, pp. 2764-2766).

The Court: I am curious to know this. Here is a thing that occurs to me. You very carefully indicated where the left bank was from 1897 on. The left bank was moving easterly or westerly?

The Witness: No, sir; westerly.

The Court: I am talking about this lower part the Nebraska people are interested especially. At some point then you started talking about the right bank.

The Witness: Because in the other period of history, as the river was going back west the right bank was destroyed so you can only pick it up —

The Court: There is no way of seeing an escarpment or anything else there. Is there any way where you can see except for what the Corps did? That is what I am getting at. You still have to depend on the Corps to find out where your right bank is, don't you?

The Witness: Yes, from the Corps maps.

Mr. Murray: I believe, Your Honor, that Nebraska contends here in the case that the island was formed prior to the Corps work with the main channel on the east side of it and the Corps shifted the channel to the west side of it as a result of their work.

It is our position that the island was not formed at that time and that it formed as a result of the Corps work, and I think the witness has reached some conclusions concerning which of those things happened, and I was trying to elicit his conclusion in that manner.

The Court: You have heard the proposition. Can you support that proposition, Dr. Ruhe?

The Witness: Yes, sir; I can, if I may show these, the transparencies, on the light table. We can't project them because they don't show well, but we can look at them on the light table. (R. V. XIX, pp. 2767-2768).

Mr. Murray: In other words, you have some more transparencies?

The Witness: I have some more transparencies. These have been constructed from the aerial photographs of 1930, 1936, 1937, 1938, 1939, 1941, 1944, 1946, 1947. These are controlled by taking the distortion out of the air photograph by cartographic means in the office and laboratory and by plotting them all to the same scale. These are all to the same scale. (R. V. XIX, p. 2769).

Q. (By Mr. Murray) Now, Dr. Ruhe, I have a very poor recollection. You had overlaid these two exhibits, one on the other, and did you state what you see by so doing?

A. Yes. When I lay one on the other, then I see the change in the channel. I also see the deposits related to the structures, and there is a change from 1930 to 1936, pre-Corps and post-Corps?

The Court: Where is pre-Corps? Where was the channel pre-Corps?

The Witness: 1930.

The Court: Where is the channel, main channel?

The Witness: It would be down through here (indicating). From here there would be a bar and there is a constriction.

The Court: Where is the left bank?

The Witness: The general left bank is this line (indicating). The right bank is that line (indicating). This is an island (indicating) and this is an island (indicating), and these would be bars (indicating).

The Court: You really can't tell where any main channel is from that, can you?

The Witness: If I were boating, I would go down this way (indicating).

The Court: Oh, I know, but you can't tell by looking at that. You weren't there and you can't see from that where the channel was except that you are going to skirt around the bars.

The Witness: That would be the way you would have to do it, skirt around the bars.

The Court: Go ahead.

Q. (By Mr. Murray) Your next transparency has been numbered "D-1225." Tell us what that is.

A. That is a transparency constructed from the 1937 aerial photograph.

Q. In similar manner to what you have described?

A. Similar manner. (R. V. XIX, pp. 2778-2779).

Q. (By Mr. Murray) Now, what, in your research and study use, do you make of D-1225?

A. If you will overlay that on 1936, then you see the change brought in the additional year. These are now islands and bars related to the structures of the Corps. From 1936 to 1937.

Q. And that is the purpose of that overlay, is that right?

A. That is the purpose of that overlay.

Q. You have done the same thing for 1938?

A. 1938.

Q. And the transparency for 1938, I take it, is this one which is 1226?

A. 1226. (R. V. XIX, pp. 2781-2782).

Q. (By Mr. Murray) I take it, Doctor, your use of 1226 would be to overlay it on 1225?

A. 1937.

Q. And you observe thereby the changes in the bars and channels and islands, and so forth, between those two years, to-wit, 1937 and 1938?

A. 1937 and 1938.

Q. Now, I think you told us generally that you did this same process —

The Court: What kind of channel have you got on the east side in 1938?

The Witness: In 1938 the channel is through here (indicating) and there are structures going through. There are secondary channels within here (indicating) —

The Court: Where is Schemmel Island?

The Witness: Schemmel Island is forming in here, down through here (indicating).

The Court: Hadn't it formed by 1938?

The Witness: In 1938, parts of it were there. Parts of it.

The Court: You have got two bodies of water now, two channels, going down each bank, haven't you?

The Witness: There is a channel here (indicating) and the channel here (indicating), and there are secondary channels here (indicating). (R. V. XIX, p. 2784).

Q. And the overlay for 1939 is marked "D-1227." Again, if you overlay D-1227 on D-1226, what do you see?

A. Change, and the accumulation of a large mass of sediment in the area generally known as Schemmel Island in 1939.

Q. In 1939, do you really see Schemmel Island taking shape?

A. You begin to see Schemmel Island taking shape in 1939.

The Court: It has taken shape, hasn't it?

The Witness: It is pretty well outlined now.

The Court: Yes.

The Witness: Pretty well outlined.

The Court: It is there.

The Witness: Yes, except for minor areas which will show.

Mr. Murray: We offer Exhibit D-1227.

Q. (By Mr. Murray) Have you made a transparency in similar manner from the aerial photo of 1941?

A. I have.

Q. Is that overlay marked "D-1228"?

A. It is.

Q. And then do you overlay that in similar fashion on 1227?

A. I do.

Q. What do you see by so doing?

A. The slight changes in outline of the area and the beginnings of the addition of this thing that

looks like a pork chop down in the south part of Schemmel Island.

The Court: That is when again?

The Witness: 1941 overlaid on 1939.

Q. (By Mr. Murray) Have you done the same, gone through the same process with the aerial picture taken in 1944 or 1945?

A. Yes.

Q. Is that marked "D-1229"?

A. It is.

Q. What do you see by overlaying that on 1228?

A. The changes in the area between 1941 and 1944, and in this area which was shown in 1941 as island is now back in channel. There are also shifts in the positions of the chutes or minor channels on the east side of Schemmel Island. There is also a change here which will show the island to the south of Schemmel Island.

Q. (By Mr. Murray) Now, what is D-1230, Dr. Ruhe?

Q The tri-color from the Corps, dated 1946-47, is that right?

A. 1946-47, yes.

Q. (By Mr. Murray) And I now ask you to tell us what that shows when you place it on top of D-1229.

A. The slight changes that take place between 1944, 1946, 1947. The channel east of the island has narrowed to chuted in its present state.

Q. Now, you have one more overlay here marked "D-1231," and it has numerous colors, including blue, on it. What is that?

A. This is a summary sheet of all these overlays and you do it by reverse procedure. You trace the

channel as shown in 1946-47, then you trace it on 1944 and 1941, and you go back in time so each color that is represented on this transparency represents the time that that portion of the island was channel, so that would be the maximum age of any sediment in that part of the island. Sometime since then that became land this portion, for example, the purple, is maximum 1936, the orange is 1930, the blue, for example, is the channel as shown on the tri-color.

The Court: What is the oldest land you find there? What color it that?

The Witness: It would be the colorless, there are four little pieces that come through the whole history on the east side, and these would be dated from 1930.

The Court: What is the next color?

The Witness: Yes. The orange pattern would have been channel in 1930, so this land is less than 1930. Then the next is purple, this is less than 1936. The brown is less than 1937, the red less than 1938, the lavender less than 1939. (R. V. XIX, pp. 2790-2793).

Q. What conclusions do you reach by the study which you have just been relating as regards to the formation of what we know today as Schemmel Island?

The Court: You start with 1934, do you, Doctor?

The Witness: 1932 to 1935 is the next pictorial record.

A. In my opinion, the island area we know as Schemmel Island formed by the construction of the dikes and sediment deposited in the channel created Schemmel Island.

Q. (By Mr. Murray). Do you ascertain from your study you have just related which part of the island is the oldest part of the island?

A. Yes.

Q. Which part of it is the oldest?

A. I will have to answer that by saying the orange areas on this — The four white areas are the oldest, and they are between things which would be identified on the 1946-47 map as chutes, and then just slightly to the west there. Those are the four oldest areas I could determine through this analysis. They are shown on the 1930 aerial photograph.

Q. How do they appear on the 1930 aerial photograph?

A. They are areas within the accretionary mass on the east side of the broad channel of the river as of that time. (R. V. XIX. pp. 2794-2795).

YEAR	DESCRIPTION OF EXHIBIT	EXHIBIT NO.
1936	U. S. Army Corps of Engineers Aerial Photo	D-1107
1937	U. S. Army Corps of Engineers Aerial Photo	D-1106
1938	U. S. Army Corps of Engineers Aerial Photo	D-1108
1939	U. S. Army Corps of Engineers Aerial Photo	D-523
1941	U. S. Army Corps of Engineers Aerial Photo	D-25
1934 thru 1943	U. S. Army Corps of Engineers Reconnaissance Maps from first run in 1934 through entire year of 1943.	D-31 thru D-259
1934 thru 1939	Set of U. S. Army Corps of Engineers ground level photos, taken 1934 thru 1939.	P-2637

APPENDIX "E"

Evidence Concerning the Otoe Bend Canal Dredged in 1938

PLAINTIFF'S TESTIMONY

LEWIS MARTIN, born 1909, Nebraska farmer, worked for W. A. Ross Construction Co., starting in 1935. In 1938 worked on dredge, Billy Peters as deck hand. Identified photo of dredge working on Otoe Bend Canal. The canal started down near Hamburg Landing and went approximately West, little Northwest. The canal had small willows on each side of it. (R. V. VIII pp. 1143-1146).

The Court: What land were you cutting through there, Schemmel Island?

The Witness: No, this is Nebraska accretion land.

The Court: Where with reference to Schemmel Island?

The Witness: It would be approximately straight — it would be southwest.

The Court: Where the proposed channel was going to be?

The Witness: Yes.

The Court: And where the stream is now, is that right?

The Witness: That is right. (R. V. VIII, pp. 1146-1147).

Q. Mr. Martin, in this canal you were talking about, that was really dug in Nebraska west of the designed channel, wasn't it?

A. It is in the proposed channel as it is today.

Q. It was the west half of the proposed channel, wasn't it?

A. Yes.

Q. How wide did you dig it?

A. Well, that is something that is — We had no reason. We had targets to go by. I would say approximately a hundred feet.

Q. Today this area would be the right bank. This all washed out over here, didn't it?

A. Well, it washed approximately over to the dikes.

Q. Yes, river work. It washed all the area out between that and the water that was there?

A. Outside of Schemmel's Island.

Q. Schemmel's Island is on east of this?

A. Yes, and the channel was east of that in 1935 when we — (R. V. VIII pp. 1148-1149).

HENRY SCHEMMEL, see Appendix "G".

DEFENDANT'S TESTIMONY

RAYMOND L. HUBER, Omaha, Nebraska, 61 years old, employed by U. S. Army Corps of Engineers from 1926 until retirement in 1963. In Omaha office from 1936 to retirement. Civilian Design Engineer worked on channelization of Missouri River.

The Court: Yes. You started using a dredge and made a channel of some kind that it eroded away and the water would do the rest?

The Witness: By training the river into the channel at the upper end, the river will take down through the new course and the old one can be closed (R. V. XXIII, p. 3307).

Q. Was that one of the tools later used at Otoe Bend?

A. It was.

Q. Why was dredging used at Otoe Bend?

A. Dredging was used because the river continued to want to hook back to the east so a dredged channel was made through the right bank bar area to give an additional channel for the river to occupy so that the left bank dikes could be extended out and close off the old channel. Then the river could be forced through the new dredged channel.

Q. Was it your personal responsibility to either recommend or not recommend that dredge cut?

A. Yes, sir.

Q. Was it your responsibility to design where the dredge cut would be?

A. It was.

Q. Did you do that?

A. I did.

Q. Was it your responsibility to determine whether or not right-of-way would have to be purchased for that dredge cut?

A. It was.

Q. Did you make that determination?

A. I did.

Q. And which way did you determine?

A. I determined that the area through which the dredge cut was to be made was several feet below high banks, subject to normal inundation before the river over-topped the banks; also the bar area was low and would not require condemnation or purchase of the land.

Q. Did the dredge cut at Otoe Bend accomplish what you wanted it to accomplish there?

A. Yes, sir; it did.

Q. And was that the maneuver which finally put all the channel at Otoe Bend for the entire length of the island into the designed channel?

A. It was, in conjunction with the dike construction; yes.

The Court: You said the engineers have over the years considered any land within the high water banks is Government land, or can be used in connection with the river, it that right?

The Witness: That is right.

The Court: You don't need to buy it?

The Witness: Yes, sir. This was between the high banks in this area.

The Court: If you go outside the banks, you have to buy or get permission to use it?

The Witness: We do. (R. V. XXIII pp. 3308-3310).

YEAR	DESCRIPTION OF EXHIBIT	EXHIBIT NO.
June 3, 1938	U. S. Army Corps of Engineers Reconnaissance Map.	D- 145

COMMENT

Shows the canal apparently dredged on date of map. Shows nothing between existing channel and canal, except a sand bar.

July 2, 1938	U. S. Army Corps of Engineers Reconnaissance Map.	D- 148

COMMENT

Shows willow bar and sand bar between existing channel and canal, with the willow bar in the designed channel.

Aug. 23, 1938	U. S. Army Corps of Engineers Reconnaissance Map.	D- 155

COMMENT

Shows nothing but sand bar between the canal and designed channel and the channel area prior to canal.

1937	U. S. Army Corps of Engineers aerial Photo taken prior to dredging of canal.	D-1106
1938	U. S. Army Corps of Engineers aerial Photo taken year canal was Constructed.	D-1108
1939	U. S. Army Corps of Engineers Aerial Photo taken year following the digging of the canal.	D- 523
1941	U. S. Army Corps of Engineers Aerial Photo taken three years after construction of canal.	D- 25
1938	U. S. Army Corps of Engineers ground level Photos taken during Construction of the canal in 1938.	P-2637

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APPENDIX "F"

*Evidence Concerning Where the Main Channel Was Immediately Before it Was Diverted into Otoe Bend Canal in 1938

PLAINTIFF'S TESTIMONY

See LEWIS MARTIN in Appendix "E".

See HENRY SCHEMMEL in Appendix "G".

DEFENDANT'S TESTIMONY

RAYMOND L. HUBER, Omaha, Nebraska, 61 years old, employed by U. S. Army Corps of Engineers from 1926 until retirement in 1963. In Omaha office from 1936 to retirement. Civilian Design Engineer working on channelization of Missouri River.

The Court: Tell us about it, how you went and what you were doing there in 1936, and what you saw. There have been people here that went before you did.

The Witness: I arrived in the Omaha District March 1, 1936. The river was still frozen with ice. As soon as the river was free of ice, early in April, we boarded the inspection launch, the inspection boat, the Sgt. Prior, and made an inspection of the Missouri River from Omaha downstream to Rulo on the inspection boat, and in passing saw this particular area. There was no island as such. There were many sandbars in the area of the Otoe Bend area (R. V. XXIII, pp. 3302-3303).

The Court: In 1936 they had been working down there —

The Witness: Two years.

The Court: The channel then was probably in the same place it is now?

The Witness: Not entirely, sir.

The Court: It wasn't?

The Witness: No. The upper end was in the designed channel, but not the lower end.

The Court: Was there bars on both sides of that channel?

The Witness: There were bars on both sides of that channel; yes, sir.

The Court: In other words, there were bars there between the channel and the Nebraska shore?

The Witness: Yes, sir (R.V. XXIII, p. 3304).

Q. (By Mr. Murray) Are you referring in your answer, Mr. Huber, were there bars all up and down the Schemmel Island location or just in some portion of it, or what?

A. Generally, up and down the Schemmel area, the Schemmel Island area, yes.

Q. Do you have particular recollections of the Otoe Bend area because it was somewhat troublesome to you?

A. I do.

Q. What was the trouble?

A. At the lower end, the lower half of Otoe Bend, the river had a tendency to form a channel back to the east, to the Iowa shore in the vicinity of Hamburg Landing so that as the dikes were extended it caused a hooking of the channel back to the east, which was a troublesome spot in that the dike work did not immediately bring it into the designed channel (R.V. XXIII, p. 3305).

The Court: Tell us about dredging then. When did the Corps, in your work, official

capacity, and with your superiors, and so on, whether you decided for or against dredging, and why not.

The Witness: The idea of using a dredge to expedite the movement of the river into the designed channel was conceived in 1936 and was first accomplished in the Narrows, which is a bend just east of the airport. It was the first time a different tool had been used to shift the river rather than to force it over by dike construction (R. V. XXIII, p. 3306).

EXHIBITS

See exhibits listed under APPENDIX "E".

YEAR	DESCRIPTION OF EXHIBIT	EXHIBIT NO.
1941	U. S. Army Corps of Engineers aerial Photo of 1941.	D-25
1946	Map of Otoe Bend area designated as 1946-47 tri-color.	D-1036

COMMENT

Contour line shows the location of abandoned channel immediately before diversion into canal.

1938	U. S. Army Corps of Engineers Reconnaissance Map dated Sept. 3, 1938	D-298

COMMENT

Shows nothing but sand bar between old channel and canal channel.

1942	U. S. Army Corps of Engineers Reconnaissance Map dated May 5, 1942	D-303

COMMENT

Shows shallow water, sand bar and Willow Bar east of designed channel in canal area.

APPENDIX "G"

Evidence Showing That No Substantial Body of Identifiable Land Was Cut Off by Otoe Bend Canal

PLAINTIFF'S TESTIMONY

HENRY E. SCHEMMEL, Nebraska City, Nebraska, one of the claimants of Otoe Island.

Q. As a result of your experience of hunting and fishing on the river, did you become familiar with an area which is now sometimes called Schemmel Island area?

A. Yes; I did.

Q. What was its appearance when you first saw it? First of all, state the year when you first saw that land.

A. In the spring of 1934.

Q. What was its appearance when you first saw it?

A. There was a long island — Well, to the east, with willows on that I saw at that time, in the spring of 1934, with willows on, and they were a reasonable height of willows. I would have to guess the height, but they were distinct and there was a — That is about it, was the willows except south farther (R. V. IX, pp. 1222-1223).

Q. Mr. Schemmel, I will hand you Exhibit P-192 and ask you to identify that document.

A. It is a quitclaim deed made on the 11th day of January 1938, George Ward a widower, of the first part, and Dan Hill and Henry E. Schemmel — or to Dan Hill and Henry E. Schemmel.

Q. Was that deed recorded in Otoe County?

A. Yes, sir; the State of Nebraska, Otoe County. The deed was recorded on the 19th day of Janu-

ary 1938.

Q. Was it also recorded in the State of Iowa?

A. Yes, sir. On the 22nd day of August 1939 at 3:30 p.m., Volume 46, page 10.

Q. Why did you record it in the State of Iowa?

A. Well, after Otoe Bend Canal had been cut in there, why, some of our land had been cut over there so we recorded it to show ownership of that land in Iowa.

The Court: All right.

Q. (By Mr. Moore) After you received the deed from George Ward, did you, either alone or in company with Dan Hill, go onto the land to look at it?

A. Yes, sir.

Q. How did you get there?

A. Well, the dike lines were built from the Nebraska shore below a — well, I think we walked the dike lines and got onto the main part of the island.

Q. What dike lines did you walk?

A. Well, just below the Otoe Bend Canal the Engineers, under contract with Ross Construction Company, built from the Nebraska bank over onto this island and had other supplemental dikes that went out to what was evidently supposed to be the designed channel of the river.

Q. That would just get you to the land on the —

A. On the Nebraska side (R. V. IX, pp. 1224-1226).

LEWIS MARTIN, see testimony set out under Appendix "E".

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DEFENDANT'S TESTIMONY

RAYMOND L. HUBER, see testimany set out under APPENDIX "E" and APPENDIX "F."

EXHIBITS

See exhibits listed under APPENDIX "E" and APPENDIX "F".

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APPENDIX "H"

Evidence Showing the Location and a Description of the Natural River at Rock Bluff Bend Before the Corps Commenced Work at That Site in 1934 and Showing What the Corps Did at Rock Bluff Bend Prior to 1943

Defendant has set out what she believes to be all relevant and material testimony of the eyeball witnesses of both Plaintiff and Defendant with regard to location and description of the natural river prior to work of the U. S. Army Corps of Engineers and showing what the Corps did at Rock Bluff Bend prior to 1943 in Appendix "J". Exhibits relating to these matters are also set out in chronological order in Appendix "J".

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APPENDIX "I"

Evidence Showing That Iowa Applied Her Common Law Rule That the Beds of Navigable Waters Are State Owned Consistently From 1856 to Date

PAROL TESTIMONY

FRED T. SCHWOB, I am 74 and retired. Prior to 1957 I was employed by the Iowa State Conservation Commission from, I am not sure whether it was the fall of 1932, or the spring of 1933. In 1946 I was Director of the State Conservation Commission and I had to quit as director because of my health, (First started to work in 1933 as game warden and had Woodbury and Monona Counties. Adjoin Missouri River.) (R. V. XXII, p. 3223).

In 1933-34, the Missouri River was very heavily loaded with silt. They called it the Big Muddy and it was well named because it was always very heavily laden with silt, and the channel was constantly changing because of the water action, and apparently the soil was easily eroded because I know when I would go down the river in a boat, big chunks of the bank would fall off and it would sound almost like a gun, and if you were close to it with a boat you had to be careful because it was dangerous. Big chunks apparently washed the sand out from underneath and the chunks would fall off and the channel was very unstable. It was changing all the time. It changed from week to week.

There were islands; I don't remember how many. I don't think any were marked as owned by the State of Iowa because nobody paid any attention, either Iowa or Nebraska, to the Missouri River because of the adverse conditions from a recreational and fish and game standpoint (R. V. XXII, pp. 3224-3225).

Q. Was that in large part related to pollution or movement of the river?

A. Pollution and unstable condition of the stream. The bed wasn't stabilized and it just wandered all over the bottom and was constantly cutting off here and building there, and cutting there and building here, and both Brown's Lake and Blue Lake and, I believe Noble's Lake were old ox-bows of the Missouri River, but they were not right on the bank of the river.

It was generally understood that the islands in the Missouri River and the islands in the Mississippi, and the islands in the Iowa and the Des Moines and the other rivers in the state, belonged to the State of Iowa, and this was our understanding.

Another thing that we had always was squatters, people that would move onto an island, and it happened all up and down the Mississippi and I know it did on the Missouri, people moved in and squatted and they would start out by living in a tent and the first thing you know they would have a shack of some kind, and the first think you know they had a little clearing and a garden and the first thing you know they were farming it.

The Conservation Commission had a written definite statement of policy back in those days known as the "25-year program". It was a long-term program for widest uses of the state's natural resources, land, water, wildlife, parks, pollution control. Not all the things in the plan were done and some things were done which were not in the program because conditions changed (R. V. XXII, pp. 3226-3228).

GERALD J. JAURON, age 57, resident of Earling, Iowa. I was employed by the Iowa Conservation Commission as a conservation officer in 1946, and my territory was Harrison and Shelby Counties. Since the Missouri River runs along the western border of Harrison County, that part of the river was in my territory from 1946 on. In 1958, I was assigned to patrol the entire river from Sioux City, Iowa to the Iowa-Missouri state line. In 1962, I was relieved

of my duties as a conservation officer and was given the assignment as "Coordinator of Missouri River Activities". Commencing in 1962, it was part of my duty to investigate and report concerning state owned lands in the vicinity of the Missouri River (R. V. XVII, pp. 2391-2396).

EXHIBITS

GENERAL MAPS SETS

YEAR	DESCRIPTION OF EXHIBIT	EXHIBIT NO.
	Complete set of Alluvial Plain Maps prepared by Iowa Conservation Commission from negatives furnished by Corps of Engineers.	D-1151 thru D-1160
	Set of translucent overlays showing in red where present Missouri River is located with reference to 1940-41 designed channel referred to in 1943 Boundary Compact.	D-1151-A thru D-1160-A
	Set of translucent overlays showing in green the areas along the river which Iowa claims to own; also showing by cross-hatching where Iowa's claims of ownership are buttressed by Court Decrees or conveyances.	D-1151-B thru D-1160-B
	Set of translucent overlays showing in yellow 49 locations where the courts of Nebraska have unilaterally determined titles to lands along the boundary since the 1943 Compact.	D-1151-C thru D-1160-C
	(Exhibits D-707 through D-712 are volumes of copies of Nebraska court decisions shown in yellow).	D-707 thru D-713
	Set of aerial and ground level photos taken by Gerald J. Jauron showing the areas along the river which Iowa claims to own.	D-1236 thru D-1261 D-1258-A D-1249-A

EXHIBITS

IOWA LEGISLATIVE BRANCH

Chapter 131 enacted by the 11th General Assembly of Iowa in 1866 required that all certificates of purchase of swampland issued prior to the first day of January, 1860 be filed within six months.

Chapter 35 enacted by the 15th General Assembly of Iowa in 1874 provided for use of the Iowa banks of the Mississippi and Missouri rivers by their owners to encourage navigation, with certain restrictions.

The Legislature of 1907 provided for the sale of beds of meandered lakes deemed incapable of public use. This was amended in 1909.

Chapter 259 enacted by the 40th General Assembly of Iowa in 1923 provided for specific uses of the river banks by municipal corporations, but specifically reserved fee-title to the bed in the State and protected the first rights of the riparian owners. This statute remains unchanged and appears as Section 372.6 of the 1966 Code of Iowa.

Sections 111.18 through 111.31 were passed originally by the 37th, 39th and 40th General Assemblies of Iowa. This would have been in the years 1917, 1921 and 1923.

NEGOTIATIONS LEADING UP TO ENACTMENT OF THE 1943 COMPACT

YEAR	DESCRIPTION OF EXHIBIT	EXHIBIT NO.
1902-41-	Exerpts from proceedings of Nebraska and Iowa legislatures indicating negotiations in progress concerning boundary compact.	P-1791 P-1851 P-1852 P-2301 P-1853 P-1854 P-1855 P-1793 P-1803 P-1796 P-1799 P-1804 P-1805 P-1806 P-1807 P-1856
	Newspaper articles relating to negotiations.	P-2500 P-2690 P-1537 P-2692 P-1536 P-1534 P-1535 P-1538

ENACTMENT OF THE COMPACT

YEAR	DESCRIPTION OF EXHIBIT	EXHIBIT NO.
1943	There are numerous exhibits showing actions by the Nebraska legislature, the Iowa legislature, and the Congress of the United States in 1943, all culminating in enactment and ratification of the Boundary Compact.	P-1549 P-1618 P-2303 P-1547 P-2302 P-2605

YEAR	DESCRIPTION OF EXHIBIT	EXHIBIT NO.
		P-2606
		P-1008
		P-1012
		P-1015
1943	AP Maps certified from Iowa Secy. of State office.	D-1
	AP Maps certified from Nebraska Secy. of State Office.	P-1770

NEGOTIATIONS FOR A NEW COMPACT SINCE 1943

YEAR	DESCRIPTION OF EXHIBIT	EXHIBIT NO.
	There are numerous exhibits in this record indicating that, since enactment of the 1943 Boundary Compact, the states of Iowa and Nebraska have continued negotiations concerning the boundary, attempting to negotiate another Compact which would place the boundary in the Missouri River as the river has now been stabilized by the Corps of Engineers.	P-1005 thru P-1007 P-2223 P-2233 thru P-2235 P-2293 thru P-2300 P-2304 P-2305 P-2306 P-2319 P-2607 P-2608

IOWA EXECUTIVE BRANCH

NEBRASKA VS. IOWA

YEAR	DESCRIPTION OF EXHIBIT	EXHIBIT NO.
1890	Copies of proceedings in the Supreme Court of the United States in *Nebraska vs. Iowa*.	P-1722
1892	Opinion	P-2603

YEAR	DESCRIPTION OF EXHIBIT	EXHIBIT NO.
1892	Decree	P-2604
	Exhibit D-1204 through D-1220 are all plats of surveys of various Iowa claimed areas which the Conservation Commission caused to be made. All were surveyed by L. H. Hart except D-1204, which was surveyed by Ivan Windenburg (Deer Island). Almost all of these surveys involved either surveying or computing a segment of Iowa-Nebraska boundary line as fixed by the 1943 Compact.	
1-19-39	Excerpt from the Iowa Conservation Commission Minutes wherein the Commission adopted a resolution to sell a certain island in the Missouri River consisting of some 300 to 500 acres to the Travelers Insurance Company for $1,250.00. The Minutes note that a Commission member, Dr. Neenan, urged a policy relative to the sale of land be adopted.	D-636
1-19-39	Another excerpt wherein the matter of adopting a policy relative to the rental of islands was considered. A committee was appointed to study the matter.	D-637
3-10-39	Excerpt from the Commission Minutes wherein the Commission considered the contents of a letter from the Isaak Walton League at Sioux City recommending establishment of a policy concerning the administration of stabilized marginal lands along the Mississippi and Missouri rivers resulting from development of the rivers for navigational purposes.	D-638

YEAR	DESCRIPTION OF EXHIBIT	EXHIBIT NO.
1-6-42 1-7-42	Excerpt from the Conservation Minutes, wherein one Brotherton had offered to purchase an island for $400.00 and the Commission rejected the offer. The land involved here was Wilson Island, and these Minutes in 1942 note that the previous offer had been made to purchase this isand which the Executive Council had disapproved. (See Exhibit D-636).	D-644
6-7-43 6-8-43	Excerpt from the Conservation Commission Minutes, wherein the Commission considered a claim for damages filed by one Weatherly arising out of the fact that he claimed the Commission had opened a dike so as to let Missouri River water into Lake Manawa, and that thereby some land owned or claimed by Weatherly was flooded or at least made too wet for farming. The Commission disallowed the claim and for the reason that the Commission believed that the so-called Weatherly land was actually state-owned.	D-646
10-17-49	Excerpt from the Commission Minutes, wherein the Commission considered an application to purchase by one Kenneth Wilson an island just off the east shore of the Missouri River one mile north of the Woodbury-Monona County line. The Commission ordered a complete investigation and report.	D-647
11-28-49	Excerpt from the Minutes where	D-648

YEAR	DESCRIPTION OF EXHIBIT	EXHIBIT NO.
11-29-49	the Commission considered an application from E. E. McFerrin of Modale to purchase some abandoned Missouri River channel in Cincinnati Township, Harrison County, near the Slaps area. The Commission determined that the area was a natural wildlife area and so determined not to sell; also at this meeting it was determined that the area which Kenneth Wilson had tried to buy was a natural wildlife area and it was determined not to sell that.	
1-15-51	Excerpt from the Commission Minutes wherein the Commission considered an application from the Auditor of Fremont County to survey and appraise a certain tract of state-owned land, being north portion of an island commonly known as McKissick's Island. After noting that it had been the policy of the Commission not to sell such islands, the application of the Fremont County Auditor was denied.	D-649
11-30-53	Excerpt from the Commission Minutes wherein the Commission considered the Application of one Arthur E. Sieck to purchase approximately 600 acres of abandoned channel in Mills County known as St. Mary's Bend. Mr. Sieck's application was rejected.	D-650
7-25-55 7-26-55	Excerpt from the Commission Minutes wherein the Commission considered the application of Henry K. Peterson to purchase Wilson Is-	D-651

YEAR	DESCRIPTION OF EXHIBIT	EXHIBIT NO.
	land. Again noting that it was the Commission's policy not to sell these areas which are natural wildlife habitat, Mr. Peterson's application was rejected.	
9-1-55	Excerpt from the Commission Minutes in which another application to purchase a Missouri River Island had been received; the person making the offer is unspecified, but the land was described as being in Fremont County. Motion was made, seconded, and adopted that the policy of not selling such islands be adhered to and that this application be rejected.	D-652
11-14-55	Excerpt from the Minutes in which an offer by one Cortmell of Onawa to purchase 23 acres of land near Blue Lake was considered and rejected.	D-653
2-27-56	Excerpt from the Minutes wherein the Director, Mr. Stiles, reported that he had written a letter to the Governor in 1955 suggesting that state-owned areas along the Missouri River should be surveyed; that the Governor had suggested that three test areas be surveyed and that provision then be made in future budgets for additional surveys. Mr. Stiles stated that the three test surveys were already under way: — one in Fremont County; one in Decatur Bend; and the other West of Missouri Valley.	D-654

YEAR	DESCRIPTION OF EXHIBIT	EXHIBIT NO.
6-9-59	Excerpt from the Minutes where the Commission noted that condemnation actions were under way for the establishment of the DeSoto Bend National Wildlife Refuge, and that there were certain problems with the Rand family in that area. The two state-owned areas known as Rand Access and Rand Bar were acquired by the state in a trade with the Rands.	D-656
8-4-59	Excerpt from the Minutes and shows the conclusion of this Rand Access-Rand Bar trade.	D-657
9-2-59	Excerpt from the Minutes where the Commission resolved to have California Bend surveyed, preparatory to commencement of a quiet title action.	D-658
10-7-59	Excerpt from the Minutes. It appears that Edward E. Eaton, attorney, of Sidney, Iowa, and Charles Wever is the man who had made the three test surveys. Mr. Wever reported that it was his estimate that the state was losing about 43,000 acres along the Missouri River to farmers who were encroaching and taking possession. He estimated that the state was losing about 1400 acres between the Missouri line and the Nebraska City bridge, consisting of several small islands. He stated that these islands had come into existence as a result of the stabilization of the Missouri River. Mr. Eaton urged the Commission to do whatever was	D-659

YEAR	DESCRIPTION OF EXHIBIT	EXHIBIT NO.
	necessary in order to have the ownership of these areas determined, including retaining of a full-time attorney.	
11-2-60	Excerpt from the Minutes where the Commission approved a sale of 1851.78 acres of state-owned land and water to the Federal government for inclusion in the DeSoto Bend National Wildlife Refuge. Discussion was also had as to the progress of litigation then pending.	D-655
3-1-61	Excerpt from the Minutes concerned with the proposed settlement of the litigation then pending in Federal Court at Sioux City between the State and the Winnebago Indian Tribe arising out of condemnation of right of way for the Winnebago Bend Canal.	D-660
9-6-61	Excerpt from the Minutes concerned with obtaining of access to the Missouri River.	D-611
10-3-61	Excerpt from the Minutes wherein the Commission approved acquisition of some land at Snyder Bend by purchase of land from one Ira Copple.	D-662
12-6-61	Excerpt from Conservation Commission Minutes wherein the Commission was considering the purchase of land at Snyder Bend for access.	D-663
12-6-61	Another excerpt from the Minutes wherein four purchases of land in the Decatur Bend area were approved.	D-664

YEAR	DESCRIPTION OF EXHIBIT	EXHIBIT NO.
12-6-61	Another excerpt from the Minutes wherein the Commission considered a problem existing as to the boundary between the state-owned bed of Carter Lake and certain lots contiguous to the lake.	D-665
1-3-62	Excerpt from the Minutes, reflecting that the Commission discussed and considered the matter that the U. S. Army Corps of Engineers was destroying conservation resources owned by Iowa in the Tyson Bend area and in the California Bend area and in the Middle Decatur Bend area.	D-666
1-3-62	Excerpt from the Minutes, wherein a Resolution was adopted wherein the Commission requested the Corps of Engineers to cease and desist from further destruction of these natural resources owned by the State.	D-667
2-7-62	Excerpt from the Minutes in which the Commission assigned the Woodbury County Conservation Board an option which it had obtained to purchase land for access to Snyder Bend.	D-668
4-11-62	Excerpt from the Minutes relating to a part of a state-owned bed of Carter Lake. It appears that the Commission agreed to sell 9.72 acres of the state-owned lake bed to the YMCA of Omaha so that the YMCA could have access to the water.	D-670
7-2-63	Excerpt from the Minutes wherein the Commission discussed problems existing with the Burt County	D-672

YEAR	DESCRIPTION OF EXHIBIT	EXHIBIT NO.
	Bridge Commission relative to the Decatur Bridge and the access road to Decatur Bridge.	
11-5-63	Excerpt from the Minutes wherein the Commission resolved to cooperate with the Corps of Engineers in promoting and constructing the Blackbird-Tieville-Decatur complex of oxbow lakes. Also, the Commission considered possible purchase of a buffer strip as required by the Corps of Engineers in connection with the project.	D-673
11-9-64	Excerpt from the Minutes wherein consideration was given to an access road off Decatur Bridge approach highway to afford the public access to Decatur Lake.	D-674
2-4-64	Excerpt from the Minutes in which the Grosvenor Purchase at Winnebago Bend was approved.	D-675
4-7-64	Excerpt from the Minutes in which the exchange with Peterson Trust was approved, involving abandoned channel at Soldier Bend and part of the state-owned area at California Bend, and pursuant to which a fence was built at California Bend.	D-676
7-6-64 7-7-64	Excerpt from the Minutes in which it was reported to the Commission that state-owned lands of Louisville Bend, Soldier Bend, Tyson Bend, California Bend, Rand Access, Rand Bar, and Wilson Island had been posted and Jauron was authorized to proceed slowly with future postings and to work closely with the	D-677

YEAR	DESCRIPTION OF EXHIBIT	EXHIBIT NO.
	Attorney General's office in the matter.	
11-6-64	Excerpt from the Minutes in which the purchase of an area adjacent to the state-owned area in Tyson Bend from Raymond Peterson was approved. Also, the boundary settlement between state-owned lands in Louisville Bend and a contiguous owner was approved. Also, the boundary line settlement between state-owned lands in Soldier Bend and Mr. Cleveland was approved.	D-678
11-6-65	Excerpt from the Minutes in which Jauron was authorized to continue his land acquisition work and approval of the purchase of the land from McFerrin in Tyson Bend was approved.	D-679
	A series of ground level photographs and aerial oblique photographs mostly in color, taken by Gerald Jauron, Iowa Conservation Commission employee, showing most of the areas claimed to be owned by the state along the Missouri River. To the best of our knowledge, these pictures were introduced simply for showing the Special Master the general nature of the state-owned areas. These pictures show that a large part of the state-owned is unimproved, not being farmed; most of it is either timber, swamp, sandbar, mud bar or channel covered by water.	D-1236 thru D-1261 and D-1258-A and D-1259-A

NOBLES LAKE

YEAR	DESCRIPTION OF EXHIBIT	EXHIBIT NO.
9-1-50	Copy of Harrison County, Iowa, District Court Decree in case entitled *State of Iowa v. Nobles Lake Drainage District,* holding that Nobles Lake (an ox-bow former channel of Missouri River near Wilson Island) was state owned.	D-1048
1947	Decree recites that case was commenced in 1947.	Page 6
1944	Decree recites that Nobles Lake had been surveyed in October, 1944, by order of Iowa Conservation Commission.	Page ?????

WILSON ISLAND

YEAR	DESCRIPTION OF EXHIBIT	EXHIBIT NO.
7-1-60	Certified copy of permanent easement and agreement whereby Henry K. Peterson, et ux, and Raymond G. Peterson, et ux, relinquished to State of Iowa their claims to Wilson Island, and granted easement for boundary line fence construction and maintenance.	D-1017

RAND BAR & RAND ACCESS

YEAR	DESCRIPTION OF EXHIBIT	EXHIBIT NO.
8-10-61	Copy of Deed — conveys Rand Bar and Rand Access to State of Iowa from Fannie Rand.	D-1053
1963	Copy of Petition — *Rand v. Iowa,* 21075, Harrison County, Iowa, District Court.	P-2700
1964	Copies of appearances and disclaimer in above case.	P-2701 P-2702

CALIFORNIA BEND

YEAR	DESCRIPTION OF EXHIBIT	EXHIBIT NO.
1-6-64	Copy of Quit Claim Deed by which Peterson Trust conveyed all its title and interest in approximate north half of California Bend area to State of Iowa.	D-1060
1930	Corps map with Willis Brown's superimposition of land involved in *Coulthard v. Simmons.*	P-2717
1937	Corps reconnaissance map of California Bend.	P-2669
1938	Corps aerial photo of California Bend	P-2380
1939	Corps aerial Photo of California Bend.	P-2382
1939	File of case entitled *U. S. v. Mencke*, condemnation for right-of-way for California Cut-off canal, Fed. Dist. Court for Nebraska.	P-2670
1941	Corps aerial photo of California Bend.	P-2393
1959	Partial transcript of *Chicago & North Western R. Y. Co. v. Simmons, et al*, District Court of Harrison County, Iowa.	P-2716
1959	Copy of Quit Claim Deed, C. & N. W. R. Y. Co. to Coulthard.	P-2719
1965	Copy of Original Notice in *Iowa v. Simmons*, Equity 21276, District Court, Harrison County, Iowa.	P-2672
1968	Copies of Petition and Answer in *Coulthard v. Simmons*, Equity 21771, Harrison County, Iowa, District Court.	P-2718

TYSON BEND

YEAR	DESCRIPTION OF EXHIBIT	EXHIBIT NO.
12-17-59	Certified copy of Decree of Federal	D-1049

YEAR	DESCRIPTION OF EXHIBIT	EXHIBIT NO.
	District Judge Hicklin in case entitled *U. S. v. 242.53 acres of land, Ned Tyson, et al,* awarding damages for taking of easement on Tyson Island to State of Iowa (Recites case started 9-30-58).	
11-16-60	Copy of Opinion of Eighth Circuit Court of Appeals affirming above case (Case entitled *Tyson v. Iowa*).	D-1113
	Copy of condemnation plat prepared by Corps of Engineers for above case.	D-1051
12-10-66	Deed from Raymond G. Peterson, et ux, to State of Iowa consummating boundary settlement and purchase of additional land in Tyson Bend area.	D-1055
1-10-68	Deed from McFerrin, et ux, to State of Iowa consummating boundary settlement and purchase of additional land in Tyson Bend area.	D-1054

DEER ISLAND
(IOWA v. RAYMOND)

YEAR	DESCRIPTION OF EXHIBIT	EXHIBIT NO.
10-20-59	Partial transcript from file of cause entitled *State of Iowa v. Raymond, et al,* District Court, Harrison County, Iowa, wherein title to Deer Island was quieted in State of Iowa.	D-1047
1-15-63	Copy of Opinion of Iowa Supreme Court in above case appearing at 254 Iowa 828, 119 NW2d 135.	D-1047-A

COMMENT

The above exhibits were introduced for two purposes: First to show that Iowa's claim of ownership at Deer Is-

land is more than a mere claim and has been recognized as valid by full and fair trial. Second, reading of these exhibits will show that Deer Island and Otoe Island formed in almost identical fashions; therefore, *Iowa v. Raymond* is authority for Iowa's claim of ownership of Otoe Island.

LOUISVILLE BEND

YEAR	DESCRIPTION OF EXHIBIT	EXHIBIT NO.
9-23-64	Copy of Memorandum of Agreement between State of Iowa and Prichard, et al, settling disputed boundary line between state owned lands and privately owned lands.	D-1118

MIDDLE DECATUR BEND

YEAR	DESCRIPTION OF EXHIBIT	EXHIBIT NO.
	Copy of Complaint in *U. S. v.* 66.95 *acres of land, et al*, in Fed Dist. Court for Northern District of Iowa.	P-2693
	Copy of letter from Michael Murray to F. E. Van Alstine regarding above case.	P-2694

BLACKBIRD-TIEVILLE BENDS

YEAR	DESCRIPTION OF EXHIBIT	EXHIBIT NO.
	Tri-color map with markings superimposed by various witnesses.	Myrland Ex. 1
1948	Copy of R. E. Contract — Kirk, et ux, to Henry K. and Raymond G. Peterson.	P-1758
1959	Copy of R. E. Contract — Pace, et al, to Lakin	P-1779
1959	Copy of Agreement — Lakin with Petersons	P-1778

YEAR	DESCRIPTION OF EXHIBIT	EXHIBIT NO.
1961	Copy of Assignment of R. E. Contract — Henry K. to Raymond G. Peterson.	P-1759
1965	Copy of Warranty Deed — Kirk to Peterson.	P-1760
196..	Copies of pleadings and documents in *Lakin v. Iowa*, 17400, Monona County, Iowa, District Court.	P-1761
196..	Copies of pleadings and documents in *Peterson v. Iowa*, 17674, Monona County, Iowa, District Court.	P-1755
196..	Copies of pleadings and documents in *Lakin v. Iowa*, 17737, Monona County, Iowa, District Court.	P-1757
1969	Snap shots by Willis Brown.	P-2656 thru P-2660 P-2709 P-2711 P-2715
5-26-65	Copy of Quit Claim Deed whereby Lakin, et ux, conveyed to State of Iowa, all interest in certain lands in Blackbird-Tieville Bend area.	D-1056
5-4-65	Copy of Quit Claim Deed whereby Raymond G. Peterson, et ux, conveyed to State of Iowa, all interest in certain lands in Blackbird-Tieville Bend area.	D-1057
	Plat of survey of lands in Blackbird-Tieville Bend area by J. D. Virtue (Sheet 1).	P-2225
	Plat of survey of lands in Blackbird-Tieville Bend area by J. D. Virtue (Sheet 2).	P-2226
	Map of Blackbird-Tieville Bend area.	P-2227

WINNEBAGO BEND

YEAR	DESCRIPTION OF EXHIBIT	EXHIBIT NO.
1946-47	Tri-color Map on which Bartleman superimposed the area in Winnebago Bend which Iowa claims to own in green; also superimposed in red the land awarded to U. S. as Trustee for Winnebago Indian Tribe in case of *U. S. v. Flower, et. al;* demonstrates that Iowa does not claim any of the land awarded to the tribe in 1937 case.	D-1120
1938	Mosaic of 1938 Corps aerial photos showing where the river was when *U. S. v. Flower* was decided.	D-1102
12-4-34 thru 2-18-38	Copy of complete file of *U. S. v. Flower*, in U. S. District Court for District of Nebraska, including maps and aerial photos used as evidence, and Memorandum Opinion of Judge Woodrough filed Aug. 29, 1937. In this opinion, the Court (on page 3) reviewed the laws of Iowa and Nebraska regarding river bed titles and held that river bed ownership must be determined on the basis of which state it is in. The Court held (on page 6) that an avulsion had occurred between 1870 and 1879 which cut off some Iowa land in Iowa Sections 31 and 32, leaving it on the Nebraska side of the river; also held that another avulsion had occurred in about 1912, stranding some Nebraska land on the Iowa side. The boundaries of land awarded to the Tribe are set out at pages 7, 9 and 10. On Feb. 18, 1938 Sup-	P-2661 D-1114

YEAR	DESCRIPTION OF EXHIBIT	EXHIBIT NO.
	plemental Judgement was filed with drawing some of the land which *had been* therefore awarded to the Tribe.	
12-27-39	Copy of Circuit Court Opinion in *U. S. v. Flower.*	D-1115
1927	Willis Brown retrace of Leo M. Peterson survey of 1927 concerning status of Tribal lands.	P-2655
1939	Corps aerial photo of Glovers Point Bend and Winnebago Bend.	P-1878
1966	Copy of part of Docket in case entitled *U. S. v.* 126.78 *acres of land, et al,* in U. S. District Court for Northern District of Iowa, showing resume of Judgment and Decree entered June 10, 1966, awarding title of Tract A (Iowa) to State of Iowa subject to easement for construction and maintenance of channel.	D-1050
1966	Copy of condemnation map prepared by Corps of Engineers showing location of Tract A (Iowa) and other tracts.	D-1052
5-27-64	Copies of deed from Ray L. Grosvenor, et ux to State of Iowa consummating "Grosvenor Purchase" of certain lands in Winnebago Bend area.	D-4061 D-1062

BROWERS BEND

(DARTMOUTH COLLEGE V. ROSE)

YEAR	DESCRIPTION OF EXHIBIT	EXHIBIT NO.
1936	Corps of Engineers aerial photo of Browers Bend showing Missouri	D-1095

avulsion at either Rock Bluff Bend or Otoe Bend. Therefore, there is certainly no sufficient evidence of avulsion to sustain any finding of avulsion in this case.

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OMADI BEND

(KROGH V. CHRISTENSEN)

YEAR	DESCRIPTION OF EXHIBIT	EXHIBIT NO.
11-3-58	Certified copy of Decree of Woodbury County, Iowa, District Court wherein title to certain described tract of land in Omadi Bend was quieted in State of Iowa in case entitled *Krogh v. Christensen, et al.*	D-1007
11-4-58	Copy of Quit Claim Deed from Krogh, et ux, to State of Iowa conveying additional land in Omadi Bend.	D-1058
11-4-58	Copy of Quit Claim Deed from Christensen, et ux, to State of Iowa conveying additional land in Omadi Bend.	D-1059

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IOWA JUDICIAL BRANCH

McManus v. Carmichael, 3 Iowa 1, in 1856.

Holman v. Hodges, 112 Iowa 714, 84 N. W. 950, in 1901.

Kitteridge v. Ritter, 172 Iowa 55, 151 N. W. 1097, in 1915.

Payne v. Hall, 192 Iowa 780, 185 N. W. 912, in 1921.

McFerrin v. Wiltse, 210 Iowa 627, 231 N. W. 438, in 1930.

Arnd v. Harrington, 227 Iowa 43, 287 N. W. 292, in 1939.

Sioux City v. Betz, 232 Iowa 84, 4 N. W. 2d 872, in 1942.

This case involved a 1928 patent from Iowa to Missouri River accretion land.

East Omaha Land Company v. Hansen, 117 Iowa 96, 90 N. W. 705, in 1902.

Dartmouth College v. Rose, 257 Iowa 533, 133 N. W. 2d 687, in 1965.

Solomon v. Sioux City, 243 Iowa 634, 51 N. W. 2d 471, in 1952. This case involved an Iowa patent issued in 1940.

Wilcox v. Pinney, 250 Iowa 1378, 98 N. W. 2d 720, in 1959.

Rand v. Miller, 250 Iowa 699, 95 N. W. 2d 916, in 1959.

Iowa v. Raymond, 254 Iowa 828, 119 N. W. 2d 135, in 1963.

We also cite the case of *Iowa v. Nobles Lake Drainage District*, the Decree having been entered in the record as Exhibit D-1048, which reveals that the case involved a survey of the lake by Iowa in 1944, and the Petition filed in 1947.

Exhibit D-1047 is a partial transcript of the file in the *State of Iowa v. Raymond*, in the District Court of Harrison County involving Deer Island. This partial transcript includes the description of real estate involved and also the Trial Court's Decree.

Exhibit D-1047-A is a copy of the Iowa Supreme Court opinion in the case of *State of Iowa v. Raymond, et al.*

COMMENT

These last two documents confirm the fact that title to Deer Island has been quieted in the State of Iowa.

Exhibit D-1007 is a certified copy of the Decree of the Woodbury County, Iowa, District Court in the case of *Krogh v. Christensen*, wherein the title of the State of Iowa to a certain tract of land was quieted. Decree dated November 3, 1958.

Exhibit D-1116 is a copy of the Iowa Supreme Court opinion in the case of *Dartmouth College v. Rose* with State of Iowa as Intervenor.

COMMENT

In this case, Iowa was in the position of claiming that an avulsion had occurred at Brower's Bend. Both the District Court at Woodbury County, Iowa, and the Supreme Court of Iowa rejected this contention relying very heavily on the presumption against an avulsion and noted that Iowa was unable to produce any eye witness to the avulsion that was alleged to have occurred in 1937.

NEBRASKA LEGISLATIVE AND EXECUTIVE

YEAR	DESCRIPTION OF EXHIBIT	EXHIBIT NO.
July 1954	Report of the Nebraska Legislative Council Committee on "Problems Arising Out of Boundary Changes Between Iowa and Nebraska".	D-680

COMMENT

Otoe County

It is stated in the above Report (Ex. D-680) that the Nebraska State Surveyor had made a computation of territory gained or lost as a result of the 1943 Boundary Compact by the several Nebraska counties along the river boundary. The report states that the State Surveyor computed that Otoe County gained 500 acres and lost 1200 acres. The Report contains no statement as to precisely where the acres gained and lost were situated. However, we know that Otoe County lost over *1200* acres at Nebraska City Island site alone. One can only deduce

YEAR	DESCRIPTION OF EXHIBIT	EXHIBIT NO.
	from this that he didn't consider Otoe Island as lost by Otoe County; this would have been another 600 acres, more or less, and Otoe County's loss would have been approximately *1800* acres. He could not have been considering the Copeland Bend Area as lost by Otoe County because this is another area of approximately 1200 acres and this would have made his total acres lost by Otoe County approximately *3000* acres.	
Cass County	The Report states that the State Surveyor computed that Cass County, Nebraska, lost 800 acres ceded to Iowa by the 1943 Compact. It would appear that he did not consider Nottleman as lost by Cass County because the Nottleman Island area is approximately 1600 acres all by itself. He may have been considering the Auldon Bar area as lost by Cass County; it is an area of approximately 960 acres. If he had considered that both areas were ceded to Iowa by the 1943 Compact, his figure for acres lost by Cass County would have been approximately 2560 acres.	
Sarpy County	The Report states that the State Surveyor computed that Sarpy County, Nebraska, lost 1000 acres ceded to Iowa by the 1943 Compact. It would appear likely that he may have had the land cut off by St. Mary's Bend canal in mind. The	

YEAR	DESCRIPTION OF EXHIBIT	EXHIBIT NO.
	State of Iowa does not claim that this land is state owned and only claims ownership of the abandoned channel in St. Mary's Bend.	
Douglas County	The Report states that the State Surveyor computed 200 acres as lost by Douglas County. Where these acres may have been is immaterial because the State of Iowa does not claim ownership of any land adjacent to Douglas County.	
Wash. County	The Report states that the State Surveyor computed that Washington County lost 900 acres ceded to Iowa by the 1943 Compact. This can only be a reference to the land in California Bend cut off by the California Cutoff canal in 1939. This is almost exactly to acreage of land which was cut off from Washington County and later ceded to Iowa by the Compact. The Nebraska State Surveyor could not have considered in 1954 that Wilson Island, Rand Bar, Rand Access, Tyson Island or Sandy Point Bend were Nebraska lands ceded to Iowa in 1943.	
Burt County Dakota County Thurston County	The Report states that the State Surveyor did not consider any territory was lost by Burt County, Dakota County or Thurston County by operation of the 1943 Boundary Compact. In other words, he did not consider that there were any lands ceded to Iowa in Soldier Bend,	

YEAR	DESCRIPTION OF EXHIBIT	EXHIBIT NO.
	Bullard Bend, Little Sioux Bend, Deer Island, Blencoe Bend, Louisville Bend, Lower Decatur Bend, Middle Decatur Bend, Upper Decatur Bend, Tieville Bend, Blackbird Bend, Monona Bend, Upper Monona Bend. Rabbit Island, Winnebago Bend, Glovers Point Bend, Snyder Bend, between Omadi and Browers Bends, Omadi Bend or Dakota Bend.	

These figures from the office of the of the Nebraska State Surveyor are particularly significant evidence in the case at bar because they stand as the only expression of opinion by that office in this record. Although Mr. Willis Brown, the present Nebraska State Surveyor, testified at length in the case, we call to the Special Master's attention that he was never once called upon by Nebraska counsel to express his opinion about anything. He was not asked his opinion concerning where the main channel of the river was when Nottleman Island formed; he was not asked his opinion concerning when Nottleman Island formed; he was not asked these key questions although he testified he had made a detailed investigation of the area and produced many exhibits which he had prepared during his work. Could it be that Mr. Brown's opinion, formed as a result of all this work were helpful only to Iowa

YEAR	DESCRIPTION OF EXHIBIT	EXHIBIT NO.
	and not to Nebraska? The evidence also discloses that Mr. Brown had made a very detailed investigation at Otoe Bend. But again, he was never asked and did not give any opinion concerning when Otoe Island formed or where the main channel was when it formed. The only conclusion to be reached is that his opinions formed during this investigation were favorable only to Iowa, not to Nebraska. The significance of this evidence is that it was the opinion of the Nebraska State Surveyor's Office in 1954 and still was the opinion of that office in 1969 that neither Nottleman Island nor Otoe Island were in Nebraska prior to 1943, and neither were ceded to Iowa by the 1943 Boundary Compact.	

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NEBRASKA COURTS RECOGNIZED

Exhibits D-1151 through D-1160 are a complete set of the Alluvial Plain maps referred to in the Boundary Compact.

Exhibits D-1151-C through D-1160-C are a set of translucent overlaps which show in yellow the location of lands in Nebraska which the Nebraska courts have unilaterally determined ownership of in various court actions since 1943.

Exhibits D-707 through D-713 are volumes of certified copies of Nebraska court decrees wherein the Nebraska courts up and down the river unilaterally made these determinations of ownership of Missouri River lands. There are 49 yellow colored areas on Exhibits D-1151-C through D-1160-C.

Independent Stock Farms v. Stevens, 128 Neb. 619, 259 N. W. 647, in 1935.

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FEDERAL COURTS RECOGNIZED

Exhibit D-1114 is a copy of the complete file in the Flowers case entitled *United States of America v. Wilbur Flowers, et al.*, in the United States District Court for the District of Nebraska, Omaha Division. On page 3 of the Court's Memorandum Opinion file August 29, 1937, the Court reviews the local law of Nebraska and the local law of Iowa as regards ownership of riverbeds within each state, and recognizes that each state was entitled to determine ownership of riverbed within the state for itself. On page 6 of this same Memorandum, the Court finds that there was an avulsion at Winnebago Bend between 1870 and 1879 which stranded some Iowa ground on the west side of the river in Iowa sections 31 and 32, which is the area Iowa now claims to own. On pages 7, 9, and 10 of this Memorandum, the Court describes the boundaries of the land he awarded to the Indian Tribe on the Iowa side of the river. By supplemental judgment filed February 18, 1938, Judge Woodrough eliminated some ground which he had theretofore awarded to the Indians.

Exhibit D-1115 is a copy of the Circuit Court Opinion in *U. S. v. Flowers, et al.*, affirming the decision of Judge Woodrough.

Exhibit D-1049 is a certified copy of the Federal District Court Decree in the case of *U. S. v. 242.83 acres of land, Ned Tyson, et al.,* which is the same case later entitled *Tyson v. Iowa* in Circuit Court. This is the decree in which Judge Hicklin awarded the damages for taking an easement on Tyson Island to the State of Iowa.

Exhibit D-1113 is a copy of the Circuit Court opinion in the case of *Tyson v. Iowa,* wherein the damages for condemning an easement upon the island in Tyson Bend by the Corps were awarded to Iowa, on the theory that said island had formed upon the state-owned bed of the stream after the 1943 Compact.

Exhibit D-1050 is a copy of part of the docket in the case of *U. S. of America v. 126.78 acres of land,* showing a resume of the Judgment and Decree entered by Judge Hanson in that case on June 10, 1966, awarding to the State of Iowa ownership of Tract A (IOWA.) subject to the government easement for construction and maintenance of the channel.

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APPENDIX "J"

Evidence Concerning Location of Iowa-Nebraska Boundary Before 1943 and on July 12, 1943

PLAINTIFF'S TESTIMONY

NOTTLEMAN ISLAND AREA

SILVA EYLER, an Iowan, aged 77, lived at Bartlett after her marriage in 1906, then south of Bartlett. In March, 1909, moved onto the Haffke place and moved off in July of 1909. River was cutting into the east bank and got too close to the house. River would cut under the big trees and big chunks, and they would just disappear. They lost two horses, corn crib and granary. "There was no flood. There might have been a June raise or something coming." (R. V. V pp. 584 & 585).

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GAY EYLER, an Iowan, aged 85, husband of SILVA. River was cutting in 1909 into the Haffke place. "Well, it wasn't too high. It was almost bank full. It was awful swift. The main channel was right against the bank, it seemed like." Wasn't flood time (R. V. V pp. 593-596).

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JOHN POWLES, an Iowan, aged 70, testified that the river was cutting east in 1908 and prior, that main river was on the east of the island then, and only a narrow chute on the west (R. V. V p. 552). He saw boats practically every year, once saw a show-boat pull up to the river bank and drive off 4 head of horses (R. V. V p. 554). The island then had willow sprouts on it, cottonwoods a foot in diameter,

sand, weeds, and rushes. He moved to a farm a half mile from the river in 1895, in 1922 the river cut to within a quarter of a mile, swift current along bank. Island east of Theo. Powles' place called Gochenour. River ran on east of it (R. V. V pp. 570-571).

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BRUCE CONNOR, an Iowan, age 81, Glenwood, Iowa. Born on farm north of Bartlett and went to Egypt School. Lived on Dilley farm in 1913. River was cutting in on south forty. Cut into Fulton and McKinley farms while lived on Dilley place. Lived there eight years. Worked for a fellow named Vanderpool putting in retards. Graveyard west of Egypt School went in river (R. V. V pp. 598-616).

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JAMES J. LIPPERT, Council Bluffs, Iowa, age 74, lived about 2 miles straight north of Queen Hill in 1904. Between 1910 and 1920, the main channel of the river was straight east, only 2 or 3 small chutes on west side. Could see the cutting on the Iowa side. Between 1925 and 1930 went down there for a picnic and waded in knee deep chute out to a sand bar with a bunch of willows on it. The main part of the river at that time right straight east against the Iowa Bank two miles. The land between could have been the south end of Gochenour Island (R. V. V pp. 745-756).

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HARRISON L. GAYER, a Nebraskan, age 75, in 1919 moved 1¼ miles straight west of Queen Hill. In 1919 drove down there, stood at Queen Hill and looked east and saw willows as far as you could see.

On Queen Hill you could see river over to north and east, couldn't see it looking straight east. River ran east from a point north of Queen Hill. You couldn't see 50 feet into those willows. In 1922 or 1923 walked *out into them* to the water's edge, a quarter of a mile, such a matter, to chute of water, wasn't main channel, no current (R. V. V pp. 761-762).

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WHITNEY GILLILLAND, a former Iowan, testified that he played on the river, and said that the main channel was east of the island, but then admitted that he might have been too far north and was talking about Gochenour Island. Then stated that the east channel was at least of equal dignity with west (R. V. VI p. 137).

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ALBERT W. WARGA, a Nebraskan, age 74, testified that the 1913 river was about a mile east of Queen Hill, between Queen Hill and river was built in accretion land, willows, and grass and stuff like that, all dry between Queen Hill and River (R. V. V p. 773).

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RUTH DOOLEY, a Nebraskan, age 52, first knew Nottleman Island in 1929, stayed on the island the summer of 1929 and again in winter of 1934. The main river ran on east side of the island, and only a small shallow chute, less than a quarter of a mile wide, you could wade across, located right up against Queen Hill (R. V. VI p. 796). Her uncle first went to Iowa side to see about sending his children to school (R. V. VI p. 794).

EDWIN M. DOOLEY, a Nebraskan and husband of RUTH DOOLEY, first saw the island in 1934, disagreed with some of his wife's testimony and after becoming confused from maps, settled down and finally said that the main part of the water was running on east side "because the tow boats towing material and stuff would go up the east side." About 50 or 60 acres cultivated in 1934 (R. V. VI pp. 801-803). No commercial navigation at that time (R. V. VI p. 813).

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GENEVIEVE AND LUTHER JOHNSON, Nebraskans, aged 62 and 69 respectively, testified of the river cutting in 1926 and 1927 on the Iowa bank and described the water along the east bank. There was an island, but they didn't testify what was on the other side of the island (R. V. IV pp. 471 and 481).

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ALBERT MASON WATTS, an Iowan, aged 68, one of the claimants to Nottleman Island, stated that the river cut east, main channel on east side of the island from 1915, the west channel was so shallow that he saw a man drive a horse and buggy over to the island, corps boats had to use the east channel, and did, when they first started to work in the area, as the west channel was too shallow (R. V. V pp. 617-656).

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CAPTAIN OTTO NEUHAUSER, Kansas City, Missouri, age 76, associated with the river since 1910. In 1915 came up the river to Omaha on a little boat with 2 barges. They had to pick their own water then. Remembered going past King Hill in 1915, hitting a sand bar and going on the east side of an island east of Rock Bluff (R. V. V p. 697).

On being asked how he would determine where the deep water was and where he would go when navigating the river, Capt. Neuhauser answered, in substance:

Coming up the river wasn't so hard because you had a sound pole on the head end. Going down, the sound pole wouldn't do much good. You better know where you are going. It is something that has to be born in you. If you see big *boils* you watch them and when they break and spread apart, when they break they boil up and break and make rings out spreading, you just watch how far they spread and that is how deep the water is.—

If you get in a place where the little boils were all in a line, you stay on the upper side of them because that is where the deep water was. There was all kinds of little things you had to catch onto, and then when the river is up all you had to do was follow the drifts. You followed the drifts. The drifts always go where the best water is (R. V. V p. 682).

Q. Would you be able to make any estimate as to how many boats, except row boats, little boats, would make the trip from Kansas City to Omaha in a year back in 1915, 1916, 1917 and thereabouts?

A. In a year?

Q. Yes.

A. About four or five. That was about all we had. Outside of snag boats (R. V. V pp. 690-691).

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ALVIN B. GREGORY, an Iowan, age 57, is a construction supervisor for the U. S. Army Corps of Engineers, in 1933 came up the river on construction boat and stopped at Rock Bluff. Had to go back down and go up east side. "There wasn't enough water: it was

wide, but not too deep." (R. V. V p. 697). In Spring of 1934 they started work right below the mouth of Watkins ditch. Dike 630.0 was first dike straight out and Dike 630.2 was trail dike off the revetment. Had trouble with water tearing dikes out. Before east channel was finally closed boats used east channel, actually no dredging done in 30's west of the island (R. V. V pp. 701-705).

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JACK CHADWICK, Nebraska City, Nebraska, aged 57, a registered engineer for the U. S. Corps of Engineers, worked for Forney Construction Company on river in 1933 and 1934. In 1934 river west of the island was flat, too flat. It was spread out some, I would say—think it was wider. I think part of it was pretty narrow. Right at the lower end, I believe, is where it was the narrowest (R. V. V p. 711). Boats went out on the west side of Tobacco Island and east side of Nottleman Island (R. V. V p. 710).

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JOE A. TESNOKLIDEK, age 53, Omaha, Nebraska stated that he ran a hunting camp in 1933 south of King Hill; that he helped a boat up the west side of Goose Island, a second boat, a paddle wheeler. Couldn't go on the west side of Nottleman Island. "It was like the Platte River. You were lucky to find a channel to row through." (R. V. V p. 724).

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ROY O. HAROLD, Plattsmouth, Nebraska, in 1938 did manned maintenance work on the dikes in Tobacco Island and Nottleman Island area. Mostly rock where the river had damaged the dikes. Worked on Dike

630.0, as had trouble holding those dikes. "Yes, they are pretty hard to handle. After flood or high water or ice tears out the piling and tears out the dikes, you repair with rock." (R. V. V p. 731). "Q. Was there quite a bit of water running through that east side even then? A. Yes, more than on the west side." (R. V. V p. 732).

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GEORGE L. McGRAW, Plattsmouth, Nebraska, aged 57, worked with Captain OTTO NEUHAUSER pulling retards, either in 1936, 1938 or 1939. One of those three years. There was water running around east side of Nottleman. Seemed about equal on each side at that time. The main channel around Tobacco Island was all on the east side (R. V. V p. 741).

COMMENT

The foregoing was the Plaintiff's eyewitness testimony as to the location of the main channel, thalweg or boat track at Nottleman Island before 1943. As we have stated in argument, it is undisputed that the island was in existence in 1923. The only relevant and material evidence relating to "where the river was" would be that evidence concerning where the river was when the island formed. If the main channel, thalweg or boat track was west of the island when the island formed, the island was thereby in Iowa in 1923, and even if the thalweg shifted from one side to the other thereafter once, twice, a dozen times or a hundred times such shifting would not transfer the island from one state to the other. Therefore all testimony concerning where the main channel, thalweg or boat track was from time to time after 1923 is irrelevant and immaterial.

The testimony of Ruth Dooley, Edwin M. Dooley, Genevieve Johnson, Luther Johnson, Alvin B. Gregory,

Jack Chadwick, Joe A. Tesnoklidek, Roy O. Harold and George L. McGraw only relate to river locations after 1923.

Only Silva Eyler, Gay Eyler, John Powles, Bruce Connor, James J. Lippert, Harrison L. Gayer, Whitney Gillilland, Albert Mason Watts, Capt. Neuhauser, and Albert W. Wargo purported to testify concerning pre-1923. The testimony of these witnesses was mainly concerning the fact that that pre-1923, the Iowa bank of the river was the cutting bank, which Iowa does not deny. Iowa does deny that such evidence proves the location of the main channel or thalweg. As Plaintiff's expert, Dr. Gillilland said, "Wherever water flows it can erode." (R. V. XI p. 1583).

Iowa tendered the following witnesses to contradict the proposition that the main channel, thalweg or boat track was east of the island when the island formed, and that it was in fact west of the island:

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DEFENDANT'S TESTIMONY

EVERETT E. HARLESS, 64, and Iowan, testified he went steamboating on Missouri and Mississippi in 1924 until 1927, then farming in Bartlett, Iowa area within a mile of the Missouri River. Hunters and fishermen on river beginning in 1920 until now. Mostly around Nottleman Island and south. Docked on Mickey Fulton farm east of island and north of King Hill, about 1/3 of way up from south end of Nottleman Island. At this point "There were two channels, one on the west of Nottleman Island and one on the east of Nottleman. The east channel was what we called the smoothest water. Being a steamboater, we called the easiest water the smooth water. The Iowa side was the smoothest water, so naturally if we wanted to go north upstream, we would go up the Iowa side and take the easy water going up. If we wanted to come

clear around the north end of Nottleman Island and back down the Nebraska side, which would be the swiftest part of the channel, on the Nebraska side, which land next to—we called it Rock Bluff in those days; I guess it is really Queen Hill, because we could make better time coming back down that channel."

The Court: You are talking about 1920 first?

The Witness: Yes, sir. The Iowa channel was the narrowest of the two channels—four to five hundred yards wide. The west channel was quite a bit wider (R. V. XV pp. 2091-2093). The Nebraska channel was the deepest channel of the two, and the swiftest of the two (R. V. XV p. 2099). There were practically no changes at all until Corps of Engineers commenced working in 1934 (R. V. XV p. 2105). Called the island a sand bar in 1920's. No farming on it then.

The Court: It had to be a pretty good current to be cutting away from the farms, didn't it?

The Witness: It was a pretty good current, but when that starts cutting, gets into that sandy loam—We have ground over there, what we call on top is a heavy soil we call gumbo (R. V. XV p. 2126).

The Witness: And underneath this gumbo is sand, and when it starts cutting in that sand—

The Court: It cuts easy and quick?

The Witness: Mighty fast (R. V. XV p. 2127).

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MARTIN SPORER, 70, a Nebraskan, testified he lived in Murray, Nebraska (west of Rock Bluff) area all his life. Recalls having gone to river in Rock Bluffs area along in 1912, '13 or '14, and the bank started at Rock

Bluff and then headed straight to King Hill. That was where the river went.

Q. Where is the little town of Rock Bluff relative to the river now?

A. About the same place (R. V. XV p. 2131).

The Court: How about the difference in the width of the river now as compared to 1914?

The Witness: As I remember it, not much difference.

The Court: How much difference?

The Witness: Well, there would be more islands then.

The Court: There would be more islands then. The river was spread out more?

The Witness: Yes; the river was spread out more (R. V. XV p. 2136).

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FRED CAMPBELL, 70, Murray, Nebraska resident. Recalled a Baptismal Service conducted at foot of Queen Hill in 1905. River waist deep 15 feet from shore (R. V. XV p. 2143). River looked deep because there would be boils in it. Deep water kind of gushes up and rolls out. River is about where it has always been, not quite as wide (R. V. XV p. 2146).

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REX YOUNG, 81, a Nebraskan, born between Rock Bluff and Murray. Lived in vicinity all his life. Around 1905-1907 west bank of river at the foot of Main Street in Rock Bluff town, right near where Rock Creek runs into the Missouri now. River was 30 to 40 rods wide. He and brother swam it out to a sand bar.

River then went around east side of Queen Hill and went right around the point and went right where those little buildings are now where Mr. Siepe lives, and those folks, and went a little to the right and went straight down the river practically south. It hit the north side of King Hill and then went around King Hill—had to go back to the east to get around King Hill. The river today is east of where it was prior to 1933 (R. V. XV pp. 2151-2154).

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WILLIAM M. CHAMBERS, 72, an Iowan, testified to year 1908 only, when 11 years old family moved to farm with 200 yards of river at that time. The "L. E. Southwick" farm on Exhibit D-1040, a 1910 plat. His first view of river it was low, in March, covered with ice and from east bank the ice was all covered with sand, and could hardly tell where sand bars on the west began and the ice ended. Next view was in flood stage, latter part of April. Water all around the house, little bit of high land sticking out. First view after flood was at a point approximately west of the house, just old muddy water and low sand bars, muddy water from bank out to edge of sand bars. When the sand bars first appeared they were out 200 yards or maybe a little more, but as river receded they kept coming closer—in the summer—bars just kept creeping closer. The water was shallow and as it filled more bars showed out,—the chute was narrowing up as the water fell. Queen Hill looked just due west. When bars first appeared they were just pure old sand (R. V. XV pp. 2166-71). He and neighbor took a boat up north—devised a little cloth sail and when wind was in the south would sail up channel between Iowa shore and the bars two or three miles north. Sometimes it appeared to be a little wider. The edge of the bars run straight, but sometimes the main bank would have a little place where it cut in, and it would

be wider there. Channel—water moving fairly swift—wasn't any decided channel in there.—about same from one side to the other with swiftness—if the wind was still blowing, we would always cross over some little chute between these bars and come down the channel side because it was swifter and would move our boat faster and with less work.—other side of the bars where the main channel was—the west side of the sand bars. Channel—west—of the sand bars, was quite a river—probably a half mile wide. Maybe even more.—it was pretty big. From the Iowa shore to the sand bars we could easily wade it all the way across.—in August, when we were swimming every day, we eventually found we could touch bottom by letting our feet down. West side of the sand bars we never sounded. It was just deeper than we had any way of touching the bottom with (R. V. XV pp. 2172-2175). In 1908—saw a snag boat—the James McPherson—wanted to get as close to it as we could. We crossed over the chute onto the bars and walked over. It was getting a snag out, had their lines and boom and crane like on a tree that had snagged in the river.—It was on the west side. The channel side.—tied up that night on the main bank on the west side. —just before cold—they—passed down again—in the west channel (R. V. XV pp. 2183-2185).

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CLARENCE H. CHAMBERS, 62, an Iowan, lived in Glenwood, Shenandoah and Sidney, Iowa area from birth in 1907 until 1922 when moved to California, returned to Iowa 1930. Father was a fisherman—liked to fish Missouri River, its backwaters and sloughs. In 1919 or '20, after World War I fished with father —during midsummer made several trips, sometimes twice a week. When they came in from the Bartlett area took a road out to river just beyond "S" curve,

road led west from painted barn. When they reached the first waters of river at end of that road—it was rather calm appearing water.—varied in width at different places along there. Fished usually some distance to south of road, where it was fairly calm water —60 to 50 yards wide or possibly a little more—beyond this water—there was land there with willow and small cottonwood growth on—Dad always referred to it as the island.—piece of water between this island and the Iowa shore—everyone called it the island chute.—this so-called island was—quite extensive—for fishing we would range generally down south—as much as a mile and up the chute a somewhat lesser distance—half to three quarters of a mile—could see what appeared to be the end of the island up in there. — We could see the lower end of the island. — As I recall, from one year to another there was usually some variation in the shape and size down there, and on one occasion I know we could see the south end. Could look across and see what was on the other side only when near the ends — too much willows and stuff, but down near the end where there was merely a long sand bar, we could see over there to — I think they called it King Hill and Queen Hill. There were two hills on the other side of the river. — immediately west of the island at the upper end and the lower end—you could see—a large expanse of water and there was was a time or two we went over there, but we didn't spend much time fishing because there would be debris and there would be a lot of very heavy stuff in there on the west side of the river. Where I could see it, the water that led to the west of it seemed to be much wider. Dad called it the channel (R. V. XVI pp. 2233-2239).

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WARD SCHADE 72, a Nebraskan, born in 1894 in Glenwood, Iowa, when 3 moved to Randolph, Iowa, 1913 moved to a farm 3 miles west of Randolph, then 1915 to farm between Tabor and Bartlett, been in Plattsmouth, Nebraska for about 27 years. Became acquainted with the river about 1915. Used to fish there in 1915 right straight west of Bartlett, road came to river about quarter of mile south of King Hill. Trips to river in those early days was mostly for fishing, hunted some, but not much. Mostly fishing in company with father-in-law, Charles Aitkin, every week, maybe three weeks, maybe it would be a month. — generally fished that portion of the river which is north and south of road. We would catch our minnows over at the bar—generally started at the upper end and came back because at King Hill we had 150 feet of water in there. They used to take big rocks and tie on the line and tie to that and go into still water. — The river run — right at the base of the hill the — in 1915 (R. V. XX pp. 2974-2980). Anyway, there is a dam that flows across the river. The river had cut in behind between King Hill and Queen Hill and flowed the channel over to the Iowa side, and the Engineers wanted it that way. Now, down at the lower end of this island that set down, they cut a canal.—South of King Hill. That's the later time after '38, so they had to plug this hole because they had pilings drove across so the river would follow this and come around. They couldn't shut off up here, they couldn't shut this off. Because the current would take the rocks right on down the river. The engineer knows all about it. Check me. — the dam was built out from King Hill — from the Nebraska shore. Clear across the main channel of the river. It wasn't too wide. Because it was deep, it run fast through there.—the main channel of the river then went to the Iowa side.—observed the Corps trying to build a dam. You couldn't fill it

because they put that big rock in there and they would go right down the river. — I started in there pulling a pair of oars in '38. — For the contractor. — I wouldn't know how far it was they put the dam in, how long it was, but when they quit putting the rock, the big rock in, the next spring high water come up, cut around and started cutting back, so the Engineers come back and refilled that with the rock off the point of the hill there (R. V. XX pp. 2986-2990). The river in relation to Queen Hill ran close to the base of the hill then. — between King Hill and Queen Hill, it run fairly straight through there at that time.

Q. Were there other channels of the river at that time as big as this channel you have been describing?

A. No. It was the main river from the hill on down. That is, there was little chutes run through it, but from the hill on south past the bar it seemed to be just one river at low time.

— been fishing on the river, — continuously from 1915 until 1938, off and on. This is the way she sets.

King Hill. Queen Hill. And King Hill is here. Queen is here (R. V. XX pp. 2982-2985).

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WILL MINDFORD, Murray, Nebraska, 63, born in 1906. Lived within five miles of Missouri River all his life. Has recollections of river in Rock Bluff-King Hill area since he was 5 years old. In late spring or early summer of 1916 his family and Baxter family drove to Queen Hill for a picnic. Mr. Baxter took some pictures of the river that witness has had in his possession ever since and introduced as exhibits by the Defendant. Exhibit D-735 was an enlargement of one taken from foot of Queen Hill

looking south toward King Hill on the Nebraska side. Exhibit D-736 taken from same spot. D-737 was taken of the main channel of the river taken looking east. All taken 30 or 40 feet east of base of Queen Hill. Left hand corner of D-737 shows portion of the river bank. D-737 is the exhibit the Special Master commented on:

> The Court: It might have been part of the Atlantic Ocean. It doesn't show any part of the river as I know the river.

This was a fair comment by the court, as the enlargement did show a vast expanse of water, and no doubt some of it was caused by distortion in the enlargement. However, it does depict "boils", which witnesses for both States testified indicates deep water, and it was taken in an attempt "to photograph a floating log", demonstrating what almost all witnesses concede, that debris followed the main channel. There is no doubt the picture was taken in 1916 of the Missouri River at the base of Queen Hill. Whether it is a true pictorial representation of the width of the river is doubtful, but it does place substantial water at the base of Queen Hill in 1916 with a sharp bank that is not inundated (R. V. XIV pp. 1982-1988).

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MAYNARD RAMGE, age 57, Plattsmouth, Nebraska, born within 2 miles of Missouri River west of Rock Bluff and lived there all his life. Known the river ever since he was able to walk until up to present time. Has hunted, fished, boated and picniced on the river and has been familiar with the river in that area. Identified D-738, an enlargement of a photo of Missouri River taken from the foot of King Hill on the north side, taken between 1932 and 1934 with camera facing approximately north-

east. Identified D-739 as an enlargement of photo taken with camera facing almost directly east from King Hill, D-740 facing more east and D-741 facing northeast. That on date pictures were taken the river in that area was a "good half or three quarters of a mile across." The current past King Hill was going in a southeasterly direction. The river flowed past what is now the Varga place and Fitchorn property, they were right on the bank of the river. To the north of King Hill the river run right along Queen Hill to the east. From Queen Hill it seemed like it went north and must have curved around the bend to the left—that would be to the northwest (R. V. XIV pp. 1958-1966). Was over and observed the river 3 weeks ago Sunday and in my opinion the river "was just about in the same position today that it was in 1934" (R. V. XIV p. 1970).

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ARTHUR T. HANSEN, Murray, Nebraska, born 1891, remembered when he was about 10 or 12 going to river right at Rock Bluff after ice. We got the ice practically east of main street, right in below, south of the present elevator. When 16 he and his future father-in-law tried to row around point of King Hill and current swung them around like a whirlpool. At that time river came around Queen Hill, angled to the west and down and hit King Hill (R. V. XXI pp. 3122-3127).

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ROY O. COLE, a Nebraskan, born in 1887 south of Plattsmouth, Nebraska, 3½ to 4 miles west of Missouri River and has lived in same place all his life. He was and is a camera buff and an excellent photographer. He not only had all his photos indexed and dated, he had all his negatives indexed and

dated. He was familiar with Missouri River in Rock Bluff-King Hill area from the early 1900's (R. V. XIV, p. 1999). He and his friends picniced along Missouri River in the area many times, and he photographed companions along and on the river. He has known the river in that area from 1904 or 1905 to date. This witness identified Exhibits D-730, D-731, D-732, D-733 and D-734 as enlargements of photos he personally took of the river in the King Hill area in 1918, 1916, 1908 or '10, 1908 or 1910 and 1908 or 1910, respectively, according to his memory without the index book. In deposition of witness on February 22, 1968 the Exhibits were identified as Cole's Exhibits 1, 2, 3, 4 and 5 and his photo index revealed that D-730 was taken in 1918, D-731 was taken in 1916, and the last three taken in 1912, and not 1908 or '10. With this minor discrepancy in his testimony this elderly gentleman exhibited keen, competent mind and memory, candid and disinterested in the litigation. He was and is a competent photographer and meticulous record keeper. That his testimony and Exhibits establish beyond sincere argument that Nottleman Island was not formed as we know it today in 1912, 1916 or 1918; that the Missouri River right bank had been cut west prior to those years where soil allowed it to cut, i. e., between Queen Hill and King Hill; and that the river was a wide river with many chutes, sand bars and small islands in those years, none of which can be categorically considered possessing any attributes of permanency. (R. V. XIV pp. 2000-2014).

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LOUIS SACK, 64, a Nebraskan, lived from 1927 to 1959 one mile from the river south of King Hill. Exchanged farm labor on Nutzman farm on which King Hill is located. Hauled corn along the north edge of King Hill in 1927 when the river circled west between Queen Hill and King Hill, at least

half a mile west of where the river is today. In about 1930 looking north from north end of Nutzman (Goose) Island to the right there was "a channel there, but a small channel. To the left was the river, I would say the river" (R. V. XV p. 2056). Saw steamboats on the river around 1930, "they traveled on the west side." Saw them occasionally, when steamboat come up the river we would drive down and see them as we could hear them whistle. Went up the river on left of the Island. In 1927 island was just a patch of alfalfa. Main channel of river came down on west side, bulk of water was on west side of island.

The Court: You had no way of knowing how deep the water was, did you?

The Witness: I know that we made ice out there one time and we had a pipe pole that was something like 17 feet long and we didn't touch bottom. We sawed ice" (R. V. XV p. 2062).

The Court: When you say they changed the channel, do you mean so far as Nottleman Island is concerned they changed the channel from the east side to the west side of island?

The Witness: No, sir.

The Court: What change was made there so far as Nottleman Island?

The Witness: The change they made in the river was south of that (R. V. XV p. 2072).

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CLAYTON PIERCE, 64, a Nebraskan, moved from Thurman, Iowa, to Rock Bluff, Nebraska, in 1942. Did a lot of fishing and hunting on the river. Started on river right west of Bartlett, and then went north of there for a couple of years when just a kid in

1921 or 1922. Nottleman Island today is located across from Queen Hill and west of the Duvall Bar. Hunted on north end of that bar back in 1926—Didn't know the name of the island at that time. The north end of island where he hunted was north of Queen Hill. —at that time there was a chute of water that come down around the east side next to the Iowa bank, and there was two streams that cut across this island on the north end, and our duck blind that we had was in between those two channels that come across on the north end of that island. It was a bar, sand bar (R. V. XXI pp. 3009-3010). It was just bare bar where we hunted, but south of there was timber—willows and cottonwood and stuff—timber to the south was between the two channels. Started hunting in 1926—hunted there two years. We were hunting between the two channels—we were just a little ways from where it split. I would say the west channel was the main channel.

Q. Well, why would you say that?

A. Well, on the flow of the stuff. Trees.

When the river was up, debris would float on the west side. Of course, naturally there would be a few come down the east side, but most of them was on the west side, in the west channel. —The east channel, I would say in the neighborhood of 800 feet wide altogether, where it was shallow and deep together. The west channel was a quarter of a mile or better. After 1926, I was on the river up in there, worked south of that for Billhorn, Bowers and Peters, but I never worked on that part of the river, but I have been in there doing coyote hunting on the east side east of the east channel and on the island coyote hunting. Took a boat out there and took our dogs and hunted coyotes on the island in about 1932 or '33.

Q. At that time did you get an opportunity to view the river on both sides of the island?

A. Oh, yes.

Q. What would you say as to the characteristics of those two channels in 1932 or 1933?

A. Well, they were just about the same as they were in 1926 at that time. That was before the Corps of Engineers started working on it.

Q. Did you ever have occasion to measure the depth of the east channel?

A. Well, not necessarily, but we could go about 300 feet and then our oars would touch the bottom from there clear on out to where we had to quit rowing to get out to the duck blinds, so a guy could have waded it with boots on after he got across that 300 feet (R. V. XXI pp. 3011-3015).

We went across that in a boat, but after you got across a short stretch there, then it was flat and during the summer months that was all white sand. Blow sand. When the river was low, there wasn't no water there at all. I worked for the Corps of Engineers until 1942, then I went back and worked in 1945. The first work I done for them was about 1931, surveying. I was carrying the chain on the survey party there surveying west of Bartlett and around King Hill. Part of it was on the west side of the river and part of it was on the east. Worked from King Hill south sounding on the river along King Hill with a lead line. Right along by King Hill, there was places there a 30-foot line would not reach bottom. It wouldn't sound it. We had several places along there, 30 feet, we could touch it with 30 feet, but some places we couldn't even touch it with 30 feet. We went south of King Hill I would judge about 600 feet from where they put

in the rock dam. That was what they were sounding for at that time, was that dam.

Q. Now, when you were sounding and surveying there, where did that channel of the river that ran by King Hill go upstream? How did it flow with relation to Queen Hill?

A. It come right along by Queen Hill. Queen Hill and King Hill, the channel was all on that side. The east channel come in just a little north of that. The two channels were together when they got to King Hill and then they split again right south of that and made another island down west of Bartlett.

Q. Was your blind pretty close to the north end of that land area you hunted on?

A. There were two channels that cut across that bar on the white sand. During the summer time, when the river was low, that was all white sand. There was no channels coming east there. We were right close to the north end, where the two channels come across that. We were right in between Keg Creek and Haynie Slough, was just north, about half a mile to where this makes a bend and then it would turn and come right down along the Duvall place there. When the river would get up, we would go back up into that Haynie Slough, they called it. From the Duvall Bar where we went out to the blind, we could see the course of the river north of the blind in 1926 and 1927. It split just above us on that bar. The river split there and part of it went down one side and part down the other. Then there was two chutes that come across where we had this blind. There was no island above us there on that part of the river, there close to us, not in a matter

of a quarter of a mile (R. V. XXI pp. 3015-3022).

Q. Is it your testimony from that point north there was only a single channel?

A. Well, that is all I recall until you got a long ways up and then there was—

Q. How far?

A. That was almost to Keg Creek, there was a small chute up there went around the east side.

The Court: Mr. Pierce, can you tell, say how many miles of timber you saw on that island in 1926?

The Witness: Well, I would hate to try to say how much timber there was there. There was probably a half a mile there, close to it, maybe not quite that much. It was white sand, blow sand, and the rest of the island was—South of that toward King Hill, there was timber in that, but that was mostly willows.

The Court: How big were the cottonwoods, do you know?

The Witness: Cottonwoods, they weren't too big at that time.

The Court: Was there any clear land in there? Was there anybody clearing land in there?

The Witness: Oh, yes; there was some land in there cleared at that time.

The Court: Some men had cleared it?

The Witness: In fact, there was a shack out there. I don't know who put the shack there, who it belonged to, but I was over on that island with my hounds running coyotes.

The Court: Wait a minute. When you were on the island, was anybody farming the island? 1926 I am talking about.

The Witness: Actually, I didn't see no farm ground out there whatsoever.

Q. You didn't cross any bank work?

A. No. There was even willow roots along there where the bank had been caving where we had our boat tied.

Q. The bank had been caving?

A. Yes.

Q. Washing out there where you had your boat?

A. The bank always caves along a place like that and there were some small willow roots and stuff sticking out of the bank. In fact, we tied our boat to a little willow tree right there at the edge of it (R. V. XXI pp. 3023-3028).

COMMENT

Although there are bits of oral testimony contra, Iowa believes it is established by all the evidence that Nottleman Island formed as a sand bar during the years 1918-1920, and became an island during the years 1920-1923. It has tendered the eyewitness testimony of Everett E. Harless, Martin Sporer, Fred Campbell, Rex Young, William M. Chambers, Clarence H. Chambers, Ward Schade, Will Mindford, Arthur T. Hansen, and Roy O. Cole concerning the river during this pre-1923 era. We believe the testimony of these witnesses to be persuasive that the main channel, thalweg and boat track were all west of the island when the island was forming, not only for the simple reason that these men were all obviously honest and disinterested, but also because their testimony is corroborated by the photographs, the

documentary evidence, and the trees. Two witnesses tendered by Iowa, Louis Sack and Clayton Pierce, although unable to testify concerning the river prior to 1923, did testify that the main channel was west of Nottleman Island when they became acquainted with the area in the later 1920s.

Nebraska answered Iowa's Interrogatory No. 34 in this case that Nottleman Island began to form "beginning in approximately 1879". We submit that she has utterly failed to prove any such fact. It is perhaps true that sometime in the latter part of the 19th century, some accretions formed to the downstream end of Toacco Island or Gochenour Island, and that these accretions for a time extended into that spot under the sky where Nottleman Island now is; but no part of Nottleman Island has been or can be identified as being those accretions and the evidence is that they were long ago destroyed and washed away, and Nottleman Island is a different land formation which came into existence in that spot under the sky in about 1918 to 1923.

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EXHIBITS

NOTTLEMAN ISLAND AREA

YEAR	DESCRIPTION OF EXHIBIT	EXHIBIT NO.
1851-1852	Original Iowa gov't survey	P-712
1855	Original Nebr. Gov't survey	P-710 and P-711
1858	Gov't tie survey	P-714
	Willis Brown transparency showing the three above surveys	P-713
1879	Suter gov't survey	P-715
	Willis Brown transparency showing 1879 survey	P-716
1879	Suter Gov't survey with Bartleman island outline and Huber thalweg	D-1105

YEAR	DESCRIPTION OF EXHIBIT	EXHIBIT NO.
	superimposed	D-1105-A
1890	Missouri River Commission survey	P-1717
	Willis Brown transparency of 1890 survey	P-718
1890	Missouri River Commission survey with Bartleman Island outline and Huber thalweg superimposed	D-605 D-605-A
1891	Commercial Plat of Lyons Township Mills County, Iowa	P-2291
1891	Commercial Plat of Lyons Township, Mills County, Iowa	D-1039
1895	Seth Dean survey of left bank	P-1668
	Willis Brown transparency of Seth Dean left bank survey	P-1668-A
1896	Clip from *Plattsmouth Journal*— Floater found about ¼ mile south of Rock Bluff; boy believed drowned at South Omaha	D-716
1901	Clip from *Plattsmouth Journal*, Floater found at "Rocky Point"	D-1004
1902	Udden Plat of Lyons Township, Mills County, Iowa	D-1047
1905	Commercial Plat of Cass County, Nebraska; shows no island opposite town of Rock Bluff; shows right bank right against Queen Hill and King Hill	D-728
1905	Commercial Plat of Rock Bluff Township; Cass Co., Nebr.; shows main channel right against Queen Hill and King Hill; shows island in location of Nottleman Island, island is not shown as being in Nebraska	D-729
1908-1910	Photo identified by Cole showing people in boat; boat is slack water between Queen Hill and King Hill; small sand bar behind	P-732

YEAR	DESCRIPTION OF EXHIBIT	EXHIBIT NO.
	boat is west of straight line between the hills; main channel is just behind sand bar	
	Photo similar to D-732	P-733
	Photo identified by Cole showing ladies in tree showing same slack water and King Hill in background	D-734
1910	Commercial Plat of Lyons Township Mills County, Ia. (No island shown)	P-2619
1910	Commercial Plat of Lyons Township Mills, County, Iowa. (No island shown)	D-1040
1913	Commercial Plat of Lyons Township, Mills County, Iowa. (No island shown)	P-1746
	Willis Brown transparency of Ex. P-1746	P-737
1916	Photo identified by Cole looking north from top of King Hill; Cole has marked main channel running right along foot of Queen Hill and King Hill	D-731
1916	Photo identified by Mindford looking from foot of Queen Hill toward King Hill. River running from foot of Queen Hill down to foot of King Hill is large and wide and is obviously the main channel	D-735 D-735
1916	Photo similar to D-735	D-736
1916	Photo identified by Mindford as looking east from foot of Queen Hill at main channel of Missouri River	D-737
1918	Photo identified by Cole as looking north from top of King Hill (August, 1918)	D-730

YEAR	DESCRIPTION OF EXHIBIT	EXHIBIT NO.
1920	Soils map of Mills County, Iowa	D-1038 P-719
	Willis Brown transparency of above soils map	P-720
1922	Seth Dean plat of proposed Drainage District in Iowa to construct retards (August)	P-721 P-2624
	Willis Brown transparency of above plat	P-722
1923	Corps of Engineers Hydrographic survey	P-723
	Willis Brown transparency of above	P-724
1923	Corps of Engineers Hydrographic survey with Bartleman Island outline and Huber thalweg superimposed. Thalweg is west of Nottleman Island. Each channel not even sounded. Configuration of river, bars and islands totally different from Dean's map of August, 1922	D-390 D-390-A

COMMENT

Iowa would note again, at this point, that both parties are agreed that Nottleman Island, the same identical land which now exists in that spot under the sky, was in existence in 1923.

YEAR	DESCRIPTION OF EXHIBIT	EXHIBIT NO.
	Samples from several trees growing on the island have been ring-counted by experts for both states; Dr. Weakly testified that three trees started growth before 1923, to-wit: No. 259 started in 1900; No. 1106 started in 1913; and No. 1234 started in 1919; Iowa's expert, Dr.	

YEAR	DESCRIPTION OF EXHIBIT	EXHIBIT NO.

Bensend testified that No. 259 started in 1922; No. 1106 started in 1922; and No. 1234 started in 1928. Dr. McGinnis testified that No. 259 started in 1923; No. 1106 started in 1922 or 1923; No. 1234 started in 1928 or 1929. Willis Brown has plotted the location of these trees on a transparency. The parties agree that a part of Nottleman Island appears on the Corps of Hydrography survey of May, 1923, and that this part never disappears from later maps and aerial photos.

Therefore, Nottleman Island being in existence in 1923, and being in either Iowa or Nebraska at that time by reason of whether the main channel was west or east of it when formed, and it could not have shifted from one state to the other thereafter by reason of any river movements thereafter, later exhibits tending to show where the river was from time to time would be irrelevant and immaterial. However, for the purpose of negating any argument that Iowa may be dismissing later exhibits because they are bad for Iowa and good for Nebraska, and for the convenience of the Special Master in reviewing exhibits, we continue our list, with notation that not a single one of them can be properly interpreted as showing the main channel east of Nottleman Island.

YEAR	DESCRIPTION OF EXHIBIT	EXHIBIT NO.
1926	Corps Aerial Photos taken in winter of 1926	P-433 thru P-441 P-2621 P-2622 P-1729 thru P-1740 D-1035
1926	Corps map made from above photos	P-725
	Willis Brown transparency of above map	P-726
1926	Corps Aerial Photo taken in winter of 1926	D-598
1926	Mosaic assembled from 1926 aerial photos	D-692
1926	Mosaic assembled from 1926 aerial photos with island outline superimposed by Bartleman	D-693
1926	Corps map made from 1926 aerial photos with island outline superimposed by Bartleman	D-1035-A
1926	Corps map made from 1926 aerial photos with thalweg superimposed by Huber	D-1035
1926	Another set of 1926 Corps aerial photos	D-747 D-748 D-750 thru D-756 D-758 D-759 D-761
1928	Corps map made in 1928 from aerial photos	D-1036 P-727
1928	Willis Brown transparency of above map	P-728
1928	Corps map made in 1928 from aerial photos with island outline superimposed by Bartleman and thalweg superimposed by Huber	D-1036-A

YEAR	DESCRIPTION OF EXHIBIT	EXHIBIT NO.
1930	Corps Aerial Photo taken 9-17-1930	P-440
1930	Corps map made from 1930 photo	D-1041
	Willis Brown transparency of above map	P-729 P-730
1930	Mosaic of Corps aerial photos taken 9-17-1930	D-595
	Mosaic of Corps aerial photos taken 9-17-1930 with island outline superimposed by Bartleman	D-595-A
1930	Aerial Photo with Huber thalweg superimposed	D-495-A
1930	Corps map made from 1930 aerial photo with island outline superimposed by Bartleman	D-1041-A
1931	Corps Hydrographic Survey maps	D-371 thru D-374
	Corps Hydrographic Survey maps assembled with island outline superimposed by Bartleman	D-371-A
1932-1934	Photo identified by Ramge looking east from foot of Queen Hill; Missouri River main channel is in photo	D-738
1932-1934	Photo identified by Ramge looking northeasterly from foot of Queen Hill; similar to D-738	D-739
1932-1934	Photo identified by Ramge; similar to D-738 and D-739	D-740
1932-1934	Photo identified by Ramge; similar to D-738, D-739 and D-740	D-741
1933	Fitch Survey	P-735
	Another print of Fitch survey	P-2345
1934	Corps Reconnaissance map made April 3, 1934, before any work commenced on Rock Bluff Bend shows main channel west of Nottleman Island	D-1111

YEAR	DESCRIPTION OF EXHIBIT	EXHIBIT NO.
1934	Corps Reconnaissance Map made May 15, 1934, shows work just commenced sounded channel still west of island	D-1112
1934-35-36	U. S. Geological Survey of east part of Cass County, Nebraska shows Nottleman Island in Iowa	D-290 D-1037
1935-1959	Folder containing Reconnaissance Maps made in 1935, 1936, 1937, 1938, 1939, 1940, 1941, 1942, 1943, 1949, 1953 and 1959	D-620
1936	Corps aerial photo taken in 1936	D-587
1937	Corps aerial photo taken in 1937	D-588
1938	Corps aerial photos taken in 1938 and arranged in mosaic by Jauron	D-597
1938	Corps aerial photos taken in 1938	P-444 P-445 P-446
1939	Corps aerial photos taken in 1939 and arranged in mosaic by Jauron	D-596
1940	Corps Construction map for Rock Bluff Bend	P-741
1941	Corps Construction map for Tobacco Bend	P-742
1941	Corps Construction map dated Feb. 1941	D-1044 thru D-1046
	Corps Construction map dated Feb. 1941 with island outline superimposed by Bartleman	D-1044-A
1941	Corps aerial photo taken 11-12-1941	D-1728 D-599
	Corps aerial photo taken 11-12-1941 with trees No. 259 and No. 1106 marked	P-448
	Corps aerial photo taken 11-12-1941 (South part of Nottleman Island and King Hill shown)	P-447

YEAR	DESCRIPTION OF EXHIBIT	EXHIBIT NO.
1941	Alluvial Plain Map	P-731
	Willis Brown transparency of Alluvial Plain map	P-732
1944	Corps aerial photos taken in 1944 and arranged in mosaic by Jauron	D-592
1945	Corps Contour Maps	D-608 & D-609
1946-1947	Corps Tri-color maps	P-1039 P-2278
	Corps Tri-color map (Goose Island)	P-2625
1952	Corps aerial photo taken in 1952	P-1714
1959	Corps aerial photos taken in 1959	P-449 & P-450
1962	Windenburg traverse made for Ia. Cons. Comm.	P-740 D-1025
	Willis Brown transparency of above	P-1691
1966	Corps aerial photo taken in 1966	P-2685

OTOE BEND AREA

PLAINTIFF'S TESTIMONY

FRANK DUNCAN, Nebraska City, Iowa, born 1892, north of Payne Junction 2½ miles, and lived around Payne for 34 years. Family moved to Mose Givens place south of Payne Junction in 1896. Went straight south from house on road to Old River bed (Iowa Chute). After 1896 and before 1900, he thought in 1899, the year they had their flood, he saw his first boat. ". . . it wasn't like our big boats that we have now. It was a boat and it had a work barge ahead of it, . . . they had cables and stuff like that, men, where they worked." It had a paddle wheel in back. Standing on the road next to old river bed, the boat ". . . it come to my left, it come up around the river and then . . ., there is a bend right there . . . and then it turned and went west . . . ." It come within 50 feet of where he was standing. The barge was about 30 x 20 and the boat was shorter (R. V. VIII pp. 1011-1028).

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CLIFF COCKERHAM, Hamburg, Iowa, born in 1892. Moved to Propp farm area in about 1893 until he was married in 1912. The Missouri River in those days was about 300 yards west of Propp's house, the old bed is there, called Iowa Chute. He saw one boat there, around 1900, he guessed. In the spring. It was 30 or 40 feet long, with paddle wheel on the back. It tied up to the east bank over night and caused quite a stir. The Missouri River is west today of where it was then. Water stayed in the chute several years, it was part of the water of the Missouri River. On cross-examination the following questions and answers were given:

Q. Will you state what you remember of the 1912 flood and why you remember it?

A. Well, you mean, when we went out in the wagon?

Q. How far did you drive in the wagon before you got out of it?

A. Well, we drove over to the north side of the railroad and got out of the water.

Q. North and, then, around over to the bluff?

A. Well, our wagon box floated on the running gears.

Q. Now, after the 1912 flood did you go back there and live?

A. Yes.

Q. Was there any change in the river channels or chutes or terrain?

A. No, I don't think so.

Q. The 1912 flood didn't change anything?

A. No.

Q. I believe, that day you told me that, so far as you can remember, the main or large channel of the Missouri River is about where it is today, is that right?

A. Well, I think it was. There was a lot of water over there, anyhow.

Q. And it wasn't very far from where it is today?

A. Well, not very far, I don't think.

The boat he saw wasn't pushing or pulling anything, was about 12 or 14 foot wide and the only boat he ever saw on the Iowa chute. River was running pretty full then. It wasn't in a normal flood time (R. V. VIII pp. 1028-2041).

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CAL TAYLOR, Hamburg, Iowa, born 1878 in Nebraska on McKissick's Island. Couldn't remember any dates, but when he was a good sized boy he remembered the Missouri River west of Albert Propp's (R. V. VIII pp. 1042-1044).

Q. When you saw the river there, was it during the normal flow or flood time, or just when?

A. Well, I have seen it when there was high water, and it was full, clear out against the old bank. And, when it was not in flood, it was further west (R. V. VIII p. 1046).

Q. There were other channels in the river during those years that you have been talking about?

A. Well, when the river went west on the low ground there was channels all through there (R. V. VIII p. 1047).

Q. The river then was east of where it is today?

A. I have seen it from the time it left that there bank at Propp's, as it worked that-a-way, and leave kind of a little channel along on the ground where the river used to run in the early days.

Q. Well, there was land west of Propp in those days?

A. Yes.

Q. And there were channels running west of Propp?

A. There was a little channel running through there where the river kept going west, and west of Propp.

Q. Was there any channel anywhere near where the river is today in those days?

A. I couldn't tell you (R. V. VIII p. 1051).

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ELMER GARRISON, Hamburg, Iowa, age 79, retired farmer, familiar with Albert Propp area. Lived on the Propp place in 1905 until 1908. In the area 37 years. In 1905 the Iowa chute was a running stream in same spot. Water came out of river up north and back in about 3/4 of mile south of Propp's. It was 50 yards wide and knee deep to over your head, just wherever you hit it. There was a levee, the John Payne Levee, followed the Iowa chute. Water left Iowa chute about 1911 or 1912. You crossed the Iowa chute to get to the Missouri River, which was pretty well to the east side of the Schwake farm, small willows, cottonwood and brush between, the willows an inch or two inches through (R. V. VIII pp. 1052-1057).

Q. Did the river during those days always stay there in that Schwake farm, along the east side of the Schwake farm, or did it move?

A. It moved west in about 1911 or 1912.

Q. Can you tell us what you can recall about that move west?

A. It just jumped over to another low place going through over on the bar.

Q. What period of time did it take it to jump over there?

A. Some time during the high water in a week or so.

Q. You were there and saw it do this?

A. No, I didn't see it do it, but I seen it after it had done it (R. V. VIII pp. 1057-1058).

Witness stated he saw steamboats in the Schwake chute and from then on up. Before the Corps started to work on the river it was on the west side of Schwake's land (R. V. VIII p. 1060).

The Court: But you don't remember any work by the Engineers?

The Witness: I didn't go over to the river.

The Court: You didn't, but when the river was there in front of the Propp place you have talked about, there wasn't any work done on it then to move it?

The Witness: No.

The Court: The Engineers didn't move it over?

The Witness: No, sir.

The Court: Build any dikes or anything?

The Witness: Nothing.

The Court: The river just moved itself?

The Witness: The river just moved back. Jumped back by going down a lower draw. It would get up and cut a new draw out.

The Court: What did it leave after it cut that draw? How much land did it leave?

The Witness: Sometimes it would leave a mile. The first time practically a mile wide between jumps.

The Court: Of dry land?

The Witness: Of dry land, yes.

The Court: How many times did it do that?

The Witness: I just seen it do it once.

The Court: That time it left a mile of land?

The Witness: It left a mile of land in there and maybe a little more.

The Court: How far north and south?

The Witness: I would say three miles.

MEDFORD (TOOTS) JAMES, born 1910, Nebraska City, Nebraska, commercial fisherman, first familiar with and fished Otoe Bend area in 1927, 1928 with oars. Laurence Yearsley was west of Schemmel Island and Frazer's Island or Goodie's Island was straight north of Yearsley's. At Hamburg Landing, a quarter or half mile south of Schemmel Island was deepest water in the whole river. Went north from Hamburg Landing on the Iowa side in early fishing days because that is where the water was and usually fished in six to ten feet of water for big yellow cat. In those days there was a lot of places in Missouri River a lot shallower than that. Two channels came around Goodie's Island, east and west, where they came together it would be approximately a foot higher and headed east. There weren't very many boats on river before 1933 or 1934 (R. V. VIII pp. 1068-1072).

The Court: At this point, let me ask you, was there any commercial river traffic at all up until 1930?

The Witness: Just some pleasure boats, I think.

The Court: Nobody hauling freight?

The Witness: No.

The Court: Coal?

The Witness: No.

The Court: Lumber?

The Witness: No.

The Court: Grain, anything like that?

The Witness: No. Woods Brothers done some work at the bridge at Nebraska City. Some riprap.

The Court: They took barges up to haul material?

The Witness: Rock and stuff. That is right at the river bridge.

The Court: Any traffic, then, was related to work on the river, is that it? Bridges and stuff of that kind?

The Witness: Yes, working on the river. There was a pleasure boat or two come up there.

The Court: No regular freight lines of any kind?

The Witness: Not that I know of (R. V. VIII p. 1073).

The engineers in the Otoe Bend area started driving piling on the Iowa side, shutting that channel off.

Q. Was there a channel along the Iowa side when they started driving the pile?

A. Well, there should be. That is where all the boats went through. I don't know whether there was a channel or not, but all the boats had to go through there.

Saw the Corps boats go through there, work boats, paddle boats, pile drivers, skid rigs, what-have-you (R. V. VIII p. 1075). West of east channel just an island out there, water going down the east side of it, chutes going down west side of it, trees, brush. The contractors drove piling out from east bank, started out with floating rig to the island then they used skid rigs across island. They pulled the dikes on east side to get through because they couldn't get the boat through on west side of the dikes. They dredged a canal on west side with south

terminus a little northwest of Hamburg Landing. Cut the trees, then dragline cut it down to water, then the dredge came through and pumped it out. Worked on it all summer. This was in 1936 or 1937, somewhere in there.

Q. Were there trees on both sides of that canal after it was dug?

A. Sure. Had to be (R. V. VIII pp. 1076-1079).

The Court: When you started, where was what you considered the main channel when you started in in 1927?

The Witness: At what particular point?

The Court: Do you know where Schemmel Island is?

The Witness: Yes.

The Court: Where was the water then?

The Witness: The main channel was right down along the Iowa bank.

The Court: And the width of the river at that point?

The Witness: It was narrow there.

The Court: Narrow all over?

The Witness: The narrower the river the deeper the water.

The Court: Could you go up the other side, the Nebraska side, the shore, the Nebraska bank, or was there such a thing as the Nebraska bank?

The Witness: Yes; there was a chute over there, but there wasn't much water in it, but the main channel was on the Iowa side of the island.

The Court: Who put the chute in?

The Witness: Well, that is—This river has done that all its life.

The Court: It is a natural chute?

The Witness: Yes.

The Court: Originally, where was the Schemmel Island? You talk about you know the subject matter here. Let's see what you know about that.

The Witness: That is just north of the state line about a mile or so.

The Court: That was west of this channel as you knew it and learned it when you started to fish there, is that it?

The Witness: Yes, sir (R. V. VIII pp. 1081-1082-1084).

Q. Do you recall about 1930, wasn't it true that there wasn't any Schemmel Island there then? It was all in the river?

A. It has been there as long as I can remember.

Q. One great big solid island?

A. No; I didn't say a great big solid island.

Q. All right. Describe it for the Court.

A. There have been various waterways through all that land for years, so far as that is concerned. As long as I can remember (R. V. VIII pp. 1087-1088).

———o———

GLENN DOYLE, 65, Percival, Iowa—worked on the river from 1933 to 1936. Worked on mat gang. Started in fall of 1933. Worked on long dike just south of Schemmel area, water there 10 to 12 feet deep. Man drowned (R. V. VIII pp. 1091-1095).

Q. Before they started that work, Mr. Doyle, coming out from the east bank opposite the Yearsley land, where did the boats go?

A. They went up and down *that chute* until they got it shut off, and then they had to go around. That was a way late in the fall.

Q. When you say "that chute," you mean the east bank?

A. —east bank, yes.

Q. What kind of boats did they have in those days,—

A. All we had there was tow boats pushing barges and drivers. Other boats didn't go up that chute there. *Out in there further out, they used to go up. They wouldn't let no big ones in there where I was at, working up and down there. They went further out* (R. V. VIII p. 1097).

Q. Now, when they were going across the islands—bars and they had to excavate to get the tie pile in, how deep would they have to dig to get it down to water level?

A. Oh, that would depend on how high your bar was, where you had to go down.

Q. What was the deepest you remember?

A. I think about 5 feet is the most we ever did go down on the bar and that was only one. It wasn't very far with that. The driver floated in the bar. There was lots of willows on it and we had a lot of work getting it cleaned off and going across there.

Q. About 5 feet?

A. Most of them was around 3 feet, 2½, 3 feet. Little places that was just, well, the river filled it in. It was high. It wasn't over, I expect, a

hundred yards long where it was that deep, and then it run off pretty shallow (R. V. VIII pp. 1107-1108).

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FRED WALKER, 53, Nebraska City, Nebraska testified he was familiar with Schemmel Island area, that main channel was east of island and saw Corps work boats go up east channel, etc. (R. V. VIII p. 1111).

Q. That clarified that. The west channel in 1930, where is that in relation to the channel today?

A. The west channel is right—There was only one channel at that time that amounted to anything and that is the one that ran along the Iowa side.

Q. Let's talk about the one that didn't amount to anything.

A. The river right in there, if you want to go with it, could have been as much as a mile wide, where there would be little streams running, bars, and little streams running, and bars, but there was just one channel (R. V. VIII p. 1117).

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LEWIS MARTIN, 59, farms on Frazer's Bend, Nebraska familiar with land farmed by Henry Schemmel worked for W. A. Ross starting in 1935. Worked on second dike above Hamburg Landing, worked on dredge in May 1938, the Billy Peters, that dredged a canal on right bank of the proposed channel of Missouri River. The canal started at Hamburg Landing and went approximately west, some north. Small willows on both sides of canal. Cut through Nebraska accretion land, southwest of Schemmel.

Canal was west part of proposed channel. It washed out all the area between the dikes and the water that was there (R. V. VIII pp. 1143-1148).

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JAMES M. GIVENS, 53, Hamburg, Iowa, son of Mose Givens who owned land on river just east of Schemmel Island and family raised there. Farm bordered Propp farm on north. Road between ran to river on north end of Island. Witness lived there until 1936. Remembers the river from 1922, when his Dad's hogs had cholera. Ran a bench measure to check rise and fall of the river summer and fall of 1932. Checked the river every morning and evening at 6 o'clock for full six months. Their farm ran north and south a mile along the river. The river ran southwest by the farm for the full length in 1924. Continued on south about the same direction (R. V. XXII pp. 3138-3144).

Along the Givens farm in the 20's there was a main channel and then you had these chutes off of it, and when the river was high there was a lot more. The main river was more or less stable, and ran on southwest a half mile below south boundary of the farm you could see. Almost the identical channel you have now, "as I remember it in 1924." (R. V. XXII p. 3146). Just before the Corps put their trail dikes in the river was about the same.

(For additional testimony of James M. Givens, see Appendix "D".)

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OTTO HINZE, 69, Hamburg, Iowa, born 3/4 mile south of corner east of Albert Propps, lived there until he was 9 then moved to Hamburg. Moved back to same farm when he was 15, started farming for

himself in '20. In 1921 and 1922 farmed where Hamburg Landing is. Started fishing on the river about 1915. Fished north of Hamburg Landing. The river for a ways north of Hamburg Landing was quite a river and then we got in what I call Given's Chute. That didn't amount to too much. Anywhere from 1915 on up to present date, that island has been there until the Government cut the chute off. Two channels one on the east and one on the west. The one on the east, the Givens Chute, is where we done a lot of fishing about 1915 to 1920. I was never over to the west channel in those days. When we fished the south end of Given's Chute he was right where the channels come together. There was a pretty good sized river come across from the west side, right around the south end of that island, and then it run into the channel that run south down through where Hamburg Landing is. Fished right in same spot there for a long while. During the 20's the water come around there just about the same way all the time. The island built up after the Government went in there and done that work. — few small willows grew over there in the 20's. Used to cut wood west of Iowa chute in about 1915. Trees six or seven inches through at bottom (R. V. XXI pp. 3084-3093).

Iowa Chute started upon the far north end of Paynes' land and then it runs south through there for quite a little ways, and then turned east and went over there pretty near to Albert's house and stuff, almost to where the old dike used to be where the blacktop road is, and then it went almost south for about a mile and a half and turned back west and went over toward the river.

Q. Prior to the time that the Army Corps of Engineers started work on it, would you describe the channels and the island, as you remember it?

A. The island was never—vegetation, trees, never got too awful big on it because water would go over it about every year, and the east channel, when the river was up there was quite a channel through there, quite a river, and whenever the river went down along towards fall, the river wasn't too big. Probably a couple hundred feet wide and not too deep.

The Court: How many commercial fishermen were there on the river when you started?

The Witness: Well, there wasn't very many.

The Court: You were one. How many others were there?

The Witness: Well, I don't know as anyone fished down there at Hamburg.

The Court: You don't?

The Witness: No, but since they got motorboats and everything like that, the territory is—there is no territory any more (R. V. XXII pp. 3094-3096).

Not too many boats on river. In a year you would see a boat go up there. Steamboats, paddle wheel boats, they would go up on the other side of the island. In 1919 saw a steam boat paddle wheel, 60-70 feet long tied up to river bank. Didn't think there was a year there wasn't some boat went up the river and down. Never did see a boat of any size go up the Givens Chute. The Government work boats went up—they weren't too big. With reference to Iowa Chute:

The Court: Mr. Hinze, when you were nine years old, when you were a boy, how wide was the chute in those days?

The Witness: Well, the only time there was ever any water in it I can ever remember was when the river was up and it was about the same then as now.

The Court: Did it have two banks in those days?

The Witness: It has it today exactly like it was them days.

The Court: What did the old residenters say what caused that, what built that chute? What did you understand when you were a kid about how it got there?

The Witness: At one time the Missouri River was over that far.

The Court: That is understood in that area?

The Witness: That is understood in that area, yes, and then it started going back again and went back to its present place.

The Court: Going back to that chute a minute, what do the old people say was in that chute?

The Witness: At one time they claim that was the Missouri River, years and years ago.

The Court: It wasn't very wide?

The Witness: It was from there west.

The Court: There were two banks there?

The Witness: Yes, but that bank was throwed up there again later.

The Court: In other words. The left bank of the chute would be the left bank of the river, is that what you are saying?

The Witness: Yes, if you are facing south, that was the bank.

The Court: What about the inside bank, the west bank, when did that appear?

The Witness: Well, I think that eventually filled in there and the chute stayed open for a few years after the rest of it filled in. The river most generally fills next to the bank and leaves those blamed places like that.

The Court: Leaves the bar, does it?

The Witness: Leaves another ravine that way (R. V. XXI pp. 3104-3106).

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ALBERT J. PROPP, 62, has lived five miles northwest of Hamburg, Iowa since 1912. Before that in Marion County, Kansas. In 1912 was seven years old. His buildings are east about half a quarter—some of them are closer than that, of the Iowa Chute, from a hundred feet to 600 feet of the Iowa Chute, is where it was when we moved there.

Q. And, if you know, would you tell us what land your father bought in 1912 when you moved there?

There was timber on the land west of the Iowa Chute, and we farmed the land east of the Iowa Chute. About 260 acres east of the Iowa Chute and about 160 acres west, of the chute which had timber, small timber, and brush on it, we used it for pasture. It was timber in 1912, most of it was quite small timber. More brush than big timber. It was small timber, cottonwood and willows. A lot of it went out of there for firewood and there was one time when we had a sawmill in there, about 1920 or '21. The trees off that 160 west of the chute for the sawmill run from a foot to 18 inches through. We cleared it all. We got it cleared along about

1943. It laid west and south of where our buildings are.

Q. How far west did it run?

A. Approrimately a mile from the buildings.

Q. Do you recognize the name Schwake Chute?

A. Yes.

Q. What is that?

A. That is another chute about the size of the Iowa Chute, just west of the Iowa Chute. When we first come here, the land run clear over to the existing Missouri River levee. Father made a deal with the Baldwin estate. They had a claim on a small corner there, and he made a deal with them to settle that up somehow or other at that time and gave them a deed to what was west of there and he kept what was east of that Schwake Chute.

Q. Was there some dispute between them as to ownership?

A. No. There was a line about—I think it was about 20 acres as near as I can remember between the chute and my father's land at that time.

Q. The chute you are talking about, which chute is that?

A. That is the Schwake Chute. You can identify it by my west line, which was my father's land, and then there is a fence and west of that there is a small corncrib just before you get to that chute.

The Court: How far is that from the river?

The Witness: If you go to the west of the island, it would be pretty close to a mile. There

used to be a chute go on both sides of that island, but since the Government work, they have shut the one on the east side of the island off so that makes it pretty close to a mile now from the main channel of the river.

The Court: Over to your land?

Q. Now, was there a levee east of the Iowa Chute when you first came to Iowa?

A. Yes; there was.

Q. Would you describe that to the Court?

A. Well, it was a small levee that was put up with teams and scrapers and it was—oh, I would say it was about six feet high and probably that wide on top or a little wider. You could drive down the top of it and it run from just north of us about half a mile to outside three miles south. Just make a circle around the outside of the Iowa Chute.

Q. Now, would you describe the Iowa Chute, if you can, when you first came to that area?

A. Well, the Iowa Chute then was about the same as it is now. There is nothing changed in it. It was about 50 feet wide and about three to four feet deep.

Q. Do you ever see it full of water?

A. I have seen it full and running over. In fact, I have seen pretty near all that land over west of the Iowa Chute under water.

Q. When was the last time you saw that happen?

A. In 1952 of course the whole bottom was under, but previous to that it was 1947 for the last time.

Q. In 1952 you say the whole bottom was under. That would be east of the Iowa Chute too?

A. That would be practically all over the bottom. There were a few high spots stuck out, but not very many.

Q. In 1947 did it get beyond the Iowa Chute or the ag levee, or where did it go then?

A. No; it didn't in 1947. It got up along that dike that you speak of. It got up to that, which was just a little ways east of the Iowa Chute, the farmer-made dike.

Q. Did you ever when you were growing up there go to the river?

A. Oh, yes. We always put up ice on the river every year.

Q. When was the first time you recall going over to the river?

A. About 1913.

Q. Where was the river at that time? Where did you cut your ice?

A. We cut it in the first channel, which was a small channel just a little ways west of the levee that is there now, where the Army Engineers have blocked the channel off and put the old channel on the west side. The channel east of the island and west of the ag levee. The ag levee was put in there in 1949. In 1947 we had a little farmer-made levee and it topped that.

Q. Where the ag levee is today you had a farmer-made levee?

A. A farmer-made levee at that time, yes, and they took it out when they put the big levee in.

Would you describe that channel when you first went over there in 1913, if you can?

It was a channel I would say approximately a hundred feet wide and the water was quite

swift, but it wasn't so very deep. I would say maybe five or six feet deep at the time we put up ice. That would be in the winter, of course. Of course, there were times of the year when it was much deeper than that. The ice would freeze a foot to 18 inches deep.

The area west of that east channel in those days, would change from one time of the year to another. Sometimes if the river was up you couldn't see anything. If the river was high, it would be covered with water and maybe there would be brush on it, and when the river would get up sometimes it would take the brush away and then it would start all over again.

The Court: You are speaking of when, what year, what date?

The Witness: That was back in 1914, '15 along in there. Well, in the 20's it began to form an island and began to—seemed as though every time we had a flood the island would get a little bigger.

The overflow seemed to deposit in around those brush and small trees and the island would get a little bigger, but the main channel of the river at that time was, as always as long back as I can remember, had been on the west side of the island.

Q. How do you know that? Did you ever visit the west side of the island?

A. We could see the west side of the island at that time because there was nothing there to keep you from seeing it.

Q. Where would you be standing when you say you could see the west side of the island?

A. On the east bank of the river that runs on the east side of the island.

Q. Wasn't there any trees or brush on the island that would prevent you from seeing very far?

A. Well, you couldn't see right straight through, but you could see around the north side of it and you could see where boats was going down there. Now and then we would see a boat go down that west side.

Q. Now, talking about boats, did you ever see a boat in the Iowa Chute?

A. No. Fishing boats is all, rowboats.

Q. Small rowboats?

A. Small rowboats, motorboats.

Q. Did they fish quite a bit in the Iowa Chute?

A. When the river was up, there was always water in the Iowa Chute. That is, if it was high. It was good fishing. That was before there was any obstruction to the water going through there.

Q. When you first went there in 1912, was water running through what is known as the Schwake Chute today?

A. Just when the river was high.

Q. There wasn't any steady stream through there?

A. No current through it at all.

Q. Did you ever have occasion to go out onto the river west of the island?

A. Not in the early years. Not back in 1915, '12 or in there. I did maybe in the 20's, I went out there.

Q. In a boat?

A. In a boat.

Q. Did you ever walk across that island to the west channel?

A. Not clear across it, no. At that time of course there wasn't much island there. We would just go over to the edge of it and that is about as far as we went. We would go out there duck hunting.

Q. How wide was it in, say, the 20's?

A. The island?

Q. The island, where the island is today. How wide was the land mass?

A. Oh, it run from a quarter to half a mile.

The Court: Yes. You could see the boats, could you?

The Witness: Yes.

Q. When you were talking about boats what kind of boats were they?

A. They were steamboats evidently because they were fairly large boats for those days. It looked like a boat about possibly 75, maybe 80 feet long and it looked as though they were steamboats because they had a lot of smoke.

Q. How many boats would you see in a year?

A. Oh, maybe three or four.

Q. Over what period of time did these boats ply the river, as you recall it?

A. Usually from in the spring until the early fall.

Q. What year?

A. Oh, what year. That was away back in 1913, '12 and '13 is where we seen them.

The first people that I knew of that was on the island was a couple of fellows built a shack

over there. It was back in about 1918 or along in there. There was John Hilger and Walt Williams. They built a shack over there. They would go over there and hunt ducks and spend a weekend over there. That is the first people I know being there.

Q. Do you know of anyone occupying it for farming purposes? When was the first time you knew of any farming on the island?

A. The first time I believe there was any farming on it was when Mr. Schemmel cleared it and started farming it.

Q. Do you know when that was?

A. That was along about 1953 when they started over there.

Q. Did he start farming right away or what did he do?

A. They done some clearing first and then it was two or three years later before they done any farming to amount to anything.

The present Missouri River levee is approximately where the old farmer—that is not the old farmer over by my house, but the next farmer levee that was over close to the river. They took it out and put the new agricultural levee in. The Government done that.

Where did they get the dirt?

Most of the dirt was from the inside, from the river side of the levee. They used scrapers and some of it they pumped. There was one stretch of it about a mile long I know of they pumped it out of the river, and the rest of it was hauled in with heavy equipment.

Q. Mr. Propp, when you first recall going on the farm in 1912, were there any buildings west of the Iowa Chute?

A. There were just some little shacks. You couldn't even tell what they had been used for. I would say half a mile west of our buildings.

Q. Didn't the Wood Brothers Construction Company work in that area somewhere?

A. They done a lot of riprapping down there to keep the river from cutting. The river was just cutting back and forth, and it got to cutting pretty bad on the east side at one time, and they done a lot of work in there, hauled in a lot of trees and stuff to try to stop it. That was away back in the 20's, about a mile south of my place, down around just north of the Hamburg Landing.

Q. Isn't it a fact that in those days there was some concern the river might cut clear over to Hamburg?

A. Well, you used to hear all kinds of stories. You still hear them.

Q. But it was cutting toward the town of Hamburg?

A. It was cutting toward Hamburg, yes, but all at once it reversed it and started filling in there and went back the other way.

The Court: What made it do that?

The Witness: Well, just like rivers do. I don't know what makes them cut in and out.

Q. Was the Iowa Chute shut off from the river by the 1948 levee construction?

A. Well, there is a tube that goes through under the levee yes. It was shut off, yes, but the only time there was ever any water in it was when the river was high, but there is a drainage tube that drains into the river on both ends.

Q. Mr. Propp, in visiting with some of the old-timers down there, the name "Lost Lake" came up several times. Do you know where Lost Lake was?

A. Well, they said that that was on the west side of my place, in that vicinity, but I never seen anything that looked like a lost lake. I always could find it. It was just a small, three or four acre low spot in the field. Water would stand in it part of the time.

Q. Good duck hunting there when there was water?

A. When the river would get up, sometimes there would be fish out there. When the river would get up and overflow, some fish would pop in there and then they couldn't get out. There was no outlet to it. I think it was a place that was cut out by overflow of the river, which it does that. In fact, in 1952 I had a hole cut in my field by the overflow of the river and I have since filled it up.

Q. You mean just a spot in the field where the river would scoop it up?

A. One spot in the field where it would dig a hole out (R. V. XXI pp. 3049-3082).

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OSCAR LEROY HAYES, 81, Farragut, Iowa, testified he moved with his family to the farm in northwest corner of Missouri when he was 11 years old, in 1897, and lived there 8 years until 1905, then moved to Hamburg, Iowa area. Visited the farm after that, and in 1913 river had cut east quarter of a mile. Between 1897 and 1905 watched boats go up the river past Minerville, and he and his brother rowed up the river to Minerville many times. Tied boat to railroad trestle. Past farm there was only one channel to the river, about half mile wide, same all way up past Minerville. To the north of their farm there was some sloughs and the Iowa chute.

The river past their farm beared a little to northwest. From 1897 to 1905 the river never overflowed in the vicinity of their farm. They took the dike road up past Propp's to Payne Junction and in those days west of the dike and Propp's was thick stand of willows 10 to 12 feet high (R. V. XXII pp. 3171-3185).

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LON BAKER, born 1879, Hamburg, Iowa, hunted in Albert Propp farm area as early as 1895. Around 1900 and earlier the area west of Propp's farm was brush cottonwoods, few trees, some farm houses or barns over in there at that time. There was a road run clear to the river, and a hedge fence along on the north side of that road. It was right close to a mile from Propp's to the river.

—o—

He hunted Lost Lake, which was about quarter to half mile east of river. Between Lost Lake and river was little cottonwoods. One pretty fair cottonwood near to lake, rest were small. There were two branches of the river then about quarter of mile apart. In between just willows and sand bars mostly and some pudholes, water holes. When he was about 18 he remembers river cutting up along Mose Givens place.

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FRANK STARR, 56, Storm Lake, Iowa, an Iowa State Conservation Officer, testified he hunted in Hamburg Landing—Schemmel Island area in 1929. Built a camp and blinds on Schemmel Island about 1935. There was a bar just west of Hamburg Landing in middle of River, running north, channel on both sides. Hunted on the bar on east side of the west channel. The west channel was deepest, widest and swiftest of the two channels. The bar they hunted on ran north half mile to a mile. North of this bar there were other bars in there. He left the area in 1938.

COMMENT

The foregoing witnesses are for the most part life-long residents of the area they discussed. They are knowledgeable, are not personally interested in the final decision of the Court, and had no reason to color their testimony, consciously or unconsciously. It isn't a question of which witnesses were telling the truth, or even which witnesses' memories are the sharpest, but rather it is a question of determining why there are divergent views, and why they don't all agree in detail. Iowa submits that both Plaintiff and Defendant's lay witnesses stated what they remembered. But each one was testifying from different vantage points and directions, in different years and different seasons of the year. Had their testimony been the same in detail it would certainly have been suspect. The testimony indicates that in the areas in dispute, the Missouri had adopted the characteristics of the wide, sand bar-choked Platte. This is also verified by the photos taken by the Corps, the maps and soundings of the Corps, and the conclusion must be drawn that the principal or larger channel did as General Loper stated, "trended" toward the west (R. V. XIV p. 1922).

ROBERT V. RUHE. For identification of this witness, see Appendix "D".

Exhibit D-1221 is a map prepared by me to show the various scarps and chutes in the vicinity of Otoe Bend and Exhibit D-1222 is a transparency prepared by me to show the summary of the various scarps versus the 1879-90 scarp. On Exhibit D-1222, the scarps shown are dated (R. V. XIX, p. 2759).

Between the 1879-90 scarp and the 1905 left bank position shown on the United States Geological Survey, Nebraska City quadrangle, there are 7 scarps, numbered red 4, 5, 6, 7, 8, 9 and 10 on Ex-

hibit D-1221. All of these scarps face westerly or southwesterly. They all represent left bank positions. My conclusion from those bank positions is that, between 1879-90 and 1905, the river gradually shifted back toward Nebraska and back toward the west (R. V. XIX pp. 2760-2761).

The Court: How do you know it was gradual?

The Witness: We have, say, 15 years and we have 1, 2, 3, 4, 5, 6 positions.

The Court: You might have a change every five years. It might have happened overnight each time. You don't know when it happened, do you?

The Witness: In that 15-year period.

The Court: But I know, you haven't changed between 1—what is your first number there?

The Witness: The first is 3 and then it changes to 4.

The Court: How long did it take between 3 and 4 to change?

The Witness: The only evidence we can say is that during that period of 15 years. We don't know the number of years.

The Court: Somebody might say it happened overnight.

The Witness: Yes.

The Court: Is that reasonable or not?

The Witness: With the conformation, I would say "No". These things are trended at different bearings. Therefore it requires a considerable shift (R. V. XIX p. 2762).

Q. Now, Dr. Ruhe, there were a couple of other things that confused me a little bit. How can a channel divide and cut both the right and left banks and widen out? What can cause that?

A. Dumping sediment in the channel, causing diversion of the channel.

Q. In other words, a dam or blockage or something would have to occur in the middle of the channel to cause that?

A. Yes. The stream deposits its own sediment, forces the channel to bifurcate, if you like the term, and then it could cut because you are locally creating concave banks on both sides.

Q. If it is sediment, it is usually a highly erodable material, is it not?

A. No. Some of it is and some is not. For example, in the Missouri River we have these things called clay plugs that are difficult to erode.

Q. Are those deposited by the river or are they in place?

A. They were deposited by the river in its previous history. They are part of the alluvial deposits of the Missouri River bottom.

Q. Is it correct to say that over the years the Missouri River has moved back and forth across the bottom, particularly in the Schemmel area?

A. Yes; it has.

Q. And each time it moves it may create something or it may destroy something else, is that correct?

A. Yes.

Q. Is it possible or can you, in the light of the history of this movement, look at a map and then look at a map five years later and because they don't coincide, automatically discard the features as shown in that map five years later on the basis the channel didn't change?

A. What you have to do is try to evaluate the validity of the maps you use and the farther back in time you go the more difficult it is to evaluate the validity.

Q. Was the 1895 Pearce Survey the only survey that you disregarded in your study?

A. I disregarded the 1903 map.

Q. Which was not a survey?

A. I think if you read my report, that when I wrote that the 1895 map didn't perturb me too much, but after I have to constrict it at the north part and then re-check the 1895 in the south part, then I began to question it.

Q. (By Mr. Moldenhauer) Dr. Ruhe, on the Gregg map, does Mr. Gregg show the Missouri River?

A. No; he doesn't.

Q. He doesn't show where it is at all?

A. No; he does not.

Q. His boundary is what he has called a slough?

A. He shows a slough, but in the connotation of the word "slough", normally this is a thing that has got land on both sides (R. V. XIX, pp. 2824-2827).

YEAR	DESCRIPTION OF EXHIBIT	EXHIBIT NO.
1847	Iowa Gov't Survey shows Otoe Island site in Iowa or in river.	P-202
1852	Iowa Gov't Survey shows Otoe Island site in Iowa or in river.	P-203
1852	Iowa Gov't Survey shows Otoe Island site in Iowa or in river.	P-204
1855	Nebraska Gov't Survey shows Otoe Island site in Iowa or in river.	P-205
1858	Tie Gov't Survey shows Otoe Island site in Iowa or in river.	P-207
	Willis Brown transparency showing the above plats.	P-208
1876-7	Suter Gov't Survey shows river in Iowa Chute.	P-370
1879	Suter Gov't Survey, river is running through island site.	P-209
	Willis Brown Transparency of 1879 map.	P-210
1879	Suter Gov't Survey with Bartleman island outline and Huber thalweg. 50% of island site is west of thalweg, and 50% east.	D-1126
1884 1888	Fremont County, Iowa, Road Plat Book showing partial bank lines of 1884 and 1888 sketched in.	P-172
1852-79-84-90	Willis Brown transparency showing left bank lines.	P-2423
1852-79-90-95	Willis Brown transparency showing right bank lines.	2-2422
1852-95-1905-40	Willis Brown map showing river locations.	P-235-A
	Transparency (Willis Brown) of P-235-A.	P-235
1852-95-1923-40	Willis Brown map showing river locations.	P-236-A
	Willis Brown transparency of P-236-A.	P-236

YEAR	DESCRIPTION OF EXHIBIT	EXHIBIT NO.
No date	Pages from Fremont County, Iowa, treasurer Plate Book.	P-166 thru P-171
	Willis Brown map showing above pages assembled.	P-2389
1886	Maps.	P-371
	Same with Otoe Island and 1890 thalweg, superimposed.	P-2627
1890	Missouri River Commission survey.	P-211
	Transparency of same above.	P-212
	Same 1890 map with Bartleman island outline and Huber thalweg superimposed; 75% of island site is west of thalweg and 25% east.	D-1125
1891	Fremont County, Iowa, commercial plat, river is in Iowa Chute.	P-372
1895	Partial transcript of *Payne v. Hall* including Fremont County, Iowa, Dist. Court Decree dated 11-19-19, Iowa Supreme Court Opinion dated 12-13-21, Gregg Survey of 1895, Survey of 8-21-19, and testimony concerning river movements.	D-747
1895	Pierce Survey in individual sheets.	P-137
	Willis Brown transparency of Pierce Survey assembled.	P-213
	Robt. v. Ruhe transparency showing Gregg and Pierce Surveys.	D-1232
1905	Geologic Survey shows river running right through island site with part of site in Nebr. and part in Iowa.	D-287 P-214
	Willis Brown transparency of Geologic Survey.	P-215
1914	Fremont County, Iowa, commercial plat shows river in Iowa Chute.	P-1707
1920	Plat of Knox Drainage District (Fremont County, Iowa).	P-1765

YEAR	DESCRIPTION OF EXHIBIT	EXHIBIT NO.
1923	Plat of Missouri Valley D.D. (Fremont County, Iowa.)	P-1766
1923	Corps of Engineers Hydrographic Survey (island site is almost entirely in river.) (Thalweg is west of most of island site.)	P-219
	Willis Brown Transparency of Exhibit P-219.	P-220
1923	Corps Hydrographic Survey with Bartleman's Island outline and Huber's thalweg superimposed.	D-1124
1926-27	Corps Aerial Photo with Bartleman's island outline superimposed.	D-1093-A
1926-27	Mosaic of Corps Aerial Photos.	P-1721
1926-27	Mosaic of Corps Aerial Photos with Huber's thalweg superimposed.	P-714
1926-27	Corps map made with above Aerial Photos with Bartleman's Island outline and Huber's thalweg superimposed. (Shows almost entire island site in Iowa.)	D-1121
1926-27	Corps map (unmarked).	P-221, 2
	Willis Brown transparency of P-221 and P-222 assembled.	P-223
1928	Corps map (unmarked) made from 1928 Aerial Survey.	P-224-5
	Willis Brown transparency of P-224 and P-225 assembled.	P-226
1928	Corps map made from 1928 Aerial Survey assembled, with Bartleman's island outline and Huber's thalweg superimposed. (About 75% of island east of thalweg, 25% west.)	D-1122
1929	Map of Otoe County, Nebr. by C. A. Shannon, Otoe County Surveyor. (Shannon shows state boundary as being entirely west of island site, and island site is entirely in Iowa).	D-272

YEAR	DESCRIPTION OF EXHIBIT	EXHIBIT NO.
1930	Corps Aerial Photo (unmarked, dated 9-17-30).	P-246
1930	Corps Aerial Photo with Huber's thalweg superimposed. (Shows about 85% of island site east of thalweg, and 15% west.	D-1092
1930	Corps aerial photo with Bartleman's island outline superimposed. Shows almost all of island site is in river; very small part is bar land attached to Nebr. shore; larger part is bar land attached to Iowa shore.	D-1092-A
1930	Corps maps made from 1930 Aerial photos (unmarked).	P-227, 228
1930	Corps made maps from 1930 Aerial photos assembled and with Bartleman's island outline and Huber's thalweg superimposed. Shows entire island site in river except southeasterly tip is on Iowa shore.	D-1123
	Willis Brown Transparency of P-227 and P-228 assembled.	P-229
1931	Corps Hydrographic Survey as of July, 1931 with Bartleman's island outline and Huber's thalweg superimposed. Shows about 85% of island site is east of thalweg, 15% is west. All channels except channel marked by Huber are denoted as "shallow water" "shallow" or "too shallow to sound."	
1933	Corps Construction Map. Base map is the 1931 Hydrographic Survey. Designed channel has been superimposed by the Corps. Also, bank lines of July 3, 1933, have been superimposed by the Corps. Shows that between July, 1931, and July 3, 1933, the river widened itself	D-427

YEAR	DESCRIPTION OF EXHIBIT	EXHIBIT NO.
	by washing away both banks.	
4-3-34 thru entire 1943	Complete set of Corps reconnaissance maps made about monthly in navigation season each year.	D-31 thru D-259
1934	Reconnaissance maps of 4-3-34 thru 7-2-34 (ex. D-3-1 - D-39) show no construction work under way in Otoe Bend. Natural channel (main) is already west of 85% of the island site and west of where the Corps plans to construct dikes at upper and of Island (Dikes 603-1, 602.9A and 602.7) Recon. of 8-1-34 (ex. D-41) shows lead-off dike 603.1 has been built. Recon. of 8-31-34 (ex. D-42) shows dikes 602.9, 602.9A and 602.7 have been built and work is under way on Dike 602.7A/ Main channel is west of dikes and bars are forming below and between the dikes in July and August, 1934, in the area of Otoe Island, and on the Iowa side of main channel Recon. of 10-1-34 (Ex. D-47) shows work commenced from Iowa shore on dike 601.9, and the only channel of the river is west of the work, and large bar is forming downstream from dike 601.9 as it is built. Recon. of 10-15-34 through 5-1 and 2-35 (Ex. D-49 thru D-61) show dike 601.9 about 50% built out from Iowa shore.	D-31 thru D-39 D-41 D-42 D-47 D-49 thru D-61
1935	Recon. for 7-2 and 3-35 (Ex. D-62) shows dike 602.7A built completely and dike 601.9 75% built. Main channel still west of all work. Same	D-62 thru D-79

YEAR	DESCRIPTION OF EXHIBIT	EXHIBIT NO.
	general situation continues to be shown on Recon. maps through 3-13-36 (Ex. D-79).	
1936	Recon. of 3-31-36 (Ex. D-81) shows break in dike 602.7 and two channels sounded, one around ends of dikes and one through the break. Recon. of 4-15 (Ex. D-83) shows break repaired and only one channel sounded, that being around ends of dikes. Same general situation shown through Recons. to 7-2-37 (Ex. D-120).	D-81 D-83 thru D-120
1936	Corps Aerial Photos taken in 1936.	P-248 and P-2641
1936	Corps Aerial Photos taken in 1936. These Aerial Photos show that Otoe Island has been formed and has taken shape as bars between and below the dikes on the Iowa side of the main channel.	D-1107
1937	Recon. of 8-2-37 (Ex. D-124) work has been resumed on dike 601.9 and it has been built to designed length. Main channel is around ends of all dikes. Vegetation is starting growth on bars formed between and below dikes on Iowa side. Last Recon. of 1937 (Ex. D-136) shows trail dike 601.9 about 2/3 built.	D-124 D-136
1937	Corps Aerial Photos taken in 1937.	P-250 and P-2642
1937	Corps Aerial Photos taken in 1937 in the 1937 Aerial Photos, the two large bars, which later joined together to form the northerly 75% of	D-1106

YEAR	DESCRIPTION OF EXHIBIT	EXHIBIT NO.
	Otoe Island approximately, are clearly established as island formations on the Iowa side of the channel and bearing substantial timber vegetation.	
1938	Recons. of early 1938 (Ex. D-137 thru D-144) continue to show the northerly 75% of Otoe Island forming between and below the dikes, in Iowa, with the main channel running around the dikes. On some Recons., it is noted that the Nebraska bank is cutting (See Ex. D-143). On the Recons. of June 3, 1938 (Ex. D-145) the canal first appears and it appears as already dredged. The intervening area between the main channel and the canal appears as sand bar and is noted as "cutting". Recon. of July 2, 1938, through October 25, 1938, (Ex. D-148 thru D-164) show channels moving closer together by cutting the intervening area until the October 25, 1938, Recon. only the canal channel was sounded.	D-137 thru D-144 D-148 thru D-164
1939	The two Recon. maps which together show the Recon. of 9-3-38 (Ex. D-277 and D-298) are full scale to show that the area between the main channel and the canal channel was all water and sand bar except a tiny willow bar is shown just off the end of dike 600.6 which is almost entirely in the designed channel. The Recon. of 5-5-42 (Ex. D-303) shows that this willow bar washed away when the canal channel widened itself out	D-277 D-298 D-303

YEAR	DESCRIPTION OF EXHIBIT	EXHIBIT NO.
	to designed width.	
1938	Corps Aerial Photo taken in 1938.	D-1108
1938	Corps Aerial Photo taken in 1938.	P-255
1937-40	Map of Otoe County, Nebr., soil survey done in 1937 to 1940 depicting Otoe Island as being in Iowa.	D-273
1940	Willis Brown transparency of Alluvial Plain Maps referred to in Boundary Compact.	P-231
1946-47	Tri-color maps.	P-2683 P-2277 P-1036 P-2710
1957	Corps Aerial Oblique Photos of Otoe Island.	P-2639 P-2640
1961	Ivan Windenburg traverse of Otoe Island.	P-237 P-383
	Willis Brown transparency of Windenburg traverse.	P-233
	CONCERNING TREES	
	A.P. Map with tree locations plotted by Willis Brown.	P-230
	Willis Brown transparency showing tree locations.	P-234
	Tri-color map with Bartleman's location of trees 230 and 1220.	D-1163
	Tri-color map with Pete Mann's location of tree 230.	D-1302
	Photos of tree 230.	P-381 P-382
	Photos of trees samples.	P-373 thru P-380
	(Note: Trees 230 and 1220 are the only live trees cut and ring counted in the Otoe Bend area. Tree 230 was not on Otoe Bend Island, but was some distance east; tree 1220	

YEAR	DESCRIPTION OF EXHIBIT	EXHIBIT NO.
	was on the island. Dr. Weakley, the Nebr. expert, testified that 230 started growth in 1895 and that 1220 began in 1932. Drs. Bensand and McGuinness, Iowa's experts, said 1220 started in 1936 or 1937 and 230 started in 1903.	
	CONCERNING SCARPS	
	Dr. Robert V. Ruhe prepared a map showing the results of his thorough investigation as a geomorphologist of the land formations in the vicnity of Otoe Island and the island itself. This map shows 11 westward facing scarps between the Iowa Chute and Otoe Island. There were no eastward facing scarps. From these facts, Dr. Ruhe testified that the river moved westward from the Iowa Chute gradually and not by avulsion.	D-1221
	CONCERNING CORPS GROUND LEVEL PHOTOS	
1934-37	The Corps took numerous pictures of the work in progress at Otoe Bend. These pictures show that there was no avulsion of any Nebraska land during the period of 1934 through 1937, and that the main channel was always west of the dikes and west of the land formed between the dikes. The land of Otoe Island therefore formed in Iowa.	D-545 D-546 D-550 D-551 D-553 D-1063 thru D-1091
	Additional photos were taken by the the Corps in 1938 showing the canal	P-2628 thru

YEAR	DESCRIPTION OF EXHIBIT	EXHIBIT NO.
	being dredged, and showing how a narrow canal was dredged, expected to widen itself out by water action to designed width of 700 feet.	P-2636

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PLAINTIFF'S TESTIMONY

GENERAL RIVER

GEN. HERBERT B. LOPER, see Appendix "B".

DEFENDANT'S TESTIMONY

RAYMOND L. HUBER, see Appendix "B".

FRED SCHWOB, see Appendix "I".

EXHIBITS

GENERAL MAPS SETS

YEAR	DESCRIPTION OF EXHIBIT	EXHIBIT NO.
1943	Complete set of Reconnaissance Maps from Corps of Engineers showing reconnaissance of July 27-28, 1943. Shows main channel of Missouri River entirely within the designed channel from Sioux City down stream to Iowa—Missouri state line except slight departures at Mile 733, Mile 651.5 and Mile 633.5. These are the maps showing conditions closest to July 12, 1943, the effective date of the Nebraska-Iowa Boundary Compact.	D-1001
1964	Complete set of Corps aerial photos of entire river from Sioux City to Iowa-Missouri state line taken in April 1964. This was the	D-4 thru D-24 D-24

YEAR	DESCRIPTION OF EXHIBIT	EXHIBIT NO.
	latest set of photos available from the Corps at time of trial.	P-2181 thru P-2202
1946-1947	Complete set of Corps Tri-color maps with areas claimed by Iowa sketched on by Willis Brown and state line channel also sketched on by Willis Brown.	P-2652 P-2653 P-2654 P-2662 thru P-2667 P-2673 thru P-2676 P-2679 thru P-2682
	Complete set of Alluvial Plain Maps prepared by Iowa Conservation Commission from negatives furnished by Corps of Engineers.	D-1151 thru D-1160
	Complete set of maps from Nebraska Surveyor's Office showing 1940-41 designed channel with relation to the original government survey of Nebraska.	P-2173 thru P-2180
	Set of aerial and ground level photos taken by Gerald J. Jauron showing the areas along the river which Iowa claims to own.	D-1236 thru D-1261 D-1258-A D-1249-A
	CANALS	
	Complete set of AP Maps with markings placed by L. H. Hart while giving his Deposition. His testimony by deposition was that he only knew of 3 genuine canals above Omaha dredged by the Corps before 1943, to-wit: California Cut-off-1939; Peterson Cut-off-1939-1940; Winnebago Bend Canal-1939-1940. These are marked on Hart Ex. No. 1.	Hart Ex. No. 1
	Complete set of AP Maps with markings placed by R. L. Huber	Huber Ex. No. 1

YEAR	DESCRIPTION OF EXHIBIT	EXHIBIT NO.
	while giving Deposition. His testimony by deposition was that 11 canals were dredged by the Corps prior to 1943 along the entire Iowa-Nebraska boundary, to-wit: California Cut-off, Peterson Cut-off, Winnebago Bend, Upper Hamburg Bend, Otoe Bend (1938), Civil Bend, Pin Hook Bend, Lower Bartlet Bend, Upper Bartlet Bend, St. Mary's Bend (1937-38) and The Narrows (1936).	
	MISCELLANEOUS HISTORICAL DATA	
1845	Admission of Iowa to Union	P-2601
1864	Admission of Nebraska to Union	P-2602
1923	Iowa Journal of History and Politics	P-2696
1891	Call for Missouri River Improvement Convention	P-1619
	Annual Reports of Missouri River Commission (1877-1881) (1883-1886) (1889-1890)	P-2686
1942	Minutes of a paper by Col. Whipple read at meeting of Amer. Soc. of Civil Engineers	P-1557
	"Steam boating on the Missouri River" by Dr. Wm. J. Peterson	D-1003
	CORPS OF ENGINEERS RECORDS & REPORTS	
1891-1907	Corps of Engineers Annual Reports	P-2689
1910		
1919		
1920-1945	Corps of Engineers Annual Reports	P-2687

YEAR	DESCRIPTION OF EXHIBIT	EXHIBIT NO.
1946-1966	Corps of Engineers Annual Reports	P-2688
1934	Corps of Engineers Project and Index Maps	P-410
1935	Corps of Engineers Project and Index Maps	P-411
1936	Corps of Engineers Project and Index Maps	P-1699
1937	Corps of Engineers Project and Index Maps	P-412
1938	Corps of Engineers Project and Index Maps	P-413
1939	Corps of Engineers Project and Index Maps	P-414
1940	Corps of Engineers Project and Index Maps	P-415
1941	Corps of Engineers Project and Index Maps	P-416
	NEBRASKA V. IOWA	
	1890-1892	
1890	Copies of proceedings in the Supreme Court of the United States in *Nebraska v. Iowa*	P-1722
1892	Opinion	P-2603
1892	Decree	P-2604
	BARTLET—PINHOOK BENDS	
1930	Corps aerial photo	P-1880
1937	Corps aerial photo	P-2372
1938	Corps aerial photo	P-2376
1938	Corps aerial photo	P-2377
	ST. MARYS BEND—CLARKE LAKE	
1902	Certificate by Clerk of U. S. District Court for District of Nebraska concerning docket entries in case entitled *Clarke v. Lienemann*	D-1099

YEAR	DESCRIPTION OF EXHIBIT	EXHIBIT NO.
	Journal Entry, copy of plat, & special findings of jury in *Clarke v. Lienemann*	D-1100

COMMENT

In *Clarke v. Lienemann*, Clarke was seeking to eject Lienemann from certain land in the vicinity of Clarke Lake, an ox-boe lake now in Sarpy County, Nebraska, almost directly west of St. Mary's Bend and St. Mary's Cut-off canal. Lienemann claimed the land, although west of the Missouri River, was in Iowa, and that the Fed. Dist. Court of Nebraska had no jurisdiction. Jury made special finding that land was in Iowa, and case was thereupon dismissed.

1942	Partial transcript of case entitled *Lienemann v. Sarpy County*	D-1018
	Copy of Opinion by Nebraska Supreme Court in *Lienemann v. Sarpy County*	D-1117

COMMENT

In the above case, Lienemann was seeking to enjoin Sarpy County, Nebraska, from taxing certain lands on the theory that, although the lands were west of the Missouri River, they were nevertheless in Iowa. The District Court of Sarpy County dismissed the case. On appeal, the Nebraska Supreme Court reversed, holding that the state boundary ran through Clarke Lake, and ordered a survey of the boundary through the lake. Roy N. Towle was appointed to make the survey and later filed plat and report. The 1902 and 1942 cases involved approximately the same land.

	Bartleman prepared a plat which is basically two Alluvial Plain maps joined together so as to show St.	

YEAR	DESCRIPTION OF EXHIBIT	EXHIBIT NO.
	Marys Bend and Clarke Lake. On this plat, Bartleman has shaded green the land found by the jury in the 1902 case to be in Iowa and has also platted the segment of state boundary surveyed by Roy N. Towle as commisioner in the 1942 case.	D-1119
1925	Map of Sarpy County, Nebraska prepared by H. B. Patterson, County Surveyor	P-1774
1937	Corps aerial photo of St. Marys Bend	P-1810
1938	Corps aerial photo of St. Marys Bend	P-1812
1941	Corps aerial photo of St. Marys Bend	P-2392
1941	Letters and report regarding boundary between Sarpy County, Nebraska, and Mills County, Iowa.	P-1057
	CALIFORNIA BEND	
	Copy of Quit Claim Deed by which Peterson Trust conveyed all its title and interest in approximate north half of California Bend area to State of Iowa.	D-1060
1930	Corps map with Willis Brown's superimposition of land involved in *Coulthard v. Simmons*	P-2717
1937	Corps reconnaissance map of California Bend	P-2669
1938	Corps aerial photo of California Bend	P-2380
1939	Corps aerial photo of California Bend	P-2382
1939	File of case entitled *U. S. v. Mencke*, condemnation for right-of-way for	P-2670

YEAR	DESCRIPTION OF EXHIBIT	EXHIBIT NO.
	California Cutt-off canal, Fed. Dist. Court of Nebraska	
1941	Corps aerial photo of California Bend	P-2393
	TYSON BEND	
	Certified copy of Decree of Federal District Judge Hicklin in case entitled *U. S. v.* 242.53 *acres of land, Ned Tyson, et al*, awarding damages for taking of easement on Tyson Island to State of Iowa	D-1049
	Copy of Opinion of Eight Circuit Court of Appeals affirming above case (Case entitled *Tyson v. Iowa*)	D-1113
	Copy of condemnation plat prepared by Corps of Engineers for above case	D-1051
	DEER ISLAND	
	(*IOWA v. RAYMOND*)	
	Partial transcript from file of cause entitled *State of Iowa v. Raymond, et al*, District Court, Harrison County, Iowa, wherein title to Deer Island was quieted in State of Iowa.	D-1047
	Copy of Opinion of Iowa Supreme Court in above case appearing at 254 Iowa 828, 119 NW 2d 135.	D-1047-A
	WINNEBAGO BEND	
	Tri-color Map on which Bartleman superimposed the area in Winnebago Bend which Iowa claims to	D-1120

YEAR	DESCRIPTION OF EXHIBIT	EXHIBIT NO.
	own in green; also superimposed in red the land awarded to U. S. as Trustee for Winnebago Indian Tribe in the case of *U.S. v. Flower, et. al.* demonstrates that Iowa does not claim any of the land awarded to the tribe in 1937 case.	
	Mosiac of 1938 Corps aerial photos showing where the river was when *U. S. v. Flower* was decided	D-1102
	Copy of complete file of *U. S. v. Flower,* in U.S. District Court for District of Nebraska, including maps and aerial photos used as evidence, and Memorandum Opinion of Judge Woodrough filed Aug 29, 1937. In this opinion, the Court (on page 3) reviewed the laws of Iowa and Nebraska regarding river bed titles and held that river bed ownership must be determined on the basis of which state it is in. The Court held (on page 6) that an avulsion had occurred between 1870 and 1879 which cut off some Iowa land in Iowa Sections 31 and 32, leaving it on the Nebraska side of the river; also held (on page 8) that another avulsion had occurred in about 1912, stranding some Nebraska land on the Iowa side. The boundaries of the land awarded to the Tribe are set out at pages 7, 9 and 10. On Feb. 18, 1938, Supplemental Judgement was filed withdrawing some of the	

YEAR	DESCRIPTION OF EXHIBIT	EXHIBIT NO.
	land which *had been* theretofore awarded to the Tribe.	P-2661 D-1114
	Copy of Circuit Court Opinion in *U. S. v. Flower*	D-1115
1927	Willis Brown retrace of Leo M. Peterson survey of 1927 concerning status of Tribal lands	P-2655
1956	Copy of Petition and Answer of Iowa in case entitled *Kirk v. Wilcox*, 80200, Woodbury County, Iowa, District Court.	P-2339
1958	Copies of pleadings and Decree in Wilcox v. Pinney, 80441, Woodbury County, Iowa, District Court.	P-2338
	Tri-color map with lands involved in *Wilcox v. Pinney* and *U. S. v. Flower* superimposed by Willis Brown	P-2661
1939	Corps aerial photo of Glovers Point Bend and Winnebago Bend	P-1878
1966	Copy of part of Docket in case entitled *U.S. v. 126.78 acres of land, et al*, in U. S. District Court for Northern District of Iowa, showing resume of Judgment and Decree entered June 10, 1966, awarding title of Tract A (Iowa) to State of Iowa subject to easement for construction and maintenance of channel	D-1050
	Copy of condemnation map prepared by Corps of Engineers showing location of Tract A (Iowa) and other tracts	D-1052
	Copies of deeds from Ray L. Grosvenor, et ux to State of Iowa consummating "Grosvenor Pur-	D-4061 D-1062

YEAR	DESCRIPTION OF EXHIBIT	EXHIBIT NO.
	chase'' of certain lands in Winnebago Bend area.	
	BROWERS BEND	
	(*DARTMOUTH COLLEGE v. ROSE*)	
1936	Corps of Engineers aerial photo of Browers Bend showing Missouri River west of land in dispute in *Dartmouth College v. Rose* taken in 1936	D-1095
7-6-37	Corps reconnaissance map of July 6, 1937, showing only channel of river still west of island approximately one mile long and half mile wide	D-1097-A
1937	Corps aerial photo shows river has broken back through an old chute east of the island without destroying the island	D-1096
8-4-37	Corps reconnaissance map of Aug. 4, 1937, showing channel east of island is the main channel.	D-1098-A
	Opinion of Iowa Supreme Court in case entitled *Dartmouth College v. Rose, State of Iowa Intervenor*, wherein Decree of Woodbury County District Court was affirmed, holding that no avulsion occurred at Bowers Bend in 1937	D-1116

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APPENDIX "K"

Evidence Relied Upon by Plaintiff to Establish Acquiescence by Iowa

TESTIMONY RE NOTTLEMAN ISLAND

DARWIN MERRITT BABBITT, age 67, Plattsmouth, Nebraska, one of claimants to the island, testified he rented South half of island in 1940, and he and partner purchased the half of island in 1941 from John Nottleman Estate for $1300.00 in Probate Proceedings, Cass County, Nebraska. Identified Exhibit P-463 and P-464 are copies of John Nottleman Estate proceedings in Cass County Court, and P-465 as copy of Administrator's Deed received. In 1940 and 1941 got to island by barge from Nebraska (R. V. I. pp. 46-55). Started to pay taxes in Nebraska in 1941, land on tax rolls in Nebraska until 1952. First paid taxes in Iowa for the year 1946 (R. V. I. pp. 60-62), identified Exhibit P-471 as pleadings in case filed in Iowa November 30, 1961, where he tried to get his taxes reduced in Iowa (R. V. I. p. 71). In addition he testified to his open occupancy, cutting of timber on the island, clearing land for cultivation, identified pictures of himself and family placed in Omaha World-Herald and advertised a farm sale on the island in 1956 (R. V. I. pp. 72-78).

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MERRILL SARGENT, Glenwood, Iowa, age 42, one of claimants to the island, testified that his father purchased land on the island in 1953 from George Troop, paid inheritance tax on the land in his father's estate to State of Iowa (R. V. II p. 168), included the land, with other lands, in a mortgage to Traveler's Insurance Co. (R. V. II p. 170), affidavit of possession filed in June 1957 (R. V. II p. 171), witness as executor valued 574 acres of island land in his

father's estate at $50.00 per acre in 1957 (R. V. II p. 231).

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GEORGE TROOP testified he purchased about 370 acres on island from Harve Shipley for $1,000.00 without having seen the land. Filed Quit Claim Deed received in Nebraska because Harve Shipley was a Nebraskan. Sold same land to Sergent by Quit Claim Deed and no Abstract of Title (R. V. II p. 247).

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ALBERT M. WATTS, 68 years old, one of claimants to Nottleman Island, testified: "We purchased a part of this land on Nottleman's Island. We bought it from Harvey Shipley, William Watts and myself. Our land is at the northeast corner, main island property. Immediately to the west of us were Charley O'Brien and Katherine. The Sargent boys own a strip through the middle—that strip through the middle is the part that George Troop sold to the Sargent boys.

EXHIBIT 460--We bought a hundred acres to start with and we bought it of Harve Shipley for a dollar an acre. What we bought was all brush and timber (R. V. V. pp. 641-42).

Paid taxes in Nebraska on this land for about eight or nine years. Lawsuits or quiet title actions brought before 1943 in the State of Nebraska which affected land title. We took it through two courts over there to clear their titles. Had a regular court session over there at Plattsmouth and called in I don't know how many and notified everybody in 17 counties of our claim there and the Judge ruled that we were the legal authorized owners. At that time we had done a little scratching around trying to

farm and the boys on the south end had done quite a little farming and cleaned off some land (R. V. V pp. 643-647).

Exhibit P-462 is a copy of the pleadings in the case we have been referring to. Harve Shipley and my brother and me. Mrs. O'Brien, or Katherine Julia O'Brien, party to this suit. Katherine Julia O'Brien was Charley's sister. He bought the land straight west of us. He come down there hunting and he found this land, and then he got after us and offered to clear the title for us in Nebraska or take it through the courts in Nebraska and make positive our record, our title, was as good as he could make them for this piece of land, and Harve Shipley, the man we bought from, gave him that job, and he took it through the courts in Nebraska over at Plattsmouth and raveled it out as far as he could go in every direction to clear our title in Nebraska, and then after that is when we sued the State of Iowa to put the titles in Iowa instead of Nebraska because it was on the wrong side of the river. He took that northwest corner for his fee. We had him and Whitney Gilliland. Gilliland helped move it over there and we relied on him to clear the title in Nebraska. We hired Mr. Gillilland to help us get it transferred over into the State of Iowa and, of course, him and Charley O'Brien worked together to get it transferred into the State of Iowa" (R. V. V p. 644).

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RAYMOND W. BECKMAN, 64, was an employee of the Iowa State Conservation Commission from 1937 through 1958 or 1959, first as a conservation officer, then as a supervisor; then he became chief of the fish and game division in 1948, which position he held until his resignation. In 1950, his immediate superior was Bruce Stiles, Director (R. V. I p. 151).

I remember receiving the letter of which Exhibit B-1 is a copy from Mr. Stiles and I answered it by a letter dated April 19, 1950. I also wrote the letter of which Exhibit B-3 is a copy to Mr. William H. Mead (R. V. I p. 151).

I have no recollection as to what investigation was made concerning the ownership of Nottleman Island for the writing the letters. I cannot be sure where I got these four names, but I believe Mr. Stiles gave them to me and I wrote the letter (R. V. I p. 155). I didn't write the letter just on my own. I didn't personally make any investigation—I want that clear—that I recall. Mr. Stiles was personally acquainted with William and Mason Watts (R. V. I p. 156).

Mr. Stiles requested me to answer the letter and directed the contents. I believe the contents were his idea—his opinion (R. V. I p. 157).

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WHITNEY GILLILLAND, 65, of Arlington, Virginia, formerly a practicing attorney at Glenwood, Iowa:

I was attorney for the Plaintiffs in *Watts, et al. v. Strand, et al.* I recognize Exhibit G-1 as copies of the court records in that case. The Decree was dated December 31, 1946, and filed January 6, 1947 (R. V. I p. 115).

The County Attorney filed answer in the case. He told me he would take the matter up with the Attorney General, but I don't know that he ever heard from the Attorney General. The County Attorney agreed to the form of the Decree, which I prepared, and Judge Johnson signed (R. V. I p. 120). The plaintiffs were in open and notorious possession of the land (R. V. I p. 122).

In about 1950, the conservation officer at Glenwood told me somebody had applied to buy Nottleman Island. When I was in Des Moines shortly afterwards, I talked with the Attorney General about it. Exhibit G-2 is a letter I wrote to the Iowa Conservation Commission at the suggestion of the Attorney General (R. V. I p. 125). Exhibits G-4 and G-5 are copies of letters I received from the Conservation Commission, signed by Ray W. Beckman. I advised Mr. William Watts concerning these letters and, as far as I know, he relied thereon (R. V. I p. 127).

There were no witnesses present, no testimony taken, no exhibits introduced in *Watts v. Strand*—the County Attorney and I just discussed the situation with the Judge (R. V. I p. 219). I don't know that any of the Plaintiffs were residing on the island; I know some of them were not (R. V. I p. 133).

—o—

NOTTLEMAN ISLAND

EXHIBITS IN RE ACQUIESCENCE

YEAR	DESCRIPTION OF EXHIBIT	EXHIBIT NO.
	DEEDS, COURT ACTIONS, SCHOOL PERSONAL TAX, ETC.	
1933	Fitch Survey	P-735 P-2345
1935	Teachers list showing Geo. Shipley in Nebr. School	P-534
1935	Neb. death certificate for Eleanor C. Shipley	P-525
1935	Nebr. vehicle registration for Harvey and Ernest Shipley	P-521
1935-36	Teacher's Report for School Dist. 5 Cass County, Nebraska	P-537
1936	Nebr. birth certificate for Elaine Joy Shipley	P-526

YEAR	DESCRIPTION OF EXHIBIT	EXHIBIT NO.
1936	School census report for Dist. No. 5, Cass County, Nebraska	P-527
1936	Personal tax schedules for Ernest L. Shipley, E. M. Dooley, H. C. Shipley and Cleo Baker	P-540 P-541 P-542 P-546
1936-37	Teacher Report for School Dist. No. 5, Cass County, Nebraska	P-536
1936-37	Vehicle registrations for Ernest Shipley and Cleo Baker	P-512 thru P-517
1937	School census report for Dist. No. 5, Cass County, Nebraska	P-528
1937	Personal tax schedule for Harvey Shipley	P-545
1937	Teacher's 3rd day report of pupils enrolled in Dist. No. 5	P-535
1937	Quit Claim Deed — Shipley to Watts	P-460
1937-38	Teacher's Report for Dist. No. 5, Cass County, Nebraska	P-538
1938-39-40	Neb. vehicle registration for Ernest Shipley	P-522, 3, 4
1939	Personal tax schedule for Harvey Shipley	P-544
1939	Deed — Shipley to O'Brien	P-459
1939	Quit Claim Deed — Church to Shipley	P-458
1940-41	Proceedings in Estate of John Nottleman (Cass Co., Nebr.)	P-463 P-464
1940-41	Administration Deed — Nottleman Estate to Jones & Babbitt	P-469
1940-41	Mortgage — Babbitt to Jones	P-465
1940-41	Transcript — Shipley v. Hull	P-462
1941	Personal tax schedule for Harvey Shipley	P-543
1942	Personal tax schedule for Harvey Shipley	P-542

YEAR	DESCRIPTION OF EXHIBIT	EXHIBIT NO.
	TAXATION	
1930-1-2-3	Nebraska introduced the real estate tax assessment sheets for Rock Bluff Precinct, Cass County, Nebraska, for the years 1930, 1931, 1932, 1933 — all of said years being on the same sheets. These show that no part of Nottleman Island was taxed in Nebraska in 1930, 1931, or 1932. Attached to Exhibit P-548-3 is a note indicating that R. D. Fitch, County Assessor that he had surveyed Nottleman Island on Sept. 7, 1933, and that Harvey Shipley should be taxed for the North half of the island and John Nottleman should be taxed for the South half of the island. The names of Shipley and Nottleman were written on the roll for 1933 but no valuations were assigned so it appears that the island was not taxed in 1933.	P-548-1 P-548-2 P-548-3
1934-35	The tax roll for 1934-35 was introduced by Nebraska. It shows that the North half of Nottleman Island (162.10 acres of high bar and 414 acres of low bar) was assessed to Harvey Shipley; the South half (162.10 acres of high bar and 218 acres of low bar) was assessed to John Nottleman. The *actual value* of the entire island was fixed by the Assessor at $1900.00.	P-550-1 P-550-2 P-550-3
1936-37	The tax roll for 1936-37 was introduced by Nebraska. It shows that for 1936, the island was assessed	P-552-1 P-552-2 P-552-3

YEAR	DESCRIPTION OF EXHIBIT	EXHIBIT NO.
	to the same person as in 1934 and 1935 and at the same total valuation of $1900.00; for 1937, 44 acres in the Northeast part of the island were assessed to William and Mason Watts; total actual valuation was raised to $1940.00 as follows:	
	Shipley $ 900.00 Watts 70.00 Nottleman 970.00 Total Actual Value $1940.00	
1938-39	The tax roll for 1938-39 was introduced by Nebraska. It shows Nottleman Island assessed as follows:	P-554-1 P-554-2 P-554-3
	Harvey Shipley $ 400.00 Kathryn O'Brien 500.00 Watts Brothers 70.00 John Nottleman 970.00 Total Actual Value $1940.00	
1940-41	The tax roll for 1940-41 was introduced by Nebraska. It shows Nottleman Island assessed as follows:	P-556-1 thru P-556-5

Ass'd to	*Acres*	*Act. Val.*
O'Brien	190.5	$ 790.00
Watts	65.8	330.00
Shipley	301.7	1250.00
Jones and Babbitt	401.1	1190.00
Total Actual Value	959.1	$3560.00

1942-43	The tax roll for 1942-43 was introduced by Nebraska. It shows Nottleman Island assessed the same as it had been assessed for 1940-41.	P-558-1 thru P-558-5

COMMENT

The exhibits listed above are the exhibits in the record in this case which tend to show what was done by Nebraskans prior to the 1943 Boundary Compact, which actions are claimed by Nebraska to be exercises of sovereignty by Nebraska over Nottleman Island. Nebraska's claim is that by reason of these exercises of sovereignty, coupled with Iowa's acquiescence, Nottleman Island was in Nebraska prior to 1943 by prescription.

Iowa points out two things about these exhibits: First, all of them are within an 11 year period immediately preceding the Compact, a period much too brief under the cases to constitute a valid basis for prescription. Second, there are no exhibits or any other evidence of either knowledge or acquiescence by Iowa.

Although Nebraska introduced evidence tending to show exercise of sovereignty by Nebraska over Nottleman Island after 1943, (for instance, it was not removed from Nebraska tax rolls until 1952) we do not understand it to be Nebraska's claim Iowa acquiesced in these purported exercises of sovereignty so that Nottleman Island continued to be in Nebraska by prescription after 1943. Rather, as we understand it, Nebraska's claim is that Iowa, by her conduct after 1943, unilaterally interpreted the Compact as a relinquishment of all state owned lands along the river; and this was Nebraska's purpose in introducing evidence of Nebraska and Iowa conduct after 1943.

While evidence of occurrences after 1943 may well be material and relevant in the case now pending in Mills County, Iowa, District Court entitled *State of Iowa v. D. M. Babbitt, et al*, which has to do with the ownership of Nottleman Island, Iowa submits that evidence of occurrences after 1943 are immaterial and irrelevant in this case, where the issue is location of the state boundary prior to the 1943 Compact.

Although Iowa believes it was not possible for Nebraska to gain prescriptive rights to Nottleman Island by any occurrence to Nottleman Island by any occurrence after 1943, and we do not understand Nebraska to be claiming by prescription after 1943, we continue listing exhibits concerning post-1943 occurrences for the Special Master's convenience.

YEAR	DESCRIPTION OF EXHIBIT	EXHIBIT NO.
1945	Deed — Shipley to Troop	P-467
1945	Cass Co., Nebr., Treasurer's Deed to O'Brien	P-468
1946	Copy of Mills County, Iowa, index book showing Exh. P-468 indexed	P-670
1946	Letter from Mills Co., Iowa, recorder to General Land Office and reply	P-2398
1946-47	Decree — Watts. v. Strand, Mills County, Iowa, Dist. Court	P-1074
	Plat of Nottleman Island for taxation purposes recorded in Mills, County, Iowa	P-1075
	Copy of part of Whitney Gillilland file in Watts v. Strand	Gillilland Exh. 1
1946-66	Copies of Mills County, Iowa, tax lists showing Nottleman Island taxed	P-2623
	Set of Willis Brown Plats showing lands described in P-2623	P-1673
1947	Warranty Deed — O'Brien to O'Brien	P-1669
1948-49	Copies indicating Lot 5, Nottleman Island, sold on 12-5-49 for delinquent 1948 taxes, redeemed 12-31-49; amount of tax — $52.10.	P-1664
1949	Deed — Jones to Babbitt	P-466
1950	Letter — Beckman to Mead	P-478
1950	Letter — Gillilland to Beckman	P-481
1950	Letter — Beckman to Gillilland	P-477

YEAR	DESCRIPTION OF EXHIBIT	EXHIBIT NO.
1951	Letters by or to Gillilland	Gillilland Ex. 2-7
1951	Part Transcript, Lee A. Sargent Estate	P-1696
1952	Letter — Cass County Nebr., County Attorney to County Assessor directing removal of Nottleman Island from Nebr. tax rolls	P-474
1954	Omaha World-Herald photos and article concerning Babbitt activities on Nottleman Island	P-487, 8, 9, 90, 92, 93, 94, 95, & 96
1956	Omaha World-Herald advertisement of Babbitt farm sale	P-1849
	Glenwood Opinion Tribune advervisement of Babbitt farm sale	P-2236
	Plattsmouth Journal advertisement of Babbitt farm sale	P-2237
1956	Right of Way agreement — Goode & Babbitt	P-1073
1957	Deed — Troop to Sargent	P-1083
1957	Mortgage — Sargent to Travelers Ins. Co.	P-2610
1957	Sargent Affidavit of Possession	P-2611
1957	Sargent Affidavit of Possession recorded	P-1082
1957	Babbitt Affidavit of Possession recorded	P-1072
1957	Omaha World-Herald pictures and article concerning good soy bean crop raised by Babbitt	P-1857
1959	Papers indicating redemption from tax sale by Babbitt	P-2613 P-559
1959	Papers indicating government loan to Babbitt	P-486
1961	Decree — Babbitt V. Edwards	P-471
1961	Letter — Production Credit to Babbitt	P-475

YEAR	DESCRIPTION OF EXHIBIT	EXHIBIT NO.
1961	Letter — Creger to Babbitt	P-1775
1961	Notice to redeem from tax sale to Babbitt	P-600
1962	Babbitt tax statements	P-605
1962	Part Letter — Lee White to Babbitt	P-476
1963	Notice of Expiration of Time to Redeem from Tax Sale — Rodman to Babbitt	P-484
1963	Publication of delinquent R. E. tax list	P-483
1963	Tax statements and receipts	P-614
1963	Drainage Tax receipts — Babbitt	P-608
1963-65	Babbitt photos of operations and improvements on Nottleman Island	P-616 thru 621
1964	Redemption from Tax Sales by Babbitt	P-2614
1964	Inventory & Final Report — John William Watts Estate	P-1750
1964	Affidavit of Possession — O'Brien	P-1698
1964	Babbitt Tax statements	P-604
1964	Babbitt Tax receipts	P-613
1965	Babbitt Tax assessment rolls	P-2612
1965	Babbitt Tax statements	P-602
1965	Babbitt drainage receipt	P-603
1965	Publication of delinquent tax list	P-510
1968	Babbitt tax assessment rolls	P-1800
1968	Babbitt Notice of Expiration of Time to Redeem from Tax Sale	P-2492

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TESTIMONY RE OTOE ISLAND

WINIFRED RHOADES, 47, of Sidney, Iowa, has been Fremont County Treasurer since 1956, was Deputy Treasurer since 1945.

I remember a discussion in 1948 or 1949 between the County Treasurer and County Auditor about some Nebraska land being put on the tax roll, but I don't recall what was done if anything (R. V. IX p. 1233).

The east part of the NE¼ and the east part of the SE¼ of Sec. 15-67-43 were on the tax rolls in 1880. No listing in 1881 and 1882. No book found for 1883. No listing in 1884 and 1885. No book for 1886. No listing for 1887. There are no books from 1888 through 1933. No listing for 1934, 1935 or 1936. No books from 1937-1942. From 1943-1948, the N½NE¼ of 15-67-43 was listed to Frank Schwake. In 1949, the N½ NE¼, SE¼ NE¼, and the NE of the NW part of Government Lot 1, all in 15-67-43 were listed. The added land in 1949 which I read was in no ownership. Other land was added in 1949 in Sec. 15-67-43 and listed to Dan Hill and Henry Schemmel (R. V. IX p. 1236).

Some of the land in 15-67-43 was sold for taxes in 1950, and redeemed by Henry Schemmel. At tax sale in 1951, Schemmel purchased some land in 15-67-43, then assigned the Tax Sale Certificates to Mary Leah Persons, and Tax Deeds were issued to her (R. V. IX p. 1241).

I have also checked the records concerning Sec. 23-67-43. Some of it was listed in 1880, 1881 and 1882. No book for 1883. Some of it listed in 1884 and 1885. No book for 1886. Some of it listed for 1887. No books for 1888-1933. None listed in 1934, 1935 or 1936. No books for 1937-1942. None listed in 1943-1948. In 1949 and since, some land in Sec. 23-67-43 has been listed to Dan Hill and Henry Schemmel.

The Court: What was the purpose of that?

Mr. Moldenhauer: Again, Your Honor, to show taxation by Iowa officials of this land and recognition of Mr. Schemmel's ownership.

The Court: County officials or state officials?

Mr. Moldenhauer: By the county officials, Your Honor (R. V. IX p. 1240).

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HENRY E. SCHEMMEL, age 76, lives southeast of Nebraska City. The community known as Minersville. First moved to there in the spring of 1934. Born September 7, 1892.

Purchased some land in that area in the 30's with Dan Hill. We purchased it at tax sale and then I would say maybe a year later we purchased from a man by the name of George Ward (R. V. IX pp. 1220-1223).

Exhibit P-1529 is a special warranty deed from Howard Huston Hanks and Merle O. Hanks, husband and wife, to George Ward, filed for record October 29, 1918, dated the 21st day of October 1918. It was Schemmel and Dan Hill first title to this property—was a tax sale certificate under part of it. We didn't get a treasurer's deed on it. Bought that tax sale certificate in the State of Nebraska, Otoe County.

Exhibit P-192 is a quit claim deed made on the 11th day of January 1938, George Ward, a widower, of the first part, Dan Hill and Henry E. Schemmel. That deed recorded in Otoe County on the 29th day of January 1938, also recorded in the State of Iowa, on the 22nd day of August 1939 at Volume 46, page 10.

Q. Why did you record it in the State of Iowa?

A. Well, after Otoe Bend Canal had been cut in there, why, some of our land had been cut over

there, so we recorded it to show ownership of that land in Iowa (R. V. IX p. 1224).

Court: All right. How much of this—has that come out yet? Is this all the island or what part of it?

Witness: That is the southern part of the island.

Q. After you received the deed from George Ward, did you, either alone or in company with Dan Hill, go onto the land to look at it?

A. Yes, sir.

Q. How did you get there?

A. Well, the dike lines were built from the Nebraska shore below a—well, I think we walked the dike lines and got onto the main part of the island (R. V. IX p. 1225).

Q. What dike lines did you walk?

A. Well, just below the Otoe Bend Canal the Engineers, under contract with Ross Construction Company, built from the Nebraska bank over onto this island and had other supplemental dikes that went out to what evidently was supposed to be the designed channel of the river.

Q. That would just get you to the land on the—

A. On the Nebraska side.

Q. How did you get to the land on the other side of the main channel?

A. We crossed the bridge—At one time, we used to go by boat, rowboat, but one time we crossed the river at Nebraska City bridge and then drove down kind of a winding road down south of what is called Payne Junction now and to the dike line at the head, the top of the island as

it is now, and we walked the dike line down and onto the island there.

The Iowa side was what is called bar land and it being—There was no water running over this island, but there was water running in a channel to the east. That is why we had to cross the dike lines to get over, because—walked along the dikes themselves on the stringers from pile clump to pile clump to get onto the island.

Q. You had to cross water to do that?

A. To get across water, yes, sir, and then the island looked—It had willows and small trees on some of it.—I can't say exactly the month, but it was in the spring of the year, and I believe in 1939 because one thing I did while the boys were putting "No Trespassing" signs on the dike line, I seeded some Reed's Canary Grass on an open space where I thought it would grow.

None of the land was under cultivation at that time, that is, not the Iowa side. Somebody had been working the land on the Nebraska side of the Otoe Bend Canal, but not that year, but before that there had been somebody farming it. We found out later that it was Almon Engleman that had some corn there. I saw the remaining stalks there and the Iowa people called it the Engleman bar (R. V. IX p. 1226).

Q. Mr. Schemmel, at the same time or about the same time you filed your deeds in Iowa, did you write a letter to the Fremont County officials advising that this land was now on the Iowa side of the channel in 1939?

A. Yes, sir.

Q. Is P-1613 the letter you wrote to the Fremont County officials?

A. Yes, sir.

It was recorded the 22nd day of August, 1939.

The Court: What is the significance of this, Mr. Moore?

Moore: It is merely to show, Your Honor, that Iowa officials were put on notice of this land in Nebraska on the Iowa side of the river prior to the Compact. There will be considerable evidence, Your Honor, that these landowners in this particular area went to some length to prove their titles.

Murray: For the limited purpose Mr. Moore stated this letter was being offered for, there is no objection, but we certainly object to it on the basis that it is a self serving declaration, the contents of it.

Moore: It isn't offered to prove the truth of the statements.

Q. I believe you testified earlier, just a little bit earlier, Mr. Schemmel, that a Mr. Engleman was farming some of the land south and west of the Otoe Bend Canal. What later became south and west—

A. I told Mr. Hill somebody had been farming that land and might have a claim to it, and we should find out who it was.

Q. Did you find that it was Mr. Engleman?

A. Yes.

Q. Based upon that information, did you then obtain some kind of a deed or release from Mr. Engleman of rights that he claimed in that land?

A. Yes, sir.

Q. What did you obtain?

A. We got kind of a warranty deed because he claimed it by adverse possession, so we went down there at his home place on the part of the island, original island, an island cut into the State of Iowa and Missouri, and his house was just below the Missouri line, and we went down there with an attorney to get a deed from him (R. V. IX pp. 1228-1229).

Exhibit P-1603 is a certified copy of the deed as it appears in the records in Otoe County.

Q. (Moore) Now, you started to tell us about your trip to the island in 1939 in the area east of the Otoe Bend Canal and north, and you got there across the dike lines. Was that at the upper end?

A. Yes, sir.

Q. Do those dike lines appear on this Exhibit P-230, this A-P map? These up here (indicating).

A. Yes, sir.

Q. What is the number of that dike, as it appears on that Exhibit 230?

A. 602.9.

Q. Who went with you on that occasion?

A. My two sons, Robert Schemmel and Douglas Schemmel.

A. Well, they nailed metal "No Trespassing" signs on that dike line.

A. "No Trespassing, Hill and Schemmel."

On the dike line. Where the dike line, after it

crossed the water on the east channel, on the island side.

Q. What did you do on that occasion?

A. I had some Reed's Canary grass and a hand seeder, and I seeded some Reed's Canary grass because it is a grass that will, after it is started, will stand flooding and come up through silt (R. V. IX p. 1231).

Had a controversy with Dr. Zimmer and Martha Higgins over Section 32, Section 32 being in Township 18, Range 15. Nebraska description. And Sections 5 and 8, Township 7, Range 15 East of the 6th principal meridian, a Nebraska description. Disposed of in Otoe County District Court.

Exhibit P-1612 the letter written by Mr. Schemmel. It was filed for record March 1, 1956, Book 6, Page 153, State of Iowa, Fremont County. I sent this with the court records and it was returned without recording so I later recorded it showing that I had sent that over there.

Sent it to the Fremont County officials on or about the date that it shows the letter was written. June 5, 1951, is the date written, and it was sent either that day or the following day.

Q. Mr. Schemmel, from 1939 until 1943, were you on the island property from time to time?

A. Yes, sir. Seeded Reed's Canary grass—whenever I had the opportunity, and then south of that we had put down a well and put in a tent which washed away in the first flood, and that is all I did to the South part.

After I became aware of the Iowa-Nebraska Compact, why, of course we were paying taxes on it in Nebraska then, and I knew we would have to pay taxes in Iowa because of this Compact, so I

went over and requested that it be placed on the tax records so that we could pay taxes in Iowa. Made that request of county auditor over there—of Fremont County, Iowa. Had conversation later on about transferring property from the Nebraska tax records to the Iowa tax records with a Mr. Cowden and Mr. Van Syoc, after I was treasurer. Of Otoe County (R. V. IX pp. 1242-1246).

In January 1947, Mr. Cowden or Mr. Van Syoc collectively told me that there had been a court case in Mills County and they were required to put it on the tax books, and I told them, I asked them to go over to the clerk's office and check the plats and stuff to verify the location of the land.

Mr. Cowden at that time was the auditor, Mr. Van Syoc was the county treasurer, both of Fremont County, Iowa. They put it on the tax records then and that is when we started paying taxes in Iowa, in 1949. That is, Mr. Hill and myself. They put it on under Iowa description (R. V. IX p. 1249).

Exhibit P-194 is a certified copy of the decree in *Charles Zimmer v. Dan Hill, et al.*, which shows that it was filed in the office of the recorder for Fremont County on the 25th day of August 1941, at 4:30 P. M. Roughly the Iowa descriptions that are used or have been used in taxing that island land are—

All of Section 15, Township 67 North, Range 43 West of the 5th P. M., and the west half, fractional west half of the northwest quarter of Section 23, Township 67, Range 43 West of the 5th Principal Meridian in Iowa (R. V. IX p. 1250).

Q. (Moore) Mr. Schemmel, did you let the property go for taxes in one or more years?

A. Yes, sir, one year.

Q. (Moore) Did you do that on advice of counsel?

A. Yes, sir.

Q. What was the purpose of that transaction or series of transactions?

A. Well, since the auditor from Fremont County, Iowa, gave the land a different description from the Nebraska surveys, I wanted to get title from an Iowa description for this same land in order to clarify and establish the rightful ownership in case of sale or if mortgaged or something like that.

Q. Did you then buy it in at those tax sales?

A. Yes, sir (R. V. IX p. 1257).

Q. You got a tax sale certificate?

A. Yes, sir.

Q. Did you assign those to your daughter, Mary Leah Persons?

A. Yes, sir (R. V. IX p. 1258).

Q. And then was the deed issued to her?

A. Yes, sir.

Moore: The plaintiff offers Exhibits P-1553, P-185, and P-186, tax sale deeds, and attached plats and certificates, all in 1955.

Court: All right, they are all in.

Q. (Moore) Mr. Schemmel, Mary Leah Persons, of course, is still a member of the Schemmel family, is that right?

A. Well, yes, but she is married and living with her husband in Albuquerque, New Mexico, and she has delegated power of attorney to my son Douglas.

Q. There have been various deed and transactions, deeds between yourself and your sons, and your sons and Mary Leah Persons, the result of which was to get all the titles in the one person, Mary

went over and requested that it be placed on the tax records so that we could pay taxes in Iowa. Made that request of county auditor over there—of Fremont County, Iowa. Had conversation later on about transferring property from the Nebraska tax records to the Iowa tax records with a Mr. Cowden and Mr. Van Syoc, after I was treasurer. Of Otoe County (R. V. IX pp. 1242-1246).

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A. Yes, sir.

Q. What was the purpose of that transaction or series of transactions?

A. Well, since the auditor from Fremont County, Iowa, gave the land a different description from the Nebraska surveys, I wanted to get title from an Iowa description for this same land in order to clarify and establish the rightful ownership in case of sale or if mortgaged or something like that.

Q. Did you then buy it in at those tax sales?

A. Yes, sir (R. V. IX p. 1257).

Q. You got a tax sale certificate?

A. Yes, sir.

Q. Did you assign those to your daughter, Mary Leah Persons?

A. Yes, sir (R. V. IX p. 1258).

Q. And then was the deed issued to her?

A. Yes, sir.

Moore: The plaintiff offers Exhibits P-1553, P-185, and P-186, tax sale deeds, and attached plats and certificates, all in 1955.

Court: All right, they are all in.

Q. (Moore) Mr. Schemmel, Mary Leah Persons, of course, is still a member of the Schemmel family, is that right?

A. Well, yes, but she is married and living with her husband in Albuquerque, New Mexico, and she has delegated power of attorney to my son Douglas.

Q. There have been various deed and transactions, deeds between yourself and your sons, and your sons and Mary Leah Persons, the result of which was to get all the titles in the one person, Mary

Leah Persons, is that right?

A. Well, the larger portion of the land is in the name of Mary Leah Persons.

Q. And that title she now has, at least so far as she is concerned, originated with these tax deeds in 1955?

A. Yes, sir.

Q. And then any interest you had you conveyed to her?

A. We conveyed—my wife and I—she was living then—conveyed to her (R. V. IX p. 1260).

———o———

DOUGLAS SCHEMMEL, age 42, of Minersville, Nebraska, a son of Henry E. Schemmel, testified about 1939 trip to island and:

We started dozing in 1955-56 winter. The east side along the old channel.

Just immediately on the west side we cleared five acres.

Planted our first crop in there in 1956.

We had 25 or 30 acres under cultivation in 1956 (R. V. IX pp. 1281-1282).

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OTOE BEND EXHIBITS HAVING TO DO WITH ACQUIESCENCE

TAXATION

YEAR	DESCRIPTION OF EXHIBIT	EXHIBIT NO.
1895-1914	Nebraska introduced tax records from Otoe County, Nebraska from	P-1 thru P-57

YEAR	DESCRIPTION OF EXHIBIT	EXHIBIT NO.
1915-55	1895-1914 and from 1915 through 1955.	
	Also. an 1895 record showing land added to tax roll. (Concerning the above, Iowa states that tax records prior to 1930 are irrelevant and immaterial because Otoe Island didn't exist prior to 1930. Iowa's position is that Otoe Island didn't begin to form until 1934. Taxation of Otoe Island by Nebraska from 1944 through 1955 only shows how unreliable any taxation evidence is because it is undisputed that the island was in Iowa after July 12, 1943.)	P-58 thru P-126 P-133
	Nebraska also introduced tax records from Fremont County, Iowa,	P-142 P-143
1866-1901	showing lands taxed from 1866 through 1901. (These tax records are also irrelevant because the record herein clearly establishes that Otoe Island did not exist in those years.)	P-144 P-150 P-151 P-156 P-157 P-159
1889	Resolution of Fremont County, Iowa, Board of Supervisors, reducing taxes because land washed away.	P-160 P-165 P-176 and P-177
1905	Resolution of Fremont County, Iowa, Board of Supervisors noting that N½ NE¼ Sec. 14-76-43 washed in river.	P-174
1934	Fremont County, Iowa, tax records for 1934 showing practically all land between Iowa Chute and Otoe Island and part of Otoe Island itself was taxed in Iowa in 1934.	D-1200

YEAR	DESCRIPTION OF EXHIBIT	EXHIBIT NO.
1934	Bartleman map showing lands taxed in Iowa in 1934.	D-1200-A
1935	Same as D-1200 only for 1935.	D-1201
1935	Same as D-1200-A only for 1935.	D-1201-A
1936	Same as D-1200 only for 1936.	D-1202
1936	Same as D-1200-A only for 1936.	D-1202-A
1943	Same as D-1200 only for 1943.	D-1203
1943	Same as D-1200-A only for 1943.	D-1203-A
	DEEDS AND COURT ACTIONS	
1905	Decree—*State of Nebraska v. Several Parcels of Land.*	P-138
1908	Treasurer's Deed to Hanks	P-141
1918	Warranty Deed—Hanks to Warren	P-1529
1920	Part Transcript—*Yearsley v. Gipple*	P-188
1922	Part Transcript—*Larson v. Ivers* (It is Iowa's position that the above Exhibits are irrelevant and immaterial because evidence is clear that Otoe Island did not exist during above years. Not same land in above Exhibits.)	P-187
1938	QC'D—Ward to Hill & Schemmel	P-192
1938	QC'D—Ward to Hill & Schemmel	P-193
1938	QC'D—Ward to Hill & Schemmel	P-2644
1939	Warranty Deed—Engleman to Schemmel	P-1603
1941	Decree—*Zimmerer v. Hill*	P-194
1940-41	Part Transcript—*Zimmerer v. Hill*	P-189
1941	Part Transcript—*Higgins v. Hill & Schemmel*	P-190
1943	Deed—Hill & Schemmel to Tyson	P-1743
1951	Final Decree—Dan Hill Estate (All above exhibits are within 5 years prior to 1943 Boundary Compact, except Ex. P-1742 is 8 years after Compact. 5 years is not long enough for acquiescence.)	P-1742

MISCELLANEOUS ITEMS

YEAR	DESCRIPTION OF EXHIBIT	EXHIBIT NO.
	Patents covering small island upstream from Otoe Island	P-1614 thru P-1617
1897	Newspaper clip dated 4-16-1897 (Nebr. City News) re high water.	P-200
	Plat by Willis Brown of land other than Otoe Island claimed by Schemmel family in Fremont County, Iowa.	P-2224
1955	Two tax Deeds from Fremont Co. Treas. to Persons.	P-185 P-186
1939	Letter from Schemmel, Dep. Co. Treas. of Otoe County, to Fremont County Recorder.	P-1613
1941	Letter from Schemmel Dep. Co. Treas. of Otoe County to Fremont County Recorder.	P-1612
1949	Partition case, *Givens v. Schemmel*	P-2698
1963	Partition case, *Givens v. Schemmel*	P-2699
1969	Pictures of Schwake Chute taken by W. Brown during trial	P-2706, 7 & 8
	Willis Brown profile from Ag. levee to Iowa Chute	P-1704, 05
1931	Excerpt from Fremont County Ditch Record	P-1768
1931	Excerpt from Fremont County Ditch Record (Missouri Valley D. D.)	P-1769
	Excerpt from Fremont County Ditch Record	P-1767
1922	Eng. Report re boundaries of new district with map	P-198
1930	Resolution re boundaries of Knox district with map	P-196
1956	Photo of Iowa Chute near Propp residence	P-2646
1967	Schemmel photo of Ag. Levee	P-2645

APPENDIX "L"

THE TREE EVIDENCE

NOTTLEMAN ISLAND

Tree No.	*Rings Counted*	*Growth Started*	*Witness*
259	65	1900	Harry Weakley
	44	1922	Dr. Dwight W. Bensend
	43	1923	Dr. Edgar A. McGinnis
1234	46	1919	Harry Weakley
	38	1928	Dr. Dwight W. Bensend
	37 + 1 possible	1928-29	Dr. Edgar A. McGinnis
1106	52-53 or 54	1913-14 or 15	Harry Weakley
	44	1922	Dr. Dwight W. Bensend
	43 + 1 possible	1922-23	Dr. Edgar A. McGinnis

OTOE BEND ISLAND

230	71	1895	Harry Weakley
	63	1903	Dr. Dwight W. Bensend
	63	1903	Dr. Edgar A. McGinnis
1115	32	1930	Harry Weakley
	22	1940	Dr. Dwight W. Bensend
	22 +1	1940-41	Dr. Edgar A. McGinnis
1220	34	1932	Harry Weakley
	29	1936	Dr. Dwight W. Bensend
	28 + 1	1936-37	Dr. Edgar A. McGinnis
1130	32	1933	Harry Weakley
	20	1942	Dr. Dwight W. Bensend
	19 + 1	1942-43	Dr. Edgar A. McGinnis
1140	30	1933	Harry Weakley
	22	1941	Dr. Dwight W. Bensend
	21 + 1	1941-42	Dr. Edgar A. McGinnis

Tree No.	*Rings Counted*	*Growth Started*	*Witness*
1210	33	1932	Harry Weakley
	39	1936	Dr. Dwight W. Bensend
	38 + 1	1936-37	Dr. Edgar A. McGinnis
11	26	1936	Harry Weakley
	20	1942	Dr. Dwight W. Bensend
	19 + 1	1942-43	Dr. Edgar A. McGinnis
1150	30	1933	Harry Weakley
	21-22	1941-42	Dr. Dwight W. Bensend
	20-21	1940-41	Dr. Edgar A. McGinnis
430	———		Harry Weakley
	49 + 1		Dr. Dwight W. Bensend
	49 + 1		Dr. Edgar A. McGinnis
500	———		Harry Weakley
	46		Dr. Dwight W. Bensend
	45 + 1		Dr. Edgar A. McGinnis

EXHIBITS

NOTTLEMAN ISLAND

Transparency prepared by Willis Brown to show location of trees from which samples were taken.	P-739

OTOE ISLAND

A. P. Map with tree location plotted by Willis Brown	P-230
Transparency prepared by Willis Brown showing tree location	P-234
Tri-color map with Bartleman's location of trees 230 and 1220 plotted	D-1163
Tri-color map with Pete Mann's location of tree 230	D-1302
Photos of Tree 230	P-381 P-382

RE EXPERT TESTIMONY GENERALLY

Photo of Dr. Bensend with equipment used by him for annular tree ring counting.	D-1164
Photo of Dr. Bensend with slab from tree 230	D-1165
Photo of section removed from slab from tree 230	D-1166
Photos used by Dr. Bensend to demonstrate the art of counting annular tree rings	D-1171 thru D-1182

PROOF OF SERVICE

I, Manning Walker, Special Assistant Attorney General of the State of Iowa, and a member of the Bar of the Supreme Court of the United States, hereby certify that on ....., I served a copy of the foregoing Defendant's APPENDIX before the Special Master, the Honorable Joseph P. Willson, by depositing the same in a United States Post Office, with first class postage prepaid, addressed to:

CLARENCE A. H. MEYER

Attorney General of Nebraska
State Capitol Building
Lincoln, Nebraska 68509

HOWARD H. MOLDENHAUER

Special Assistant Attorney General of Nebraska
1000 Woodmen Tower
Omaha, Nebraska 68102

JOSEPH R. MOOBE

Special Assistant Attorney General of Nebraska
1028 City National Bank Building
Omaha, Nebraska 68102

such being their Post Office addresses.

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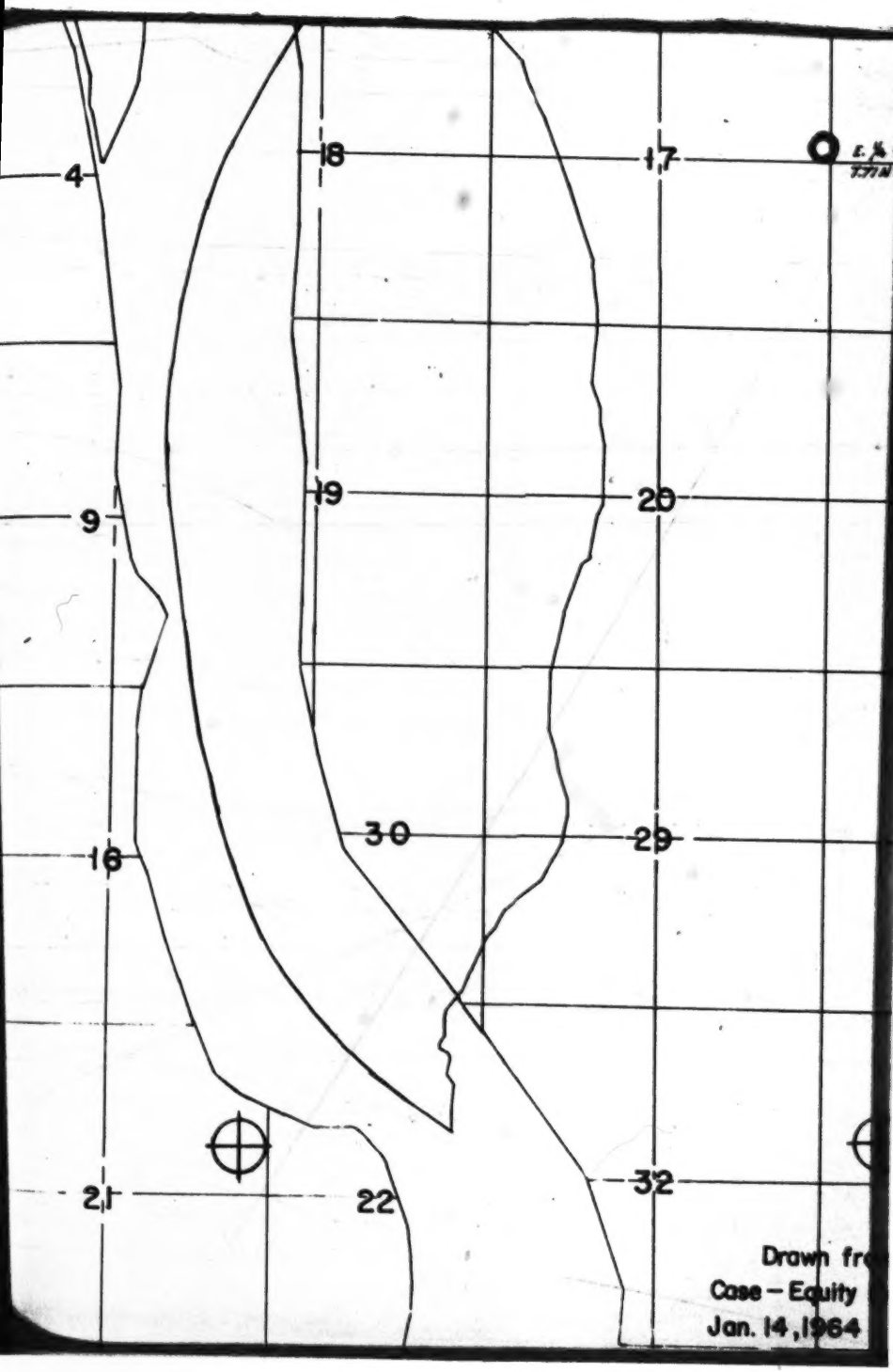
Manning Walker
Special Assistant Attorney
General of Iowa
Logan, Iowa 51546

NOTTLEMAN AND OTOE ISLANDS EXHIBITS
ARE ON THE FOLLOWING PAGES.

NOTTLEMAN ISLAND EXHIBITS

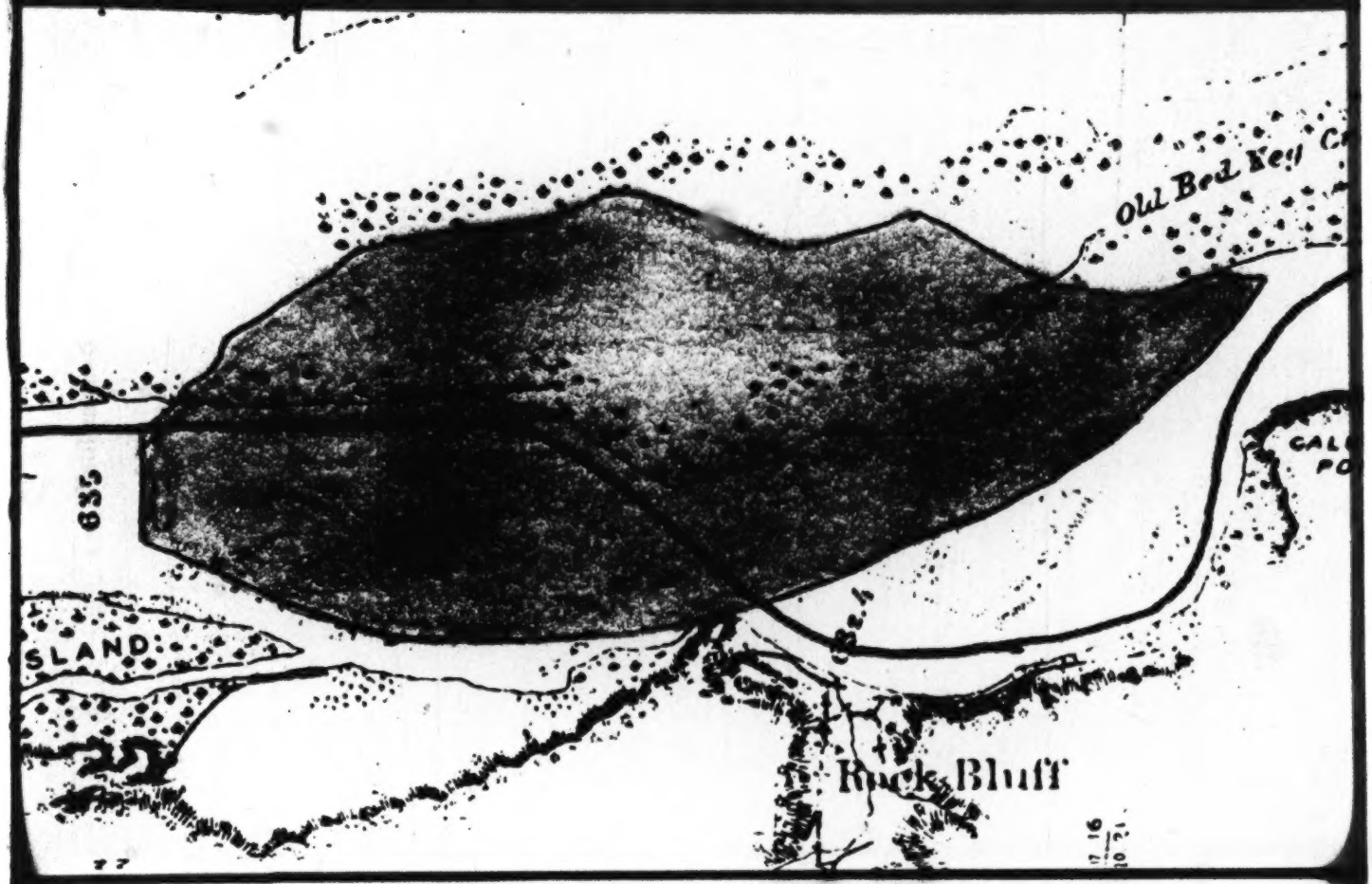
NOTTLEMAN ISLAND

Exhibits P-1691—(Brown Transparency of island traverse by Windenburg) and P-713 (Gov't. Surveys of 1852, 1856, & 1857) superimposed to show that island was entirely in Iowa or in river when area first surveyed.


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32
Drawn fro
Case – Equity
Jan. 14, 1964

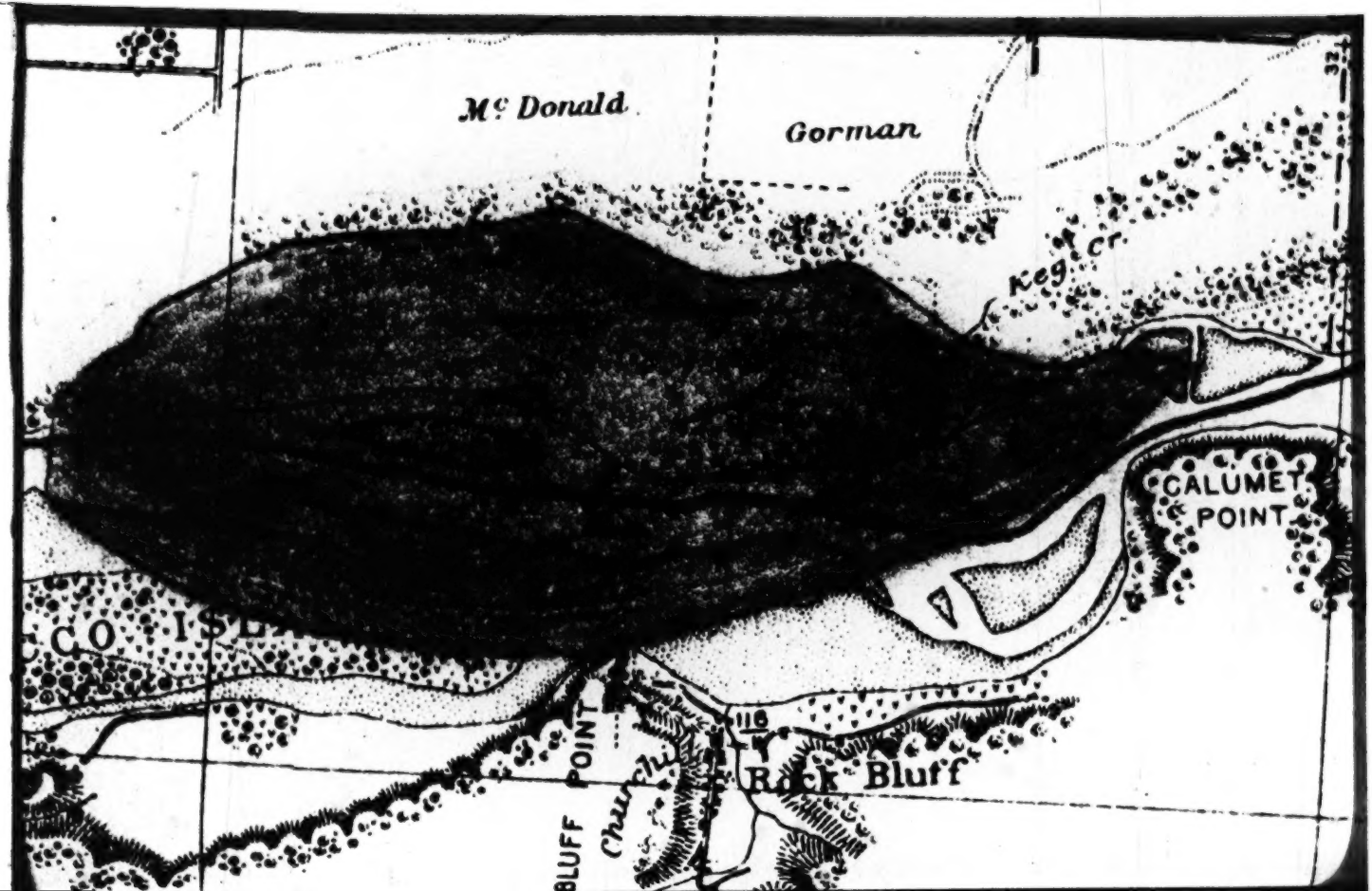
NOTTLEMAN ISLAND

Exhibit D-1105-A—1879 Suter Survey with island superimposed by Bartleman and thalweg superimposed by Huber.


Old Bed Keel C
635
SLAND
Rock Bluff

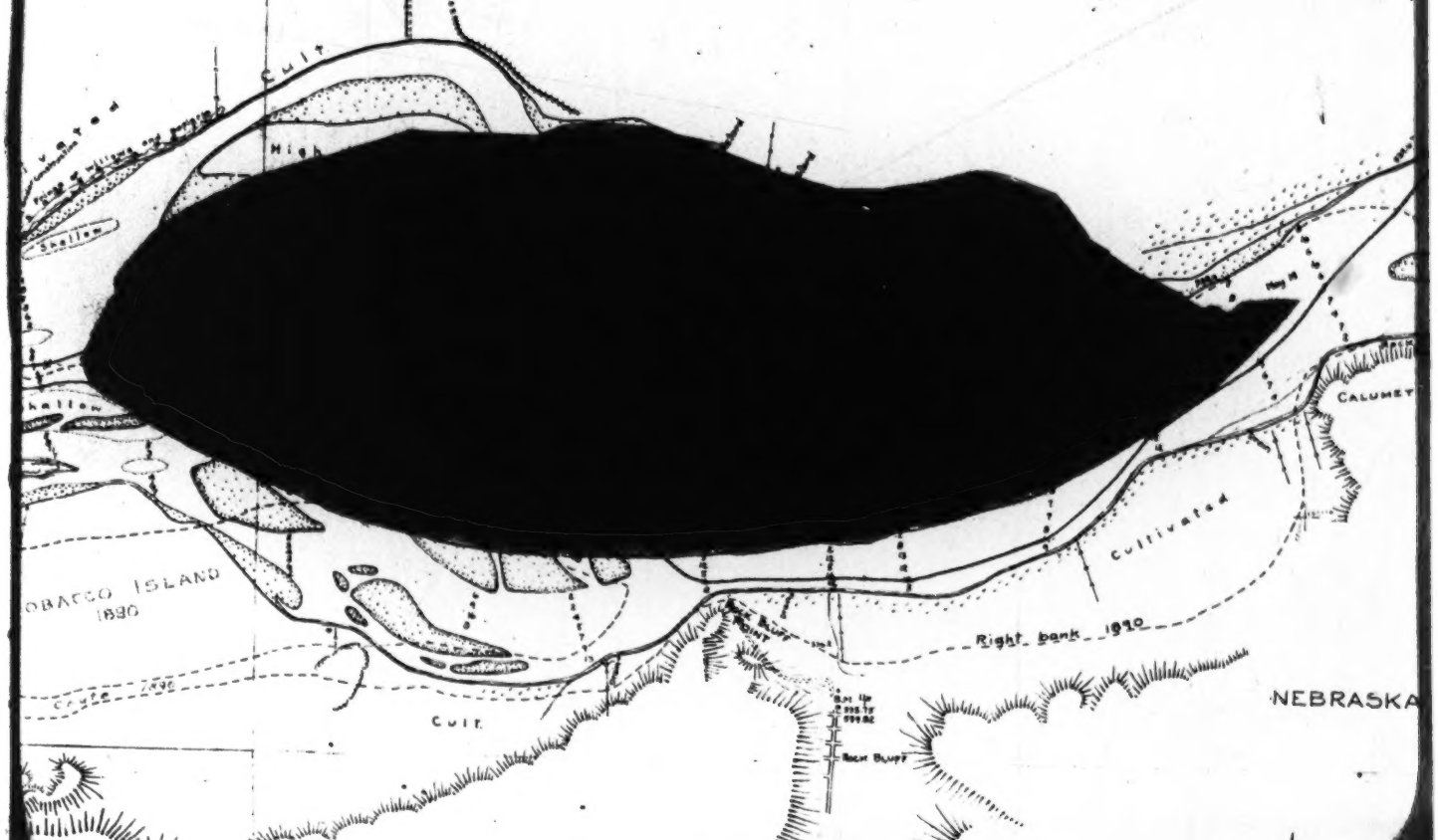
NOTTLEMAN ISLAND

Exhibit D-605-A—1890 Missouri River Commission Survey with island superimposed by Bartleman and thalweg superimposed by Huber.


Mc Donald
Gorman
Keg cr
CALUMET POINT
CO
BLUFF POINT
Church
118
Rock Bluff

NOTTLEMAN ISLAND

Exhibit D-390-A—1923 Hydrographic or Topographic survey with island outline superimposed by Bartleman and thalweg superimposed by Huber.


Cult
High
Shallow
Shallow
CALUMET
Cultivated
OBACCO ISLAND
1880
Right bank 1920
Cult
NEBRASKA

NOTTLEMAN ISLAND

Exhibit D-693—1926 aerial mosaic with island outline superimposed by Bartleman.



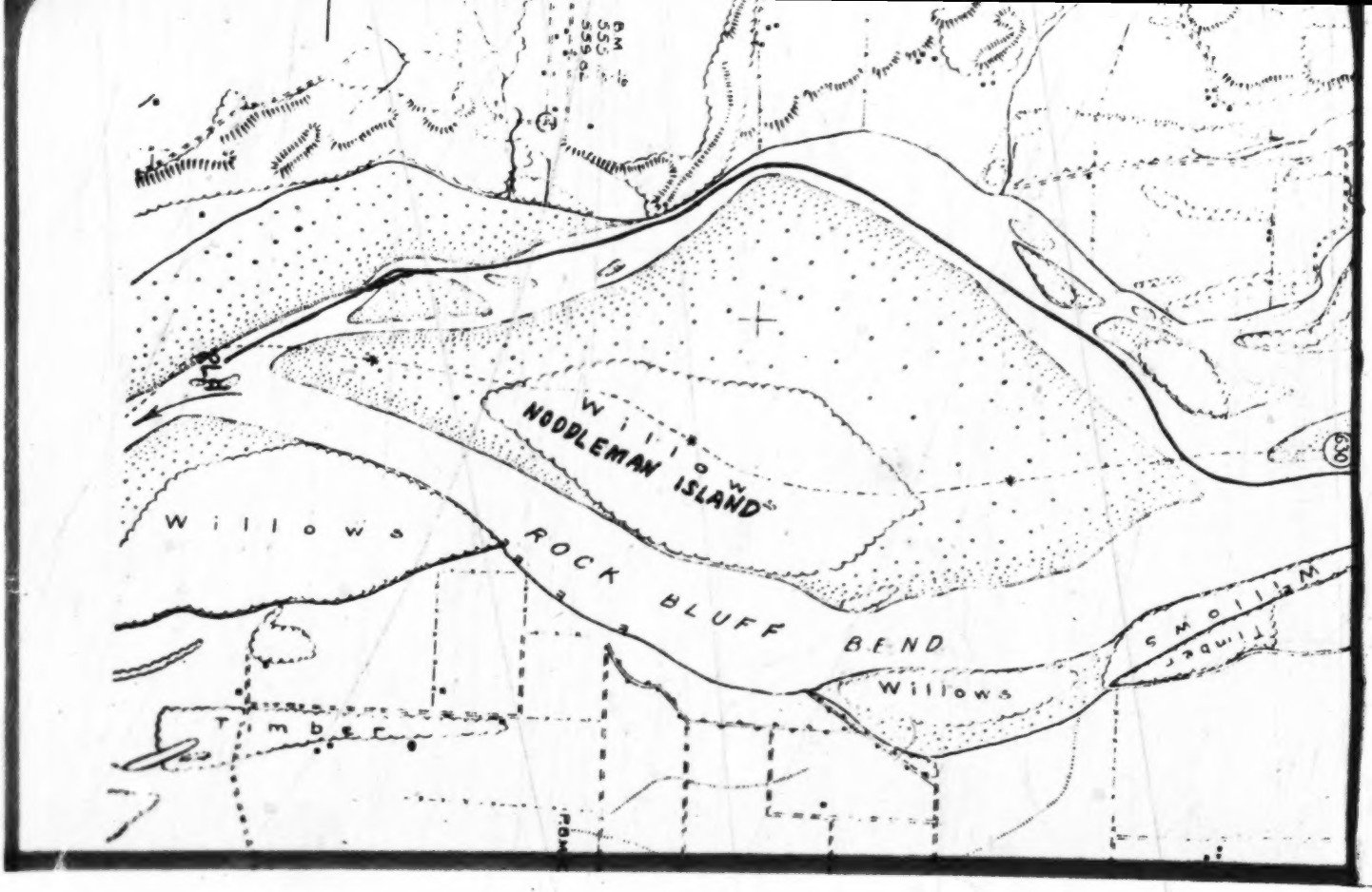
NOTTLEMAN ISLAND

Exhibit D-1035-A—Corps map made from 1926 aerial photos with island outline superimposed by Bartleman.

630
Willows
Timber
Willows
T E D S C
P.B.M. 334

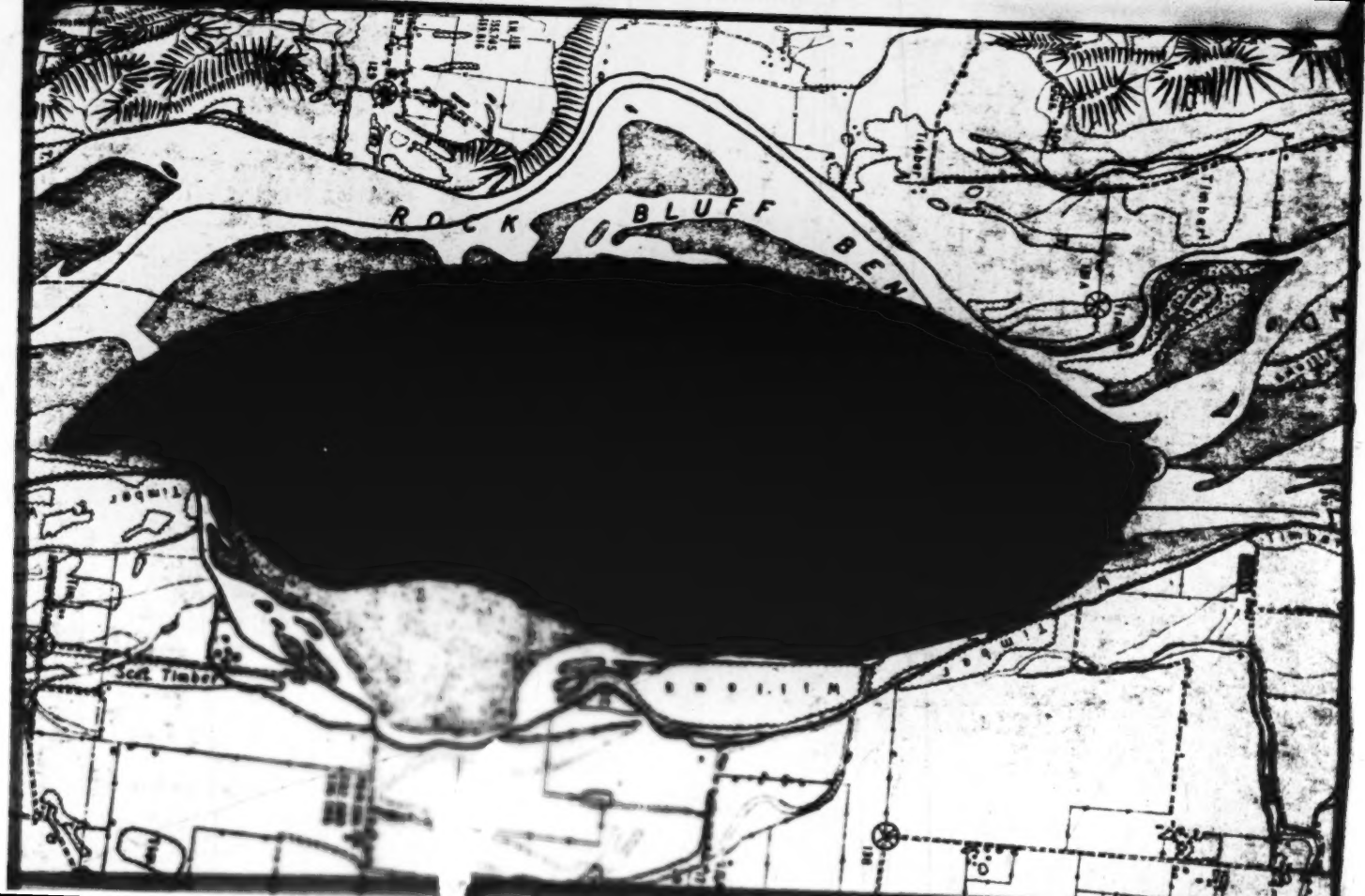
NOTTLEMAN ISLAND

Exhibit D-1035—Corps map made from 1926 aerial photos with thalweg superimposed by Huber.


Willow
NODDLEMAN ISLAND
Willows
ROCK BLUFF BEND
Willows
Timber
Willows
Timber
636

NOTTLEMAN ISLAND

Exhibit D-1036-A—1928 Corps map with island superimposed by Bartleman and thalweg superimposed by Huber.

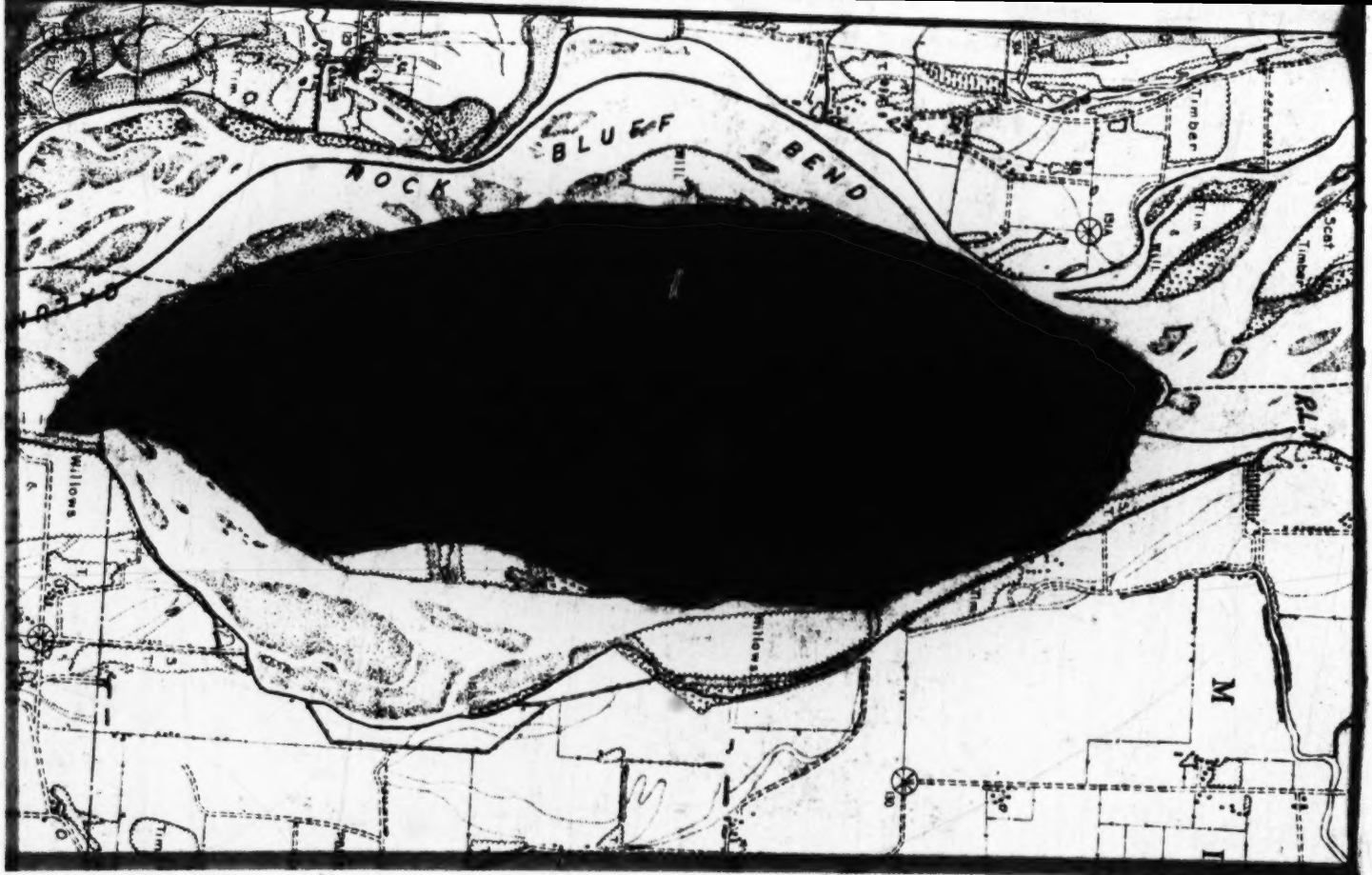

ROCK BLUFF BEN
Scott Timber
BROLLIUM

NOTTLEMAN ISLAND

Exhibit D-595-A—1930 Aerial mosaic with island superimposed by Bartleman and thalweg superimposed by Huber.

NOTTLEMAN ISLAND

Exhibit D-1041-A—Corps map made from 1930 aerial photos with island superimposed by Bartleman and thalweg superimposed by Huber.


BLUFF
BEND
ROCK
Timber
Willows
Willows
M

NOTTLEMAN ISLAND

Exhibit D-371-A—1931 Hydrographic Survey with island superimposed by Bartleman and thalweg superimposed by Huber.

NOTTLEMAN ISLAND

Exhibit D-1044-A—Construction map used by Corps from 1931 until about 1945 when retired with island superimposed by Bartleman.

Scat
Timber
Timber
Tim
Mill
M
I
Willows
Willows
BLUFF
BEND
ROCK

NOTTLEMAN ISLAND

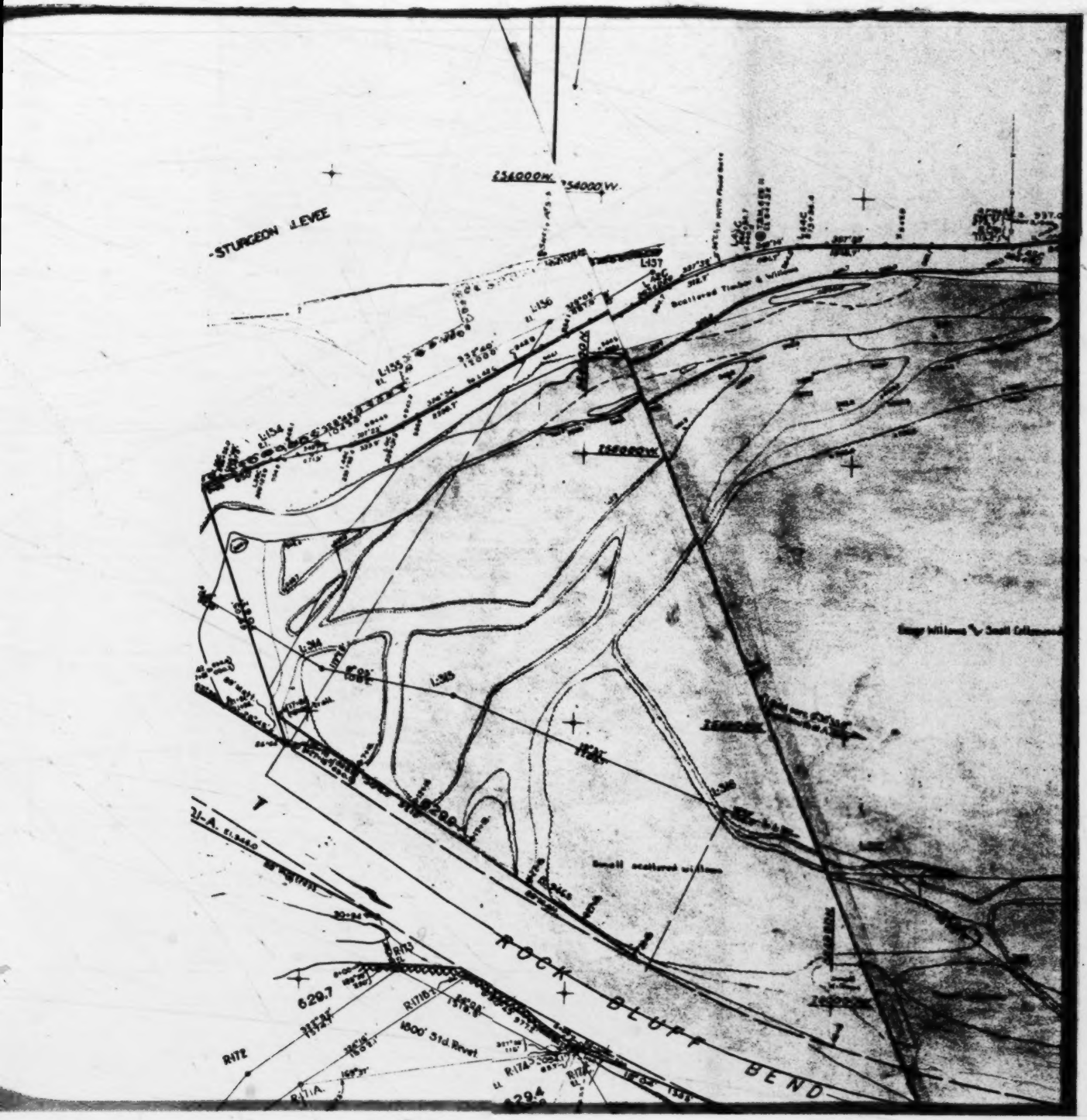
Exhibit D-371-A—1931 Hydrographic Survey with island superimposed by Bartleman and thalweg superimposed by Huber.

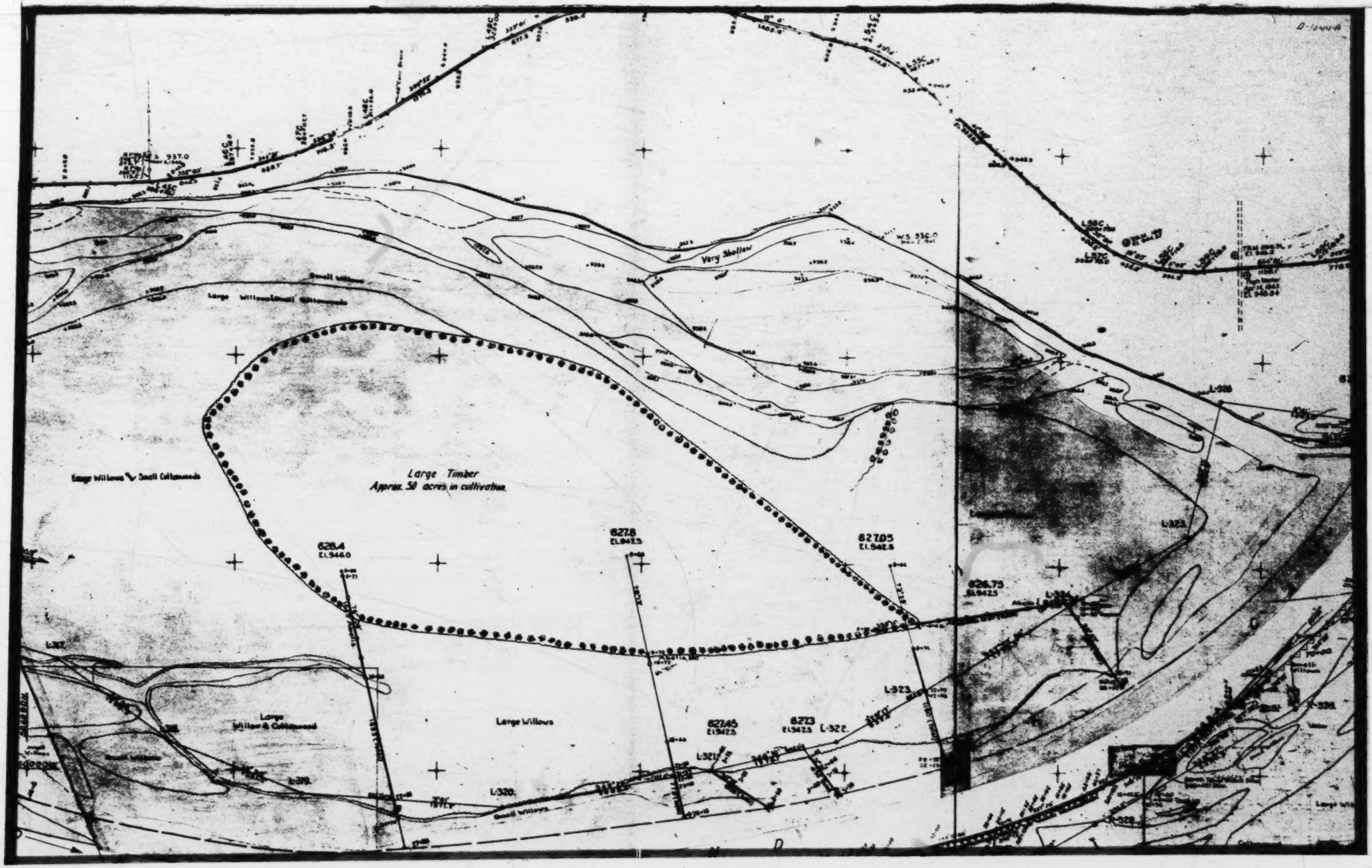




NOTTLEMAN ISLAND

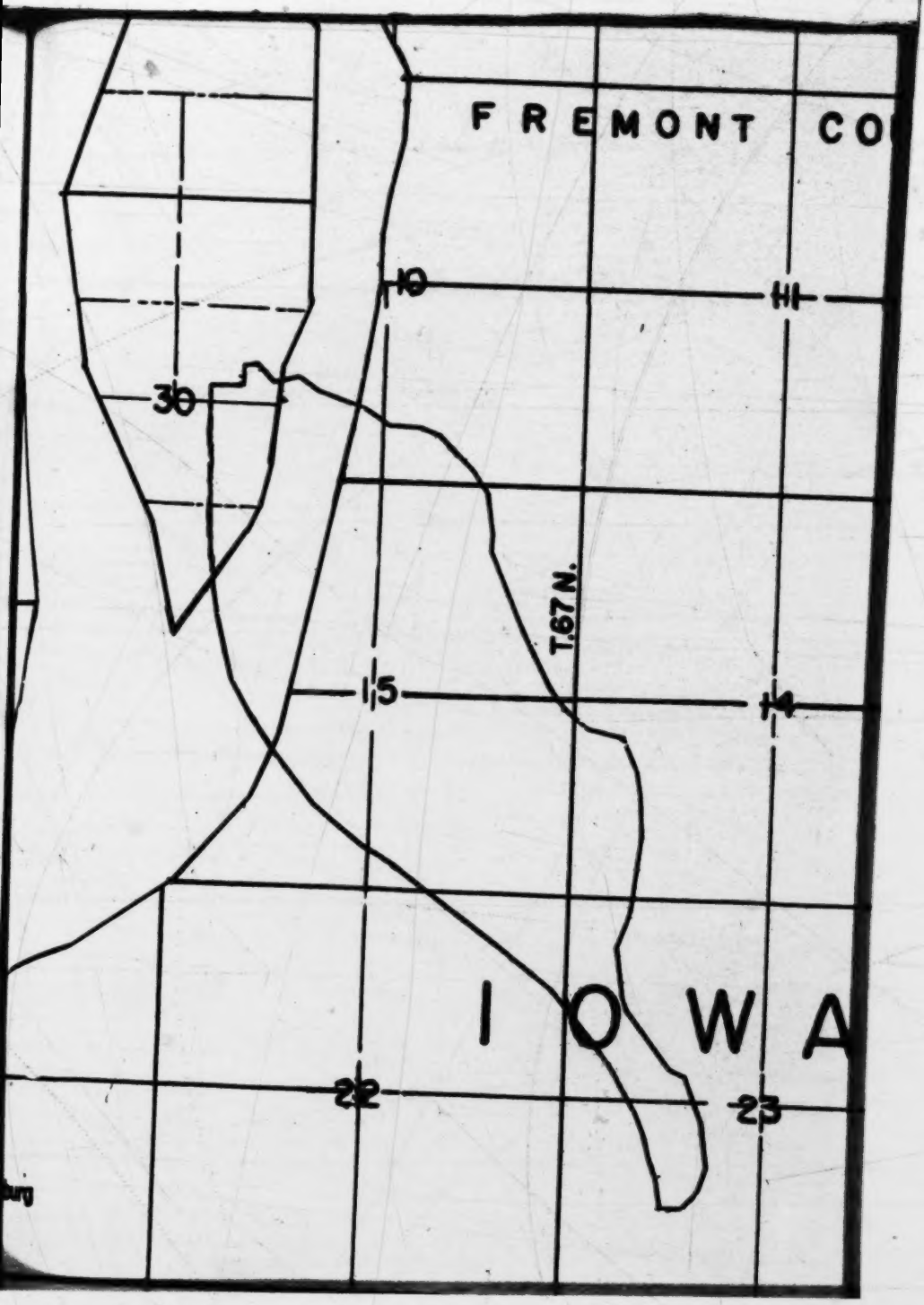
Exhibit D-1044-A—Construction map used by Corps from 1931 until about 1945 when retired with island superimposed by Bartleman.


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L-1
ROCK BLUFF BEND
629.7
629.4
R172
R171A
R171B
R174
R175
1800' Std. Revet
Small scattered willows
Scattered Timber & Willows
Boggy Willows & Small Cottonwood
Small scattered willows


D-1044-A
Very Shallow
W.S. 936.0
Large Timber
Approx. 50 acres in cultivation
Large Willows & Small Cottonwood
Large Willows
Small Willows
6284
El.944.0
6278
El.942.5
6270.5
El.942.5
626.75
El.942.5
627.45
El.942.5
6273
El.942.5
L-322
L-323
L-320
L-321

OTOE ISLAND

Exhibits P-233—(Brown transparency of island traverse) and P-208 (Brown transparency of 1852, 1856, & 1858 Gov't surveys) superimposed to show that 95% of Otoe Island was in Iowa or in river when area first surveyed.


FREMONT CO
10
11
30
T.67 N.
15
14
IOWA
22
23

OTOE ISLAND

Exhibit D-1124—1923 Hydrographic Survey with island superimposed by Bartleman and thalweg superimposed by Huber (Shows over 95% of island east of thalweg).


COUNTY
small willows

OTOE ISLAND

Exhibit D-1093-A—1926-27 aerial mosaic with island superimposed by Bartleman.

OTOE ISLAND

Exhibit D-1121—Corps map made from 1926-27 aerial photos with island superimposed by Bartleman and thalweg superimposed by Huber. (Shows over 95% of island east of thalweg.)

Timber
Willows and Timber
Timber
Willows
Willows
Willows
OTOE BEND
Willows
500

OTOE ISLAND

Exhibit D-1122.—Corps of 1928 map with island superimposed by Bartleman and thalweg superimposed by Huber. (Shows 2/3 of island east of thalweg.)

C
Timber
Scattered Timber & Willows
Scat. Timber
Willows
Willows & Timber
BEND
BEND
600

OTOE ISLAND

Exhibit D-1092-A—1930 aerial mosaic with island superimposed by Bartleman.

OTOE ISLAND

Exhibit D-1123—Corps map made from 1930 aerial photos with island superimposed by Bartleman and thalweg superimposed by Huber. (Shows 3/4 of island east of thalweg.)

Scattered Timber
Scat Timber
Timber
Timber
Timber
Timber
Timber
Willows
Willows
Willows
Willows
Willows
BEND
600

OTOE ISLAND

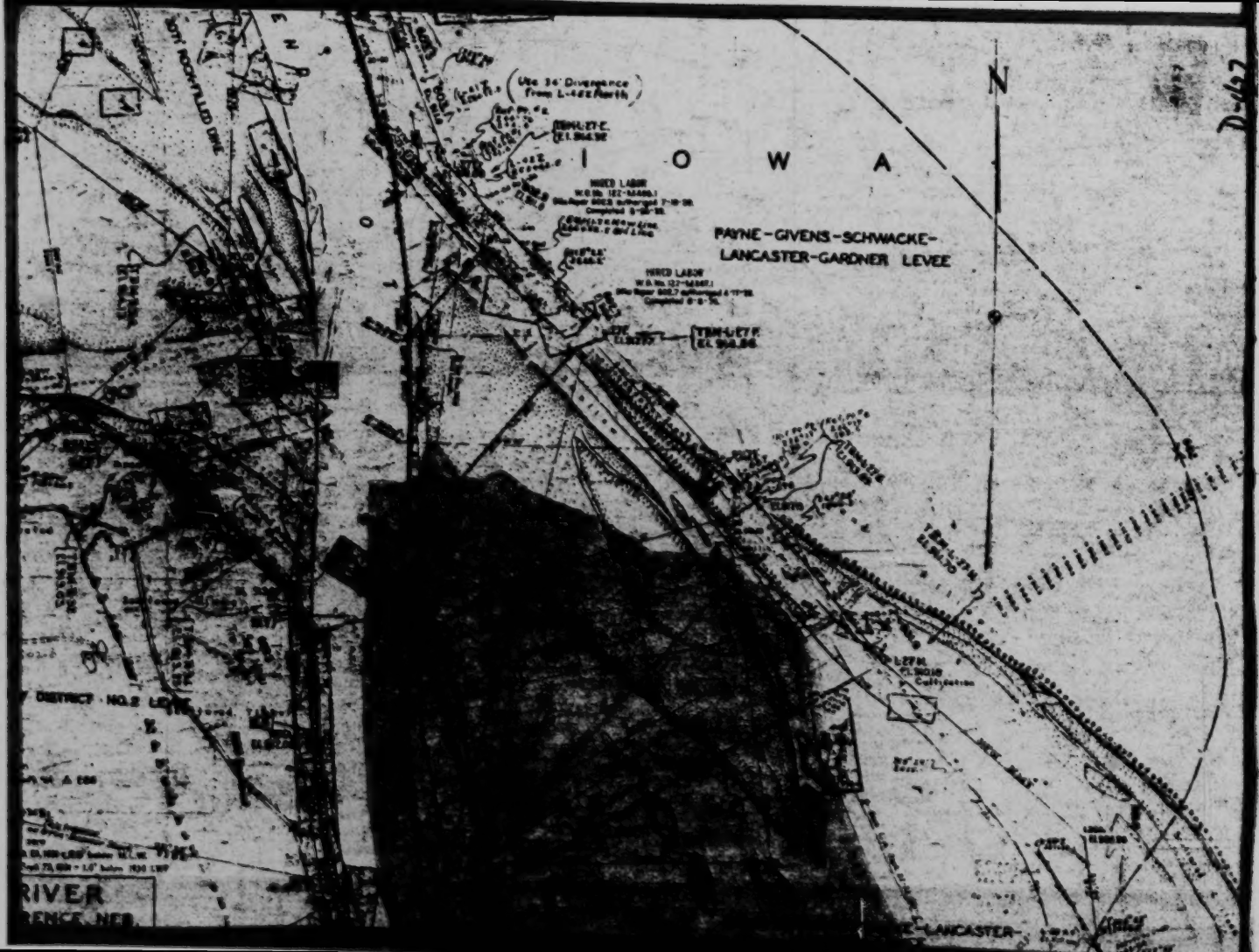
Exhibit D-291-A—1931 Hydrographic Survey with island superimposed by Bartleman and thalweg superimposed by Huber. (Shows 85% of island east of thalweg.)

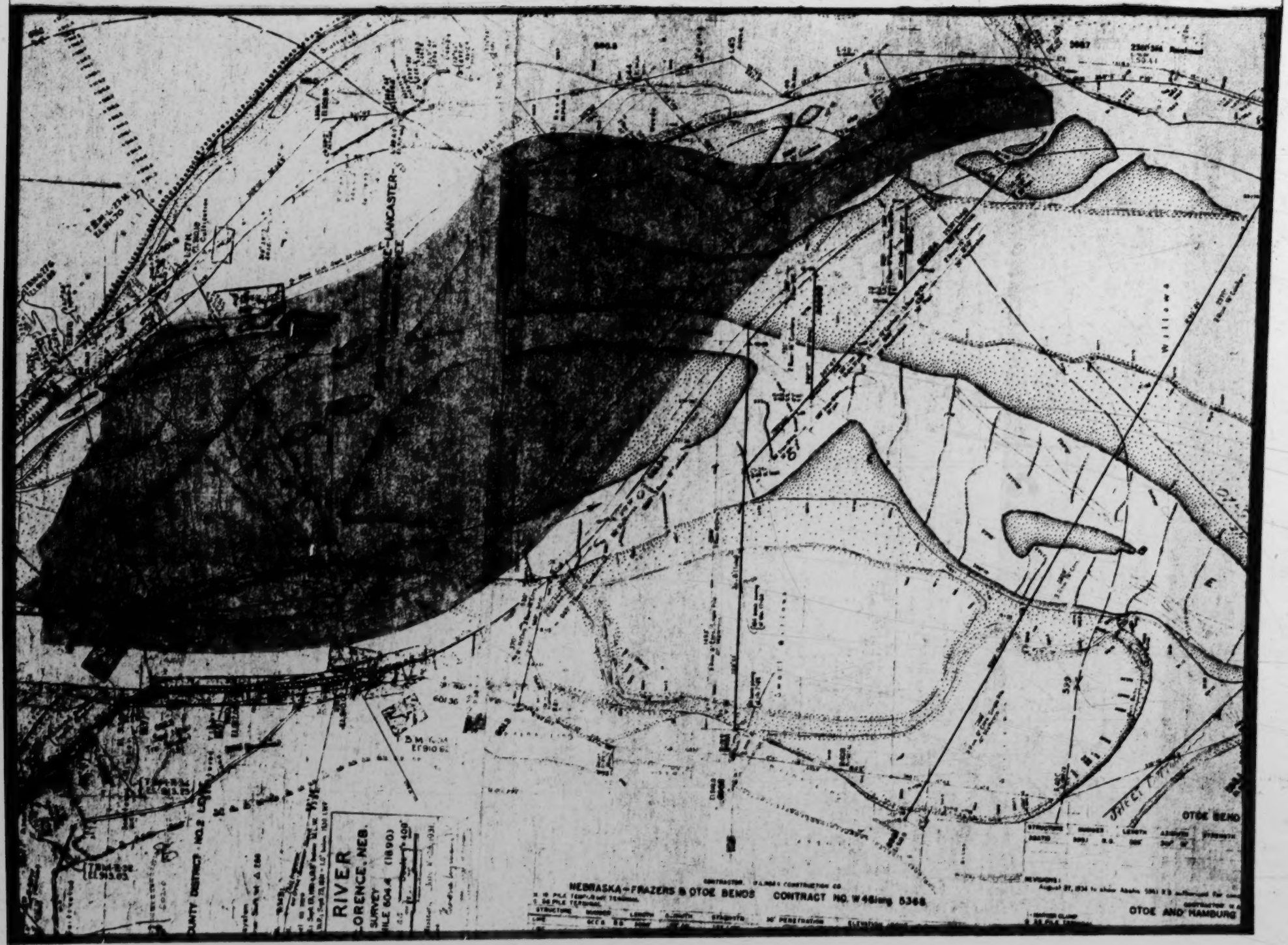

IOWA
N
ACTUAL DEPTHS AS SOUNDED
0' to 6'
6' to 9'
9' to 12'
Over 12'
Scattered Timber
Scattered Timber
Cleared for Cultivation
Cultivated


Scattered Timber
Cleared for Cultivation
Cultivated
Young Cottgen
Small Willows
Willows
Too Springs To Ground
D-24-A

OTOE ISLAND

Exhibit D-427—Construction Map used by Corps from 1931 until retired in 1945 with island superimposed by Bartleman.


D-467
N
I O W A
PAYNE-GIVENS-SCHWACKE-
LANCASTER-GARDNER LEVEE
DISTRICT NO. 2 LEVEE
RIVER


LANCASTER
RIVER
NEBRASKA-FRAZERS & OTOE BENDS
CONTRACT NO. W46Eng 5368
OTOE AND HAMBURG

OTOE ISLAND

Exhibit D-1107—1936 Corps aerial photo.



OTOE ISLAND

Exhibit D-1106—1937 Corps aerial photo.

OTOE ISLAND

Exhibit D-1108—1938 Corps aerial photo.

OTOE ISLAND

Exhibit D-523—1939 Corps aerial photo.

OTOE ISLAND

Exhibit D-25—1941 Corps aerial photo.



In The

Supreme Court of the United States

October Term, 1964

No. 17, Original

STATE OF NEBRASKA, PLAINTIFF,

VS.

STATE OF IOWA, DEFENDANT.

PLAINTIFF'S REPLY BRIEF BEFORE THE SPECIAL MASTER HONORABLE JOSEPH P. WILLSON

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INTRODUCTORY STATEMENT

Plaintiff does not accept Defendant's statement of facts, interpretation of the cited cases, or analysis of Nebraska's argument. Rather than meet or attempt to correct every misstatement in Iowa's Appendix or Brief, Plaintiff has collected certain representative inconsistencies which will be pointed out in this Reply Brief without purporting to cover all of the points which Plaintiff disagrees with.

Plaintiff will first consider certain inconsistencies between Iowa's statements and her actual conduct as shown by the evidence; limited reference will be made to the quality of Iowa's evidence relied upon and to Iowa's analysis of the cases and Plaintiff's position; and

then consideration will be given to the unfair and unjust consequences which would follow should Iowa be correct in her position.

References to Iowa's Brief, page number, and lines are abbreviated as follows (B., p. ....., l. .....). References to Iowa's Appendix may be abbreviated (A., p. ....., l. .....).

———o———

I.

MISSTATEMENTS OF FACT AND INCONSISTENT ARGUMENTS BY THE STATE OF IOWA

Although not intending to point out all of the alleged misstatements of fact and misleading arguments by the State of Iowa in her Brief and Appendix, plaintiff would point out the following misleading or inaccurate statements and arguments by Iowa:

1. Recognition of Nebraska titles.

Iowa's Statements:

Iowa continues to make such statements as:

"Iowa agrees that the Compact does not permit Iowa to own any *land ceded* by Nebraska to Iowa. Iowa cannot own any land which formed and came into existence in Nebraska anyway, whether ceded or not. Iowa claims only land which she believes to have formed in Iowa and became state owned by Iowa law." (B., p. 20, ll. 17-22.)

"Titles to all ceded lands which were good in the ceding state would be good in the receiving state, and certainly, a Nebraskan's good legal title in

Nebraska to some land which was ceded became a good legal Iowa title after cession." (B. p. 35, ll. 20-24.)

"The Compact being part of the law of Iowa, any protection therein granted owners of the Nebraska land ceded to Iowa by the Compact, has been and will be recognized by the Courts of Iowa." (B., p. 71, ll. 13-16.)

"Iowa Courts and officials have always recognized the Compact terms." (B., p. 76, ll. 13-15.)

"Good titles to lands located within the territorial boundaries of Nebraska prior to the 1943 Boundary Compact, and under the Compact terms ceded to Iowa's jurisdiction, should be recognized by the State of Iowa and the Iowa Courts in accordance with the principles of law of the State of Nebraska as of the date of the Compact." (B., p. 77, ll. 16-21.)

". . . Iowa only desires property belonging to the people of Iowa." (B., p. 109, ll. 28-29.)

"Iowa seeks only what lands are rightfully hers, and this cannot be termed a taking of private property without compensation because we seek to take no private property from any private landowner." (B., p. 118, ll. 18-22.)

"Iowa does not disregard the Compact. She recognizes the *good* Nebraska titles which were held by private parties in Nebraska City Island, California Bend, Soldier Bend, Winnebago Bend, and Browers Bend." (B., p. 120, ll. 11-14.)

At the same time, Iowa states:

". . . Iowa believes there is clear, satisfactory and convincing evidence that the boundary was not in the river at the following locations:" (B., p. 12, ll. 4-7.)

* * *

3) *California Bend.* Iowa has always recognized that the dredging of the California Bend Canal in about 1938 was a true man-made avulsion. (B., p. 12, ll. 24-26.)

* * *

5) *Winnebago Bend.* The pre-Compact boundary was most certainly not in the river as the river was running in 1943. In *U. S. v. Flowers,* the Federal Court had held on (sic) in 1938, that there had been two avulsions at Winnebago Bend prior to 1938; that the first of these had stranded Iowa land on the Nebraska side of the river, and that the second had stranded Nebraska (Indian) land on the Iowa side of the river. Also, the Winnebago Bend Canal was dredged in about 1938. Again, the Special Master has no responsibility to determine in this case where the pre-Compact boundary in Winnebago Bend was; it suffices to say that it was not in the 1943 designed channel. (B., p. 13, ll. 1-13.)

* * *

6) *Bartlett-Pinhook-Bend.* A canal had been dredged through an island in about 1938 and the river was running through the canal in 1943. This canal was probably a man-made avulsion. The question remains as to which state the island was in prior to 1938, and the Special Master has no duty to make that determination here." (B., p. 13, ll. 14-20.)

"Certainly, St. Mary's Cut-Off, DeSoto Bend Cut-Off, California Cut-Off and Peterson Cut-off were man-made avulsions." (B., p. 98, ll. 13-15.)

" . . . as evidence in the case at bar was rather clear and convincing, that the islands both above and below Rock Bluff Bend and Otoe Bend formed in Nebraska, and as previously stated, Iowa only desires property belonging to the people of Iowa." (B., p. 109, ll. 25-29.)

How and why these are misstatements or are inconsistent.

In spite of Iowa's repetition of sanctimonious statements about how she is recognizing the Compact and only wants land properly belonging to her, the evidence shows that Iowa is claiming land in California Bend by virtue of her sovereign right and Iowa is claiming land in Winnebago Bend under the same theory. Iowa on the one hand has admitted that there were "true avulsions" in both of these bends, which means that land had to have been ceded to Iowa and the river at the time of the Compact was entirely in Nebraska at both places, yet Iowa is claiming land in these two bends. How can she continue to assert that she recognizes good Nebraska titles in California Bend and Winnebago Bend when she is attacking them?

Iowa has stated that the evidence clearly shows that the island immediately below Rock Bluff Bend formed in Nebraska. The evidence shows that this island was referred to on the Corps of Engineer maps as Goose Island and the Corps of Engineers dredged a canal in 1937 cutting off the lower part of Goose Island. This downstream portion was placed on the East side of the designed channel by the canal and became a part of Auldon Bar which Iowa is claiming. This is the same canal referred to by Iowa as the Bartlett-Pinhook Bend Canal which she admits was "probably a man-made avulsion."

Consequently, Iowa is claiming land which she acknowledges was actually ceded in Winnebago Bend, California Bend, and at Auldon Bar even though she admits

that there were true avulsions prior to the Compact in all three of these areas.

In spite of the fact she admits there were some avulsions, Iowa has taken the position that in those places where the Missouri River is presently confined to the stabilized channel as it appears on the alluvial plain maps referred to in the Iowa-Nebraska Boundary Compact, the State claims ownership of the entire bed east of the middle of the main channel as used in the Compact. (Interrogatory No. 164, pp. 440-441 of Plaintiff's Resume'.) Iowa's own statements and conduct indicate that, even under the theory which she argues, she violates the Compact and her continued statements to the contrary constitute a gross state hypocrisy which should not be allowed to continue. The state must be honest.

2. Nebraska owners' riparian rights.

Iowa's Statements:

Iowa has made the following statements concerning the Nebraska riparian owners' rights:

> "Under Iowa's construction of the compact, no Nebraska riparian owner was deprived of any vested property right, and owners of land formerly in Nebraska, now ceded to Iowa, still become the owners of any accretions to such lands which have formed since the compact, or which may later form." (B., p. 31, ll. 28-30 and p. 32, ll. 1-4.)

> "Both (cited cases) simply hold that a riparian owner is entitled to his accretions, and with this we do not disagree. This is the law of both Nebraska and Iowa." (B., p. 34, ll. 22-25.)

"Plaintiff is stating that Nebraska riparian owners prior to the Compact had an expectancy in accretion and reliction. That this expectancy was a vested right under Nebraska law. The pre-Compact boundary was a moving boundary, always following the thalweg as it moved. The state boundary since the Compact is a fixed, permanent boundary. The Nebraska riparian owners' rights before the Compact were limited, by the state boundary, and they are still limited by the state boundary. Any vested right to accretion, reliction or to bed of the stream East of the fixed boundary must be determined by Iowa law, now, the same as it was prior to the Compact." (B., p. 32, ll. 5-16.)

"In other words, Nebraska contends that the thalweg still remains the private boundary. Iowa can't believe that any such result was intended by the two states when they entered into the Compact." (B., p. 35, ll. 7-10.)

How and why these are misstatements or are inconsistent.

Although Iowa continues to insist that she is recognizing Nebraska titles and Nebraska riparian rights, she has again engaged in doubletalk and misleading statements because she also has taken the position that the Nebraska riparian owners' rights are cut off at the state line. The only reason that Nebraska riparian owners' rights prior to the Compact were limited by the state boundary was because the state boundary and the property boundary were the same. Both were the movable thalweg or main channel of the Missouri River. When one moved the other necessarily moved and following an avulsion, both would have become fixed at the same place. However, the Compact changed the state boundary to a fixed line which was not synonymous to the thalweg.

Following the Compact, the property line and the state line no longer coincided. Under both the provisions of the Compact and general principles of constitutional law, this changing of the state line could not deprive a private owner of his property line. Otherwise, he has been deprived of his property without due process of law.

In the *Tyson* case (described at pages 393-396 of Plaintiff's Resume'), Iowa took the position that the Nebraska owner could not accrete across the state line into Iowa, but the evidence clearly established that the land formed as accretion to the right bank side of the main channel. Whether this land area formed as an accretion to the Nebraska riparian owners' bed or bank is immaterial, since the Nebraska riparian owner owns the bed to the middle of the main channel or thalweg. Because it happened to form on the Iowa side of the Compact line (but on the right bank side of the thalweg) the Nebraska land owners were clearly deprived of property which otherwise would have been theirs had it not been for the Compact because the Court applied the "Iowa law" that the state owned the bed and the land was "in Iowa". Nebraska contends that the result in the case of *State of Iowa v. Tyson*, is a classic example of violation of the Compact and deprivation of the Nebraska riparian owners' vested property rights without compensation under the guise of "Iowa law".

Obviously under Iowa's construction, the Nebraska riparian owner would be deprived of his right to accretions to the bed and to any accretions which might extend to the East of the fixed Compact boundary.

3. Acts and diligence of public officials.

Iowa's Statements:

Iowa has made the following statements concerning the acts of its previous public officials and the state's diligence in ascertaining "state-owned" areas:

> "It is unconscionable to think that the responsible officials of Iowa in 1943 were utterly derelict in their duty to protect the public interest." (B., p. 80, ll. 1-3.)

> "Insofar as the opinion of a State Conservation official that the Nottleman Island area was not claimed by Iowa in 1951, or not listed as State-owned lands by those having a duty to list them as such, it has been long-established and accepted that neither a County, State or Federal government can be bound by the acts of its officers when they depart from the requirements of the law." (B., p. 96, ll. 10-16.)

> "Iowa submits it has always protected its land titles whenever they have been attacked, and whenever adverse claims became apparent, such as occupancy and conversion to private use." (B., p. 97, ll. 12-15.)

> "We find no other case (than *Krimflofski*) in which a State or a Federal court has held that wild, natural lands can be adversely possessed by using it for hunting and fishing, and especially where the state holds it for the use of its citizens as a hunting and fishing preserve, as does Iowa, with no evidence that Iowa was aware of the claimed adverse occupancy." (B., p. 108, ll. 24-30.)

> "Iowa has always been interested in the areas to which it holds title, whether they be abandoned channels filled with water, sand dunes, and pot holes, islands of little value or islands of substantial value. The Iowa Conservation Commission by its very nature and purpose is and always has been vitally in-

terested in all wild, natural and undisturbed areas in the State without regard to their commercial or agricultural value." (B., p. 118, ll. 29-30; p. 119, ll. 1-6.)

How and why these are misstatements or are inconsistent.

On the other hand, Iowa in its answers to interrogatories in the *Babbitt* case stated it had:

". . . made no investigation concerning exactly who is or may be in possession of parts or portions of the disputed area (Nottleman Island) adversely to plaintiff (Iowa) and plaintiff (Iowa) should not be required to make an investigation concerning possession merely for the purpose of answering interrogatories." (See Answer 4 at page 80 of Plaintiff's Resume'.)

Iowa also stated in answers to interrogatories in the *Babbitt* case:

"Plaintiff, (Iowa) deeming the entire matter of possession to be irrelevant and immaterial, has no information as to how long the various tracts in the area have been cultivated or by whom this has been done, nor any exact descriptions of the tracts cultivated by different parties." (See Answer 6, at page 82 of Plaintiff's Resume'.)

Mr. Schwob, director of the Iowa State Conservation Commission from 1941 to 1946, testified that the islands along the Missouri River were not marked as owned by the state because "at that time nobody paid any attention." (Vol. XXII, p. 3225). He also testified:

"Q. Had the Iowa Conservation Commission done anything to determine or to mark these islands to show the people that they made claim to them?

A. I don't think they did at that time because there was no use of the river. Public use of the river was pretty nil because of the adverse conditions for fish and game. People didn't care about it and there were very few places of access to the river." (Vol. XXII, p. 3231.)

This was also confirmed by the testimony of Lloyd Bailey, Superintendent of Land Acquisition for the State Conservation Commission of Iowa, who testified that, for 10 or 12 years or more following the Compact, the State wasn't interested and no official action had been taken. Mr. Bailey also testified the Secretary of State was the State Land Officer or Commissioner in Iowa and the list of lands up and down the Missouri River claimed by the State of Iowa was not on file in the Office of the Secretary of State. He thought generally all the activity up and down the Missouri River started about 1958. The evidence shows the lands were not posted by the Conservation Commission and, even in July of 1964 when the Commission decided to post certain areas, Mr. Jauron was admonished "to proceed slowly" and to work closely with the Attorney General's office in the matter. (Pages 73-74 of Iowa's Appendix.)

The Iowa Conservation Commission minutes abstracted at page 70 of Iowa's Appendix indicate Mr. Eaton, an attorney, appeared in 1959 before the Commission to urge them to retain a full-time attorney and do whatever was necessary to have ownership of areas along the Missouri River determined.

The record fails to identify the areas in the Planning Report as having been claimed by Iowa at the time

of the Compact and even though Iowa has suggested she was asserting ownership at Noble's Lake in 1944, the court Decree of December 1, 1950, offered by Iowa indicates that Noble's Lake was cut off from the Missouri River and was a separate meandered lake in Iowa in 1858, which was 9 years prior to admission of Nebraska into the Union, and has been a meandered lake ever since (Exhibit D-1048).

The evidence clearly shows that the Attorney General of Iowa, Robert Larson, presently a judge on the Iowa Supreme Court, had notice of the Nottleman Island situation both in 1947 and again in 1950. Also, the Mills County Attorney and Auditor had informed a Deputy Iowa Attorney General about the situation in 1946 and had requested an opinion.

Although Iowa inaccurately states on page 89 of its Brief that Mr. Beckman, who was Chief of the Fish and Game Division ". . . wrote a letter in 1951, without the knowledge or consent of the Commission or any member thereof or any other responsible official of Iowa, stating that Iowa didn't own Nottleman Island . . .", the record is clear that Mr. Beckman was directed to write the letter by the Director of the Iowa State Conservation Commission whose position was a statutory one created by the Code of Iowa, Section 107.11, who directed the contents of the letter.

If Iowa is correct in its statements that its officials were always diligent in protecting Iowa's "land titles", then why should it not be assumed that all of her officials from the time of the Compact up until Iowa in-

itiated its land-acquisition program as outlined in the Missouri River Planning Report of 1961 were diligent in their duties when they recognized that the state had no claim to the areas shown in the Planning Report. Why should it not be assumed that Mr. Beckman, Mr. Stiles, the Director of the Iowa Conservation Commission, and all the other Iowa officials from the Governor and Attorney General on down were performing their duty and that they had asserted title to the only areas which the state had any legitimate claim to?

Iowa has also attempted to disclaim responsibility for the acts of all of its Mills and Fremont County officials as well as of its state taxing agencies. Plaintiff would point out that Section 4 of the Compact specifically provided that the county treasurers of the counties affected should act as agents in carrying out the provisions of that section which had to do with taxation of lands ceded. The county treasurers recognized these lands were ceded and then proceeded to tax both Nottleman Island and Schemmel Island in Iowa following the Compact. Section 4 of the Compact also required that Iowa recognize any Nebraska tax liens or other rights accrued or accruing within five years of the Compact and Katherine O'Brien was recipient of a tax deed issued by Cass County, Nebraska in 1945 which the Iowa Mills County Treasurer, under Section 4, was obligated to recognize as agent for the State of Iowa under authority of Section 4 of the Compact. In addition, plaintiff would again point out that the Iowa county officials are created by the statutes of the State of Iowa and the

County Attorney of Mills County is a statutory official. The State of Iowa is apparently disclaiming responsibility for the acts of all of its county officials in the six counties bordering the Missouri River and for its Attorney Generals and Conservation Commissioners and Governors during the decade immediately following the Compact.

It might be asked whether the State of Iowa is now responsible for the actions of Mr. Murray, former Attorney General Scalise, and Assistant Attorney General Scism, who disclaimed ownership of land in the Peterson-Lakin cases in Blackbird Bend. Does the State of Iowa disclaim responsibility for the action of George West, Assistant Attorney General of Iowa, who on behalf of the State of Iowa in the *Kirk v. Wilcox* case in 1956, admitted private ownership "as accretion land" of what was abandoned channel adjoining Flower's Island. Does the State of Iowa disclaim responsibility for the statements of its counsel in this case? At some later date are we to again be subjected to the argument that the present Iowa officials are not responsible for their actions?

Iowa must admit that no Iowa governmental agency at the time of the Compact showed any record of the areas listed in the Planning Report as "state owned lands", river beds, or abandoned river beds as required by her own law. Iowa would certainly like to forget these facts or ignore them but her statutory officials responsible for ascertaining what lands belonged to the

State of Iowa determined at that time that she had no claim to Nottleman Island or Schemmel Island or any of these other areas. Plaintiff would suggest that the officials in 1943 and the Legislature were not derelict but that they were performing their duties properly by not claiming these areas which were not "state-owned lands." For years after the Compact her state officials were performing their duties in not claiming these lands until certain individuals in the Attorney General's office and Conservation Commission embarked upon the aggressive program of land acquisition embodied in the Missouri River Planning Report of 1961.

Iowa has attempted in its Brief commencing at page 53 to disregard all of the conduct of the two states with regard to the Nottleman and Schemmel areas. However, Iowa should not be able to ignore the factual situation which existed immediately prior to the Compact as the States entered into the Compact in the context which existed in 1943 and prior. Iowa also should not be able to ignore conduct following the Compact which was consistent with the fact that these areas were ceded to Iowa by Nebraska under the Compact. These facts show how the parties conducted themselves at the time that they were negotiating and entering into the agreement to settle the boundary problems. Iowa should not be allowed to completely disregard these facts. Plaintiff submits it is inconceivable that conduct such as Iowa is asserting today was ever anticipated by the states in 1943 as being possible or sanctioned by the Compact.

4. So-called "trust lands."

Iowa's Statements:

Iowa has continued to argue that these specific areas in the Planning Report are "trust lands". She has stated:

> "What word or phrase in the Compact requires that Iowa disclaim all of her trust lands in the Missouri Bottoms?" (B., p. 71, ll. 1-3.)
>
> "Iowa has not ignored her trust lands along the Missouri River." (B., p. 118, ll. 12-13.)
>
> "Iowa is not only justified, but she is obligated as trustee for the people to preserve state ownership of her public lands." (B., p. 118, ll. 23-25.)

However, Iowa has also described some of her exhibits as:

> "Set of translucent overlays showing in green the areas along the river which Iowa claims to own; also showing by cross-hatching where Iowa's claims of ownership are buttressed by Court Decrees or conveyances." (A., p. 62, ll. 19-25.)

How and why these are misstatements or are inconsistent.

Immediately many questions come to mind if these are in fact trust lands. If Iowa owns the land and has title as trustee, why must she "buttress" her claim by other conveyances?

The evidence shows Iowa had no record of these areas along the river at the time of the Compact and for many years thereafter. What trustee does not have an inventory of the assets of its trust?

If these are trust lands, then how can Iowa justify disclaiming abandoned river bed in the Flowers Island area in the case of *Kirk v. Wilcox?* How can she justify disclaiming the abandoned river bed in the Peterson-Lakin area of Blackbird Bend or Kirk Bar and in the Walter Pegg area? How does she justify purchasing land in the Iowa half of the abandoned channel around Nebraska City Island? How can one of her attorneys represent a private land owner against another private land owner in a quiet title action to land in abandoned channel in California Bend as is the situation in the case of *Coulthard v. Simmons?* How can one of the State's attorneys make the decision that the State is not interested in the abandoned channel in the Walter Pegg area and represent Mr. Pegg? How does Iowa justify not claiming the abandoned channels in California Bend resulting from the avulsions occurring prior to the Compact?

The state must be honest.

5. Identification or location of the boundary.

Iowa's Statements:

Iowa counsel continues to insist that the boundary can be located on the ground at any point and is identifiable, stating:

> "Iowa submits that the boundary line can be located and is identifiable, . . . that it is entirely possible to determine whether disputed land is ceded land, or land that was always in one state or the other, or was land that came into being subsequent to 1943 in one state or the other." (B., p. 71, ll. 17-18, 21-25.)

> "The entire record in this case abidingly establishes by more than a preponderance of evidence that the Compact boundary line *can be located.*" (Emphasis theirs.) (B., p. 7, ll. 1-3.)
>
> "The evidence is clear that either State can locate the Compact line with all the certainty that any reasonable person would require, . . ." (B., p. 62, ll. 25-27.)

However, Iowa also has finally admitted that her surveyor made an error in the Babbitt case:

> "Admitted, that in the Rock Bluff Bend area the Iowa surveyor did not take into account the narrowing of the channel by the U. S. Corps of Engineers after the date of the Compact, and its formal claim was 50 feet in error, but this was in the flowing stream." (B., p. 62, ll. 20-25.)

How and why these are misstatements or are inconsistent.

Iowa should not be allowed to excuse any errors on the grounds that they existed "in the flowing stream". Were it not for the fact that these areas at some time may have been in the flowing stream of the Missouri River, Iowa would have had no claim whatsoever to them. On the one hand she justifies her claims by the fact that they are river bed and on the other hand, when in error, she minimizes the error on the basis that it is only in that river bed.

The evidence has clearly demonstrated that Iowa's surveyor, Mr. Windenburg, could not locate the Compact boundary in the Nottleman Island area; three surveyors (Mr. Windenburg, Mr. Brown, and Professor Lubsen) all disagreed as to location of the Compact line there; and Mr. Windenburg's surveys also do not follow any geo-

graphic feature along the eastern side of the Babbitt and Schemmel traverses. Iowa's surveyor, Mr. Hart, used different and inconsistent methods in locating the Compact line, sometimes using straight lines of 500 foot chords to establish his curve when the lines on the bank were also 500 foot chords and at other times adjusting his lines so that the length was different from the length of the chords along the bank. Obviously they had to be of a different length since it is impossible to have two parallel curves formed by straight chords in which the chords are of the same length.

The Corps of Engineer letters to the Nebraska State Surveyor, Nebraska State Senator Syas, Mr. Jauron, and the Governor's Advisory Committee on the Iowa-Nebraska Boundary all stated that the present state boundary between Iowa and Nebraska cannot be located throughout from maps in the Corps' files. (See pages 54-55 and 431-433 of Plaintiff's Resume'.) Mr. Huber drafted the letter which was sent to Mr. Jauron.

Even Mr. Hart, who claimed he could locate the boundary but whose methods varied, testified that it was "not something that could not be resolved between the surveyors on the ground", indicating room for disagreement. The testimony concerning the Peterson-Lakin land at Blackbird Bend or Kirk Bar also indicated that the Iowa State Conservation Commission line did not go through the "slough in the abandoned channel" and did not have a geographic basis consistent with Iowa's theories. All of the evidence shows that, although Iowa continues to repeat that her surveyors can find the boundary lines and the bank lines, what the state apparently

really means is that her surveyors can find the line which Iowa desires, whether or not there is any basis for that line in fact.

The testimony really illustrates that the Compact used general language and adopted the boundary in general terms in a context in which determination of the line on the ground was never anticipated and where Iowa was making no proprietary claims to property, such as they are making today, which might require a survey on the ground. The Compact was adopted in general terms to provide a general result, with no anticipation that either state would use it as a property line or require that it be located with the preciseness required for property surveys.

With regard to Iowa's present statement that it is entirely possible to determine whether disputed land is ceded land, Plaintiff would point out that this is inconsistent with the statement in Part 1 of the Missouri River Planning Report (which Iowa has stated is the present policy of the Iowa State Conservation Commission) quoted at page 60 of Plaintiff's Resume' and repeated:

> "The past violent fluctuations in river water levels have been so frequent that changes in channels, bank location, sand bars, etc., *made it virtually impossible to describe the state boundary or to determine land ownership on the Iowa side.*" (Emphasis supplied.)

In addition, the Legislative history and newspapers, publications, and periodicals which recognized for many years prior to the Compact that there was a real question as to the true and correct boundary line between

the states and that for practically all land adjacent to the river no conclusive determination of either state or private boundaries had been possible, indicate the states considered the problem insurmountable and so they avoided those determinations by the agreement. In light of this, how can the State of Iowa now say that it is possible to determine whether disputed land is ceded land? The state must be honest.

6. The situation as to Iowa's "ownership" of the areas.

Iowa's Statements:

Iowa would infer that there has been no doubt concerning her ownership of the areas in dispute and that Nebraska's position would cause ownership problems along the Missouri River:

> ". . . Nebraska's proposed construction would reopen myriad title questions along both sides of the boundary, which have long been considered as laid at rest, . . ." (B., p. 75, ll. 20-23.)

> ". . . adoption of Nebraska's proposed construction would be like firing the starting gun for a race, the racers being all private parties desiring to own some river land, the prizes being the thousands of acres along the river not now in private possession or taxed, and the millions of losers would be the general public, including generations yet unborn." (B., p. 75, ll. 26-30 and p. 76, ll. 1-2.)

> "Title to many of the areas claimed by Iowa as State trust lands are not in dispute: some have been obtained by purchase: some have been decided by courts of competent jurisdiction (both for and

against the state): and others are being challenged in courts of competent jurisdiction." (B., p. 77, ll. 29-31 and p. 78, ll. 1-3.)

How and why these are misstatements or are inconsistent.

The evidence shows just the opposite. It is Iowa's position which has opened up a Pandora's box of problems. Almost the entire area along the river had been occupied and claimed and the Iowa Planning Report has recognized this fact. In almost every area referred to in the Missouri River Planning Report the recommendation is made to quiet title to lands. This is a clear indication that someone else is claiming the title other than Iowa. In addition, many of the aerial photographs show areas cleared and farmed and this is particularly true of the areas south of Omaha where the river has been stabilized since 1943 and prior. It is Iowa's conduct which is opening up all of the problems which had apparently been settled and laid to rest until Iowa adopted her new position. In fact, there is no indication from the evidence that there would be a race for these lands, but the evidence all shows that someone else has already laid claim to them. The race is only by the State of Iowa to acquire lands to which it previously has made no claim.

In Iowa's final statement quoted above, Iowa has said that title to many of the areas claimed by Iowa as trust lands are not in dispute, but she then immediately makes the inconsistent statement that some of these areas have been obtained by purchase, some have been decided by courts of competent jurisdiction, and others

are being challenged in courts of competent jurisdiction. Almost every one of these parcels was claimed by a private citizen. The fact that settlements were made by individuals with Iowa under the club of a law suit, in which the State of Iowa could exert all of its state resources and assert its sovereign immunities as defenses, does not make the settlement fair.

7. Iowa's use of presumptions.

Iowa has attempted to rely on several presumptions which, although possibly applicable in a non-Compact situation where only the common law is to be considered, completely ignore the effect of the Compact. Reliance upon these presumptions in cases by the State to quiet title to lands along the Missouri River illustrates the complete unfairness and injustice that Iowa is perpetrating. Iowa argues on the one hand that it was presumed that the boundary was the middle of the Missouri River, but on the other hand she then seems to concede at page 12 of her Brief that there is "clear, satisfactory and convincing evidence that the boundary was not on the river" at six listed locations, including four locations where she is presently claiming land under her "sovereign rights."

The mass of evidence has indicated that it was generally recognized at the time of the Compact that the river did not constitute the boundary in many locations and there were areas all up and down the river where land of one state was isolated on the other side of the river. Iowa's argument completely disregards this his-

tory and even disregards the statement in Part 1 of the Missouri River Planning Report that, "the past violent fluctuations in river water levels have been so frequent that changes in channels, bank locations, sandbars, etc., made it virtually impossible to describe the state boundary or to determine land ownership on the Iowa side." In light of this, how can Iowa now rely upon a presumption that the boundary was in the "middle of the Missouri River" (B., p. 15, ll. 13-17). If the boundary was already in the Missouri River Channel, then why the need for a Compact? The agreement itself certainly changed any presumptions and the effect of such presumptions insofar as Iowa is concerned.

Iowa's statement at page 117 of her Brief that because Nottleman Island and Schemmel Island were on the East side of Missouri River in 1943 just before the Compact, they were presumedly in Iowa, is indicative of her approach, and Nebraska contends this is evidence of the fact that Iowa is utilizing the Compact to aid it in claiming lands. Nebraska submits it is not fair for Iowa to now rely upon the presumption, especially when she knew otherwise and when it was of public record at the time of the Compact that there were at least a dozen canals which had been dredged by the Corps of Engineers in the channelizing of the Missouri River and there was a general historical recognition of many natural cut-offs of the Missouri River. This Corps work superimposed upon an already confusing situation, only emphasized why the states did not consider it feasible to attempt to locate the pre-Compact Boundary.

What Iowa has done is recognized in her Planning Report that it was "virtually impossible" to describe the state boundary or determine land ownership and has then attempted to make this determination by merely establishing the existence of an area with a chute or some water to the East of it. Iowa then relies upon the presumptions, and places the burden on the landowner to prove something which the State has recognized is "virtually impossible" to determine. In light of the evidence, how can Iowa now attempt to place the burden entirely on the landowner to prove something which she agrees was "virtually impossible" 27 years ago at the time of the Compact? The state must be honest. She should not be able to wait 20 or 25 years while witnesses die, records are destroyed, and memories fail by passage of time and then place that burden upon any individual while arguing that none of the normal equitable limitations run against her because she is the sovereign.

8. Settlement by a boundary commission or the legislatures.

Iowa's Statements:

Iowa states that the settlement of this dispute is a political matter to be determined by the Boundary Commission. She has stated:

> "If omissions were made in the 1943 Compact, Iowa submits that they can only be supplied by another Compact between the two states, negotiations for which are already underway. It is a political matter, not a judicial matter." (B., p. 87, ll. 29-30, p. 88, ll. 1-3.)

How and why these are misstatements or are inconsistent.

Iowa's suggestion that negotiations for a Compact are already under way ignores her own report of the Governor's Advisory Committee on the Iowa-Nebraska Boundary which recommended, on December 1, 1964:

> "That the State of Iowa and the State of Nebraska shall file a friendly suit in the U. S. Supreme Court to establish guide lines to determine title of lands transferred in a boundary compact with reference to individual land owners and claims upon lands by states, and such other questions as the attorneys may desire." (See pp. 55-56, Plaintiff's Appendix.)

The Governor in his Address to the Iowa Legislature in 1965 recommended the settlement of the Iowa-Nebraska boundary dispute as suggested by the Boundary Committees.

In light of the fact that Iowa's own Boundary Committee and Governor recommended a law suit to establish guide lines, how can the State of Iowa now represent that this is a matter for the Boundary Committees? How can the State of Iowa suggest that negotiations are under way when the Nebraska Legislature authorized and sanctioned this law suit by resolution?

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II.

THE QUALITY OF IOWA'S EVIDENCE.

Since an extensive summary of Iowa's evidence together with appropriate comments has already been

made in Plaintiff's Resume', Plaintiff will make the following limited comments concerning the quality of Iowa's evidence as relied upon in her Brief and Appendix. Nebraska does not accept Iowa's categorizations of the evidence or her arguments as to what this evidence shows. Nebraska would take issue with the accuracy of many of Iowa's statements which are too numerous to consider in this Brief. As is the case with her other arguments, Iowa has a facility for looking at certain facts and then stating that they are something else.

Iowa has said at page 39, lines 8-11 of its Brief, that:

> "Every Court which ever confronted a problem such as the Court here confronts has relied most heavily on the Corps of Engineers' maps and records to determine the true history of the area involved."

The record and reported cases also indicate that Iowa has relied heavily upon the testimony of Mr. Huber and upon his ability to draw a line indicating the "thalweg" on aerial photographs and reconnaissance, hydrographic and other maps prepared by the Corps. It is the improper use of such maps and documents by Iowa which has created a gross unfairness to the land owner. The testimony and record amply demonstrates that Iowa has attacked the reliability of the reconnaissance maps as shown at pages 483 and 484 of Plaintiff's Resume' in which Iowa has stated that the Courts in other court cases should give little or no weight to the reconnaissance maps and that aerial photographs demonstrate the unreliability of certain reconnaissance sketches. There was also testimony by General Loper and

Stewart Smith concerning how these maps were made as well as testimony by Mr. Huber in the *Tyson* case in 1960, when he was testifying on behalf of the State of Iowa, in which he described how the reconnaissance maps were made and agreed that it was "kind of an old fashioned way of establishing a record." (See pages 471-474 of Plaintiff's Resume'.) Mr. Huber testified in that case and in this that "you can't determine the depth of water from an aerial photograph."

The record has amply demonstrated that, in spite of his and Iowa's insistance to the contrary, Mr. Huber cannot accurately place the "thalweg" as it would have existed at various times in the past on these Corps documents. He cannot even do it consistently. After testifying that it was easier for him to locate the "thalweg" on a hydrographic map than on aerial photographs and other maps and, if he were wrong in placing the "thalweg" on a hydrograph, he would be more likely to be wrong in placing it on an aerial photograph, Mr. Huber proceeded to place his "thalweg" on the 1931 Corps hydrograph in a different location than he did when testifying in the Schemmel case in the District Court of Fremont County, Iowa in 1964. This is demonstrated by Iowa's Exhibit D-291-A found at Otoe-16 of Iowa's Appendix in which his 1969 "thalweg" can be seen to the East of a bar immediately above the letter "B" in the word "Bend" near the lower portion of the map and his 1964 "thalweg" can be seen to the West of that same bar. Mr. Huber testified there was 1,100 feet maximum distance between the two lines. He was in error in placing the thalweg on a 1930 aerial photograph where he again

located it in a different position than he did in the Schemmel case and he misplaced the thalweg on the 1890 Corps of Engineer map in the Queen Hill vicinity, running his thalweg to the West of the island just above mile 627.9 on Ex. D-605-A (Nottleman - 6 of Iowa's Appendix) whereas a comparison of the 1890 map with other Corps maps locating that thalweg showed it to the East of the same island and along the left bank. The record is replete with examples of errors and inconsistencies in Mr. Huber's testimony from one case to another, yet he has been one of Iowa's principal witnesses in its various quiet title actions.

Iowa relies only upon those Corps records which support her particular position which she may be taking in a specific case, and the evidence shows that Iowa has also been able to obtain ample testimony that such records are inaccurate or unreliable when it meets her purposes in other cases. Such a situation should not be allowed to continue, and no farmer's title should be tested by such standards. The State of Iowa must be consistent. The State of Iowa must be honest.

Another often used witness by Iowa, Mr. Jauron, testified as a witness in a case in 1962 or 1963 that Nottleman Island formed some time in the early 30's, based on his observation of the age of the vegetation on Nottleman Island, whereas by deposition in 1966 he testified he had made no attempt to age the trees at Nottleman Island and he had made no attempt, up to the time of that deposition, to estimate when it came into existence by observation. (See pages 518-520 of Plaintiff's Resume'.) In the present case he testified under direct examination that the earliest

date Nottleman Island could have formed was 1918 and attempted to justify his earlier testimony by the fact he had found a 1926 Corps aerial photograph showing the island. Any situation which permits such a variance in testimony by state officials is unconscionable.

The unreliability of the placement of Nottleman and Schemmel Islands on various Corps documents by Mr. Bartleman is also illustrated by a comparison of Exhibit D-1036-A at Nottlemna - 16 of Iowa's Appendix where the upstream point of the island is found on Mile 630 and the lower part of the island is far above King Hill or Calumet Point, which is not shown on the exhibit, with Exhibit D-605-A at Nottleman - 6 of Iowa's Appendix which shows the lower part of Bartleman's Nottleman Island extending downstream below the northern part of Calumet Point. The upper portion of the island on Exhibit D-605-A is well below Mile 630.

On Exhibit D-291-A which is found at Otoe - 16 of Iowa's Appendix most of an island marked "Willows" in the northeast corner is included as a part of Schemmel Island whereas on Exhibit D-427 found at Otoe - 18 only approximately the lower one-half of that same "Willows" area above Dike 601.9 is included within Bartleman's location of Schemmel Island. A comparison of his placement of the island on Exhibit D-1093-A found at Otoe - 6 and Exhibit D-1092-A found at Otoe - 12 of Iowa's Appendix shows his section corner common to Sections 10, 11, 14 and 15 in different places on the two exhibits. If the North-South section line is extended to the North it intersects a cultivated field or cleared area on Exhibit D-1092-A whereas when extended to the North on Exhibit D-1093-A

the section line would just come to the western edge of that same cultivated field. These are only a few examples of the unreliability of this type of evidence.

There is also conflict between some of Iowa's present positions and the testimony of her witnesses. For instance, Iowa has stated at page 58 of her Brief that Otoe Island "didn't exist before 1936." However, Iowa's witness, Albert Propp testified that John Hilger and Walt Williams built a shack on the island in about 1918 (see pages 146-147 of Iowa's Appendix). He also testified that it began to form as an island in the 20's (page 144 of Iowa's Appendix). Iowa's witness, Otto Hinze testified the island has been there anywhere from 1915 on up to the present date. (See p. 137, Iowa's Appendix.) Iowa's witness, James Givens also testified " . . . there was some pretty good-sized trees" on Schemmel Island in 1936. (See p. 33, Iowa's Appendix.) Thus, Iowa's offered testimony as to when the island commenced to form is in conflict with Iowa counsel's contention that the island formed as a result of the Corps work (p. 41 of Iowa's Appendix) and that it didn't exist before 1936 (B., p. 58, ll. 26-27).

Reference to the qualifications of Iowa's witnesses and their lack of familiarity with the areas or subject matter, and to her "expert testimony" has been made in Plaintiff's Appendix. Plaintiff would only add here that even Iowa's witnesses who testified concerning the age of trees on Schemmel Island admit that two trees on the island started their growth prior to the dredging of the Otoe Canal. Dr. Bensend and Dr. McGinnis testified that both Tree Numbers 1220 and 1210 commenced their growth in 1936 or 1937. (Pages 199-200, Iowa's Appen-

dix.) These two trees were located on what was the west side of the river and were cut off by the Otoe Canal and placed upon the east side of the river by the canal. Consequently, even from Iowa's own offered testimony concerning the trees, there can be no dispute that the Corps moved the river from the East to the West into the Otoe Canal by other than mere "pushing" and they did not wash away the intervening land.

Plaintiff submits that the quality of Iowa's evidence is inadequate to justify Iowa's conduct or her position, and the State of Iowa should not be able to take advantage of such evidence to attack private titles.

———o———

III.

IOWA'S ANALYSIS OF THE CASES AND OF PLAINTIFF'S POSITION.

Plaintiff does not accept Iowa's analysis of the cases cited and plaintiff does not accept Iowa's paraphrasing of plaintiff's arguments or positions. Plaintiff's statements in her Brief and Appendix speak for themselves and will not be repeated here.

For example, Iowa has attempted to add a new requirement to the law of avulsion by inserting the words "substantial body of identifiable land", defining "substantial" by her own stadnards. It is submitted that the cases do not turn upon that point, and Iowa is now attempting to impose an additional requirement in order to justify her conduct. Even though disagreeing with Defendant's contention, Plaintiff would point out that both

Nottleman Island and Otoe Island are substantial bodies of land.

Iowa has cited the case of *Louisiana v. Mississippi*, (Number 14, Original) at page 41 of her Brief, and, although the reported opinion at 348 U. S. 24 does not detail the factual situation, it was completely different from ours. In that case, as indicated by the Special Master's Opinion, the Corps of Engineers did construction work upstream from the area affected and all of the movements of the thalweg downstream at the place in litigation were under the water and there was no evidence that the thalweg moved around any land area. In addition, this case was decided under the common law in the absence of a compact. The recent case of *Arkansas v. Tennessee*, 397 U. S. 88, Decree at 26 L. Ed. 2d 537, mentioned by Iowa, recognized a "classic example" of an avulsion and the map attached to the opinion shows the Court located the boundary in a chute with a configuration which is remarkably similar to the Iowa Chute in the Schemmel case. The Court affirmed common law principles which Plaintiff has argued were applicable prior to the Compact. The Special Master's opinion in the case of *Illinois v. Missouri*, No. 18 Original, Sup. Ct. U. S. (1969 Term), also recognized a natural avulsion and Judge Johnsen suggested that the conditions of "long possession" and "long acquiescence" supporting a state's claim to territory are entitled to variances which exist in the circumstances of individual situations and a shorter length of time might be appropriate today than has been described in some of the cases. In the old days when lines of communication and transportation

were not as advanced, it is more understandable that areas might be unknown or ignored, but in this century where we have such modern and rapid transportation and communication, and where the taxing officials are supposedly more diligent and have aerial photographs, maps, cadastral maps, and complete descriptions of their counties, it is more difficult for the states to excuse their failure to exercise jurisdiction over or tax lands, especially where they are required to do so by law. That case was also decided under the common law and, of course, the Nebraska-Iowa situation is different because the states settled their problems by contract in 1943 which distinguishes our case from the above three cases.

Iowa would attempt to avoid any contractual commitments imposed upon her by the Compact by arguing that the Compact only had the effect of being legislation. However, the Courts have always recognized a distinction between reciprocal legislation of states and the contractual commitment imposed by a Compact. This distinction was mentioned by Mr. Chief Justice Hughes in the case of *Massachusetts v. Missouri*, 308 U. S. 1 at 16-17 where the Court stated:

> "But, apart from the fact that there is no agreement or compact between the States having constitutional sanction (Const. Art. 1, § 10, par. 3), the enactment by Missouri of the so-called reciprocal legislation cannot be regarded as conferring upon Massachusetts any contractual right. Each State has enacted its legislation according to its conception of its own interests. Each State has the unfettered right at any time to repeal its legislation. Each State is competent to construe and apply its legis-

> lation in the cases that arise within its jurisdiction. If it be assumed that the statutes of the two States have been enacted with a view to reciprocity in operation, nothing is shown which can be taken to alter their essential character as mere legislation and to create an obligation which either State is entitled to enforce as against the other in a court of justice."

Iowa should not be able to relegate the terms of the Compact to the status of mere state legislation. To do so would be to disregard the basic principles of Compact and Constitutional law which have existed in this nation since its founding.

Plaintiff disagrees with so many of Iowa's statements concerning interpretation of the cases and her restatements of Nebraska's arguments, that it would extend this Brief unduly to attempt to comment upon every point. Lack of comment here should not be construed to mean agreement or approval.

IV.

CONSEQUENCES OF IOWA'S ARGUMENT.

Iowa's argument necessarily leads to the following consequences:

1. The only effective section of the Compact would be Section 1 establishing the new boundary and Iowa would require a judicial determination, 27 years or more later, of what areas were "ceded", a fact which the evidence shows was considered by the States to be virtually impossible at the time the Compact was entered into.

2. The entire burden of establishing this fact is placed upon individual land owners as Iowa can rely upon certain presumptions.

3. In those areas where records have been destroyed or witnesses are no longer available, the land owner is in a hopeless position and left where he cannot possibly rebut the presumption of gradual movement of the river because of Iowa's long delay in taking her present position.

4. The Compact settled nothing except to place areas within Iowa's jurisdiction where Iowa can attempt to claim them using "Iowa law".

5. A few Iowa officials can continue to pick and choose the various areas which the State claims without regard to the factual history of their formation and without inquiry into Nebraska records.

6. Iowa can at any time in the future assert claims to other areas along the Missouri River which she has never laid claim to before.

7. The language of the Compact that "titles, mortgages, and other liens good in Nebraska shall be good in Iowa" and the provisions for recognition of tax liens would be meaningless. All determinations would be made in the Iowa Courts in an action in which the State of Iowa, the contracting party agreeing to respect the title, is attacking the title and knew when she entered into the Compact that it was "virtually impossible" to prove where the pre-Compact boundary was.

8. Rights in the State of Iowa would be created in specific areas along the river at a time more than 20 years following the adoption of the Compact whereas, at the time of the Compact in 1943, Iowa made no claim to these specific individual lands, did not have them of record in her General Land Office as required by her statutes, and had not marked the boundaries as also required by her statutes.

9. Iowa can litigate the title to a small area of land in a situation such that the cost of the land owner's attorneys fees would exceed the value of the land in order to obtain a principle which would assist her in acquiring title to other areas along the river.

10. There would be a government of men and not of laws along the Missouri River.

11. Iowa can buy land in abandoned channels along the river from certain privileged land owners and yet claim the title to abandoned channels against other non-privileged land owners.

12. Iowa can use certain evidence such as Corps of Engineers soundings and aerial photographs in support of her position where they are favorable in certain cases and yet can attack those same soundings and aerial photographs as being unreliable in other cases where such documents do not support her position.

13. Iowa can disregard the fact that there had been many natural avulsions and the Corps of Engineers had dug numerous canals along the Missouri River and the States contracted in light of this.

14. Iowa can disregard quiet title actions in Nebraska which had been decided prior to the adoption of the Iowa-Nebraska Boundary Compact of 1943.

15. Iowa can continue to state on the one hand that she recognizes title to lands ceded and on the other hand she can claim such lands, as she is doing by her own admission in California Bend, Winnebago Bend, and in Bartlett-Pinhook Bend at Auldon Bar. Nebraska contends she is also making this same unjustified claim to Nottleman Island and Schemmel Island and other areas in violation of the Compact.

16. Iowa can claim lands in court actions in her own courts even though those lands are being taxed by the Iowa county officials, by the State's own Inheritance Tax officials, and even though the Iowa Conservation Commission and Attorney General's office had knowledge of such lands as far back as 1946 and 1950, at which time they recognized the private titles.

17. Iowa can survey the lines to the lands which she claims without using any basis in fact for such lines and she can unilaterally establish where the state line is, using inconsistent methods which would give different answers if applied to the same area.

18. Iowa can claim lands which have been on the Iowa tax rolls for over 20 years and at the same time not claim or disclaim titles to lands adjacent to the Missouri River which were at one time a part of the bed of the Missouri River, which were not on the Iowa tax rolls during any of that 20 year period.

19. Iowa can disregard the fact that lands may have been taxed in Nebraska for years prior to the Compact and occupied by Nebraskans, and she can ignore all of those incidents of possession and ownership which may have existed in Nebraska prior to the adoption of the Iowa-Nebraska Boundary Compact of 1943.

20. Iowa can overlook the fact that the inhabitants of the area and the local officials considered lands to have been in Nebraska until the Compact and recognized that those lands were ceded to Iowa by the Compact.

21. Individual property boundaries of Nebraska owners would have been changed without compensation to a fixed line instead of the "middle of the main channel" or thalweg of the Missouri River which was a movable boundary.

22. Individual land owners in Nebraska are deprived of their riparian rights and the right to accretions, either to the bank or to the bed, when the river moves into the State of Iowa. The most a Nebraska owner could gain by accretion would be 350 feet whereas he could lose his entire farm.

23. Titles to all lands in the Missouri River Valley are clouded by the fact that Iowa might at some later date claim title to lands based upon her sovereign rights to beds or abandoned beds of the Missouri River and based upon her position that no equitable defenses apply against her. This is especially so since Iowa has stated she believes that "the entire flood plain of the Missouri River from the hills in Iowa to the hills in Nebraska was once the channel of the Missouri River."

24. There could be a mad rush for additional lands along the Missouri River by the Iowa Conservation Commission.

25. Iowa can continue to hold as a threat over the heads of all of the land owners in the Missouri River Valley the possibility that at some future date she may claim other areas as abandoned river beds, relying on the presumptions, and also taking the position that she is not responsible for any of the previous contrary acts of her public officials and that none of the equitable defenses apply against the State.

26. The provisions of the Compact would be considered as only having the effect of a statute and no longer creating any contractual obligations between the states. Such doctrine would shatter the precedents under the cases and the Constitution of the United States and have far reaching consequences upon all interstate compacts in the United States.

27. The Compact would have the effect of subjecting Nebraska titles to "Iowa law", divesting them of certain vested ownership rights without compensation.

28. The Compact would have created a situation where Iowa could delay for over 20 years any claims she might have until all contrary evidence has disappeared and the presumptions act as a conclusive rule of law in her favor.

29. Iowa can rely upon witnesses to establish the "thalweg" as of any date even though such witnesses might locate this "thalweg" at different places on the

same exhibits while testifying under oath in 1964 and again testifying under oath in 1969.

30. The State of Iowa can rely upon certain reconnaissance photographs where they help Iowa's cause and attack those same documents as being unreliable in situations where they may be inconsistent with Iowa's position. The State of Iowa thus has no accountability to be consistent in its approach.

31. The State of Iowa can rely upon the presumption of gradual movement of the Missouri River even though the State knows about canals having been dug in Nebraska by the Corps of Engineers prior to the Compact at the very location in issue.

32. Iowa can continue to disclaim land areas where owned by Iowa lawyers or rich Iowa land owners, even though those lands have never been taxed in Iowa and were former beds of the Missouri River.

33. Under Iowa's practice, there would be no contractual commitment on the part of the State of Iowa under the Iowa-Nebraska Boundary Compact to recognize titles good in Nebraska and the effect of the Compact would have been to establish Iowa's right to litigate title to the areas in her courts, utilizing Section 1 of the Compact only and applying so-called "Iowa law" which divests the former Nebraska land owners of a vested interest.

34. Iowa can admit avulsions in areas such as California Bend and Winnebago Bend, recognizing that such areas were ceded, and still claim lands in those ceded

areas based upon her alleged sovereign right to the title to beds and abandoned beds of navigable streams.

35. Iowa would not be responsible for the actions over the years of her previous Attorney Generals, State Conservation Commissions, and all of her county officials, whose positions were created by state law and whose duties and responsibilities are established by state law.

36. Iowa can continue to locate the boundary under any method she determines without regard to whether it is a correct method or is consistent with other methods used by her.

37. Iowa can take advantage of the acquisition of land whenever the river moves to the east into Iowa and can terminate the Nebraska riparian owner's right to bed and accretion at the state line solely because this became a fixed line by the 1943 Compact.

38. Iowa can disregard the situation which existed at the time of the Compact and impose a different situation upon the Compact language which was not anticipated or in existence when the parties contracted.

39. Land owners are penalized for not having spent time, energy and money to prove their title in the Iowa Courts immediately after the Compact in order to establish what both states and Congress had agreed in 1943 in unequivocal terms belonged to these land owners.

40. Iowa can take the position in some cases that it has no right to give up "trust lands" whereas in other

cases it can disclaim such lands of similar character.

41. Iowa can claim that all Nebraska titles and indicia of ownership arise from "spurious, fictitious instruments."

42. By the decision to question a landowner's title, in her own courts, Iowa can deprive him of his land because of the economic burden, time, expense, presumptions, "Iowa law" and sovereign immunities which the State imposes upon him.

43. Farmers all along the Missour River who have cleared, cultivated, fertilized and developed the land and paid taxes upon it in Iowa will lose their farms without compensation.

Plaintiff submits that the Compact should not be construed in such a manner as to result in such oppression, unfairness, injustice, and absurd consequences.

———o———

CONCLUSION

Nebraska submits the evidence shows Iowa's entire land acquisition program is motivated by nothing more than her economic self interest and an attempt to obtain as much land as possible without compensating the landowner. There is no rational consistency in any of Iowa's conduct as she argues evidence and fact to meet her fancy in individual situations to achieve only one result, which is a declaration of ownership in the State of Iowa.

Iowa then attempts to justify such conduct by statements as the one at page 85, lines 25-26, of her Brief, "Nebraska would foreclose inquiry; Iowa would inquire, and has done so." How does Iowa justify the fact that she did not inquire back before she entered into the Compact and how does she justify waiting for 20 years after the Compact before making inquiry? Iowa continues to disregard the history of the Compact, its purpose, and her conduct at and prior to the time the Compact was entered into. The two States foreclosed inquiry by each other as to the location of the pre-Compact boundary at the time they entered into the Compact, recognizing such determination was almost impossible. It was the purpose and the intent of the States in adopting the Compact to lay to rest questions involving the historic location of the boundary and the manner in which bottom lands came into being and it is, therefore, a violation of the Compact for either State to make a claim of ownership which requires an individual or the other State to litigate the question of the precise location of the boundary at the time of the adoption of the Compact or the formation of land by the action of the river. The Compact necessarily changed the rights of the States which might have existed under their common law and Iowa should now be bound by her agreement that not only was a new boundary created but all private titles would be recognized without the necessity of determining where the State boundary had been previously.

In addition to these contentions, Nebraska submits that the evidence clearly and convincingly establishes that both Nottleman Island and Schemmel Island formed in Nebraska, and the landowners had good Nebraska titles prior to the adoption of the Iowa-Nebraska Boundary Compact of 1943.

Plaintiff respectfully renews its request for relief previously made.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 17, ORIGINAL

STATE OF NEBRASKA,
Plaintiff,

vs.

STATE OF IOWA,
Defendant.

IOWA'S PROPOSED DRAFT OF REPORT AND RECOMMENDATIONS OF HONORABLE JOSEPH P. WILLSON, SPECIAL MASTER

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 17, ORIGINAL

STATE OF NEBRASKA,
Plaintiff,

vs.

STATE OF IOWA,
Defendant.

IOWA'S PROPOSED DRAFT OF REPORT AND RECOMMENDATIONS OF HONORABLE JOSEPH P. WILLSON, SPECIAL MASTER

GENERAL STATEMENT OF THE CASE

In 1943, the States of Iowa and Nebraska entered into a compact with the approval of the Congress of the United States concerning their common and contiguous boundary, which compact is generally known and referred to as the "Iowa-Nebraska Boundary Compact of 1943".

Nebraska asserts in this case that certain conduct by Iowa constitutes violation of this compact. Nebraska seeks

a construction and interpretation of the compact to the effect that Iowa's conduct constitutes violation, and seeks a judgment and decree of this Court which would force, require and enjoin Iowa to cease and desist from such conduct.

JURISDICTION

Nebraska asserts that this Court's jurisdiction to hear and determine this matter arises from Article III, Section 2, Clause 2 of the Constitution of the United States and 28 U. S. C. Sec. 1251 (a) (1). She further asserts that the matter of jurisdiction has heretofore been settled and adjudicated by this Court's prior order wherein her motion for leave to file her Complaint was sustained and Iowa's resistance to said motion was overruled.

Iowa, on the other hand, asserts that this Court must examine its jurisdiction at all stages of the case and, if at any stage it appears that there is no justiciable controversy between the states, or that Nebraska has no real interest in the controversy which would entitle her to maintain the action, the case should be dismissed.

Although Nebraska offered evidence tending to show that the boundary fixed and established by the 1943 Boundary Compact is described in such a manner that it may now be difficult or impossible to precisely locate it in the water or on the ground today, she seeks no relief in this case arising from such fact. In other words, location of today's boundary line between the two states, being the boundary line fixed by the 1943 Compact, is not an issue in this case. In any event, having heard and considered the evidence concerning location of the boundary line fixed by the Compact, your Special Master believes and finds that said boundary line can be located accurately

today at all points where accurate location may be required, although diligent effort may be required in order to do so.

The real issue in this case is concerning where the boundary line between the two states *was* immediately prior to July 12, 1943, the effective date of the Boundary Compact. One might ask: Why should this question of where the pre-1943 boundary line was be a matter of importance to the two states now, some 28 years later? Briefly stated, the matter is of importance because on this question of where the pre-1943 boundary line was, hangs the ownership of a number of tracts of land along and in the vicinity of the boundary. Ownership of lands, river beds and abandoned river beds which were in the State of Nebraska prior to 1943 was determinable by the law of Nebraska. Likewise, ownership of tracts which were in Iowa prior to 1943 was determinable by the law of Iowa. In many cases, the answer as to ownership would be different because of difference between the state laws of the two states. This Court has consistently held that each state may have and apply within its own borders whatever system of land title laws she may see fit. As stated in *Arkansas* v. *Tennessee*, 246 U.S. 158, at page 176:

> "How the land that emerges on either side of an interstate boundary stream shall be disposed of as between public and private ownership is a matter to be determined according to the law of each state, under the familiar doctrine that it is for the states to establish for themselves such rules of property as they deem expedient with respect to the navigable waters within their borders and the riparian lands adjacent to them. (Citing cases.) Thus, Arkansas may limit riparian ownership by the ordinary high-water mark (Citing cases.) and Tennessee, while extending riparian ownership upon navigable streams to ordinary low-water mark, and reserving as public the lands constituting the bed below that mark, (Citing cases.)

may, in the case of an avulsion followed by a drying up of the old channel of the river, recognize the right of former riparian owners to be restored to that which they have lost through gradual erosions in times preceding the avulsion, as she has done in *State v. Muncie Pulp Co.*, 119 Tenn. 47, 104 S.W. 437. But these dispositions are in each case limited by the interstate boundary line from where otherwise it should be located."

The laws of the two states regarding ownership of accretion lands, river beds and abandoned channels are similar but there are two important differences: (1) In 1856, approximately 20 years before Nebraska was admitted to statehood, it was determined in Iowa that private land titles to riparian lands along navigable streams would extend only to the ordinary high water mark and that the beds of the navigable streams in Iowa were state-owned. *McManus* v. *Carmichael*, 3 Iowa 1. In 1906, 50 years later, it was determined that private land titles to riparian lands in Nebraska would extend to the thread of the contiguous stream. *Kinkead* v. *Turgeon*, 74 Neb. 573, 104 N.W. 1061. (2) It has been the law of Nebraska from very early in her history that title to land may be acquired by adverse possession as a result of ten years of open, peaceable and notorious possession, even though the possessor entered upon the land as a trespasser. In Iowa, on the other hand, the law is and for many years has been that title cannot be gained by adverse possession unless the possessor entered upon the land and possessed it with claim of right or color of title.

In the beginning, the Iowa-Nebraska boundary was the middle (or thalweg) of the Missouri River from a point opposite the mouth of the Big Sioux River near Sioux City, Iowa, thence downstream to a point where the middle or thalweg was intersected by the Iowa-Missouri boundary

line near the town of Hamburg, Iowa. Movements and changes of the boundary prior to 1943 were governed by the "Rule of the Thalweg" as promulgated by this Court and many state courts, including the state courts of both states. Generally stated, the "Rule of the Thalweg" was and is that wherever a boundary is described as the "middle" of a river, the term "middle" shall mean the "deepest part" or "navigation channel"; whenever the thalweg moved by the gradual process of "accretion", the boundary moved with it; but whenever the thalweg shifted from one channel to another by a sudden "avulsion", the boundary did not move to the new thalweg, and the boundary remained in the abandoned channel.

In prior litigation between the two states (*Nebraska* v. *Iowa*, 143 U.S. 359, 36 L.Ed. 186, 12 S.Ct. 396) it was determined that an avulsion had occurred in the vicinity of Omaha, Nebraska, and Carter Lake, Iowa, whereby the thalweg suddenly shifted from a channel to the west of the town of Carter Lake, Iowa, to a new channel east of the town, with the result that Carter Lake, Iowa, remained in Iowa and did not become part of Nebraska even though it was and still is west of the Missouri River. Special provision in the 1943 Boundary Compact preserved Carter Lake's status as being in Iowa, and there is no issue in this case concerning Carter Lake or any land in that immediate vicinity.

Carter Lake is the only site along the boundary where it had been judicially determined in litigation between the two states that there had been an avulsion so that the boundary was not the thalweg of the river in and prior to 1943.

From the general statements hereinabove made concerning the internal title laws of the two states it will be

seen that, if accretion land formed along the Missouri River, or a former channel became an abandoned channel, or an island arose from the river bed west of the thalweg and in the State of Nebraska, its ownership was determinable by the law of Nebraska. There has been much litigation in the state courts of Nebraska down through the years, both before and since 1943, wherein ownership of these lands has been the issue. Generally, the courts of Nebraska have held that accretion lands which formed contiguous to the shoreline of a riparian owner became property of such riparian owner, and when a channel became an abandoned channel, the riparian owner became the owner to the former thread of the stream, and when an island arose from a stream the riparian owner became the owner of such island, depending on which side of the thread of the stream it arose. The salient fact at this point is that the State of Nebraska has never been found to be the owner of any such lands because by her law, she elected to make all such lands and river beds, islands and abandoned beds privately owned. In some of the Nebraska cases, ownership of river lands was determined by application of the Nebraska law of adverse possession. *Burkett* v. *Krimlofski*, 167 Neb. 45, 91 N.W.2d 57.

There has also been much litigation in the state courts of Iowa concerning ownership of river lands. The Iowa courts have generally held that accretion land which forms contiguous to the riparian shore of a private riparian landowner becomes property of such riparian owner; the state loses its title to that spot under the sky which was formerly river bed but which is now covered by the private riparian landowner's accretions; the state gains title to the new riverbed in Iowa. If the bed of a navigable river becomes abandoned by an avulsion, property boundaries remain unchanged so that the state continues to own the abandoned

bed to the ordinary high water mark. If an island arises from the state owned bed of a navigable river in Iowa, it is considered to be in the nature of an accretion to the state-owned bed and the island is therefore state-owned. *Holman* v. *Hodges*, 112 Iowa 714, 84 N.W. 950. *Payne* v. *Hall*, 192 Iowa 780, 185 N.W. 912; *Iowa* v. *Raymond*, 254 Iowa 828, 119 N.W.2d 135.

During the pre-trial phase of this case, it was established that the State of Iowa now claims to own some thirty-two tracts along the boundary. All of these tracts are presently in Iowa. Some of these tracts are land; some are sand bar; some are marsh; some are still inundated by Missouri River water; some are a mixture of land, sand bar, marsh and land under water. Some of these tracts formed and came into existence in their present forms before 1943 and some since 1943. She claims some of them by operation of the Iowa law of state ownership of navigable river beds, islands and abandoned channels; some of them by exchange with various individuals; some of them by purchase from various individuals; some of them by quiet title decrees; and some of them by a mixture or combination of theories or claims. In addition to the 32 specific tracts, she claims to own all that part of the bed of the present day Missouri River which is in Iowa.

The State of Nebraska does not claim to own any of these tracts. The State of Nebraska claims to own nothing by operation of her common law because, as pointed out above, her law provides no basis for any such claims of ownership.

There is not any tract or parcel of land, river bed, marsh or abandoned river bed which the State of Iowa claims to own and which the State of Nebraska also claims to own. Nebraska's complaint is limited to the proposition that Iowa violates the 1943 Boundary Compact by claiming

to own tracts which were *privately* owned in Nebraska prior to 1943 and tracts which have formed since 1943 in such manner that they became privately owned. Nebraska brought and seeks to maintain the instant case on behalf of these private parties; she claims power to do so because she was a signator to the Compact; her claim of power is under the doctrine commonly known as "parens patriae".

Iowa asserts that Nebraska has no real or present interest in the controversy; that Nebraska is not the "real party in interest"; that necessary elements for "parens patriae" are absent; and that her action, the instant case, should therefore be dismissed and denied. Since all tracts which Iowa claims to own are admittedly in Iowa, and Nebraska doesn't claim to own any of them, Nebraska's territorial integrity is not threatened; Nebraska's tax base is not threatened; it is clear that Nebraska's right to maintain and prosecute the instant case does in truth and in fact depend upon the doctrine of "parens patriae" alone.

A succinct but accurate review of the "parens patriae" doctrine was written by Chief Judge Pence of the United States District Court of Hawaii in the recent case of *State of Hawaii* v. *Standard Oil Company*, (1969) 301 F. Supp. 982. (Opinion on appeal at 431 F.2d 1282). Judge Pence's conclusions concerning parens patriae (which were undisturbed on appeal) were that, where a state seeks to maintain an action in its parens patriae capacity, two prerequisites must be met: (1) The facts must show that the state has an interest independent of and apart from the titles of her citizens, and (2) The facts must show that a substantial portion of its inhabitants are adversely affected by the challenged acts of the defendant.

The evidence here clearly demonstrates that the State of Nebraska has no interest in this case independent of and apart from the titles of her citizens.

Nebraska made no proof as to the number of private parties who are or may be claiming to own the 32 tracts which Iowa claims to own along the boundary. Suffice to say that this number can only be an infinitesimal fraction of the population of Nebraska, and the people of Nebraska generally have no real interest in this matter.

After an obviously thorough search by good and diligent counsel for Nebraska, no case or precedent has been cited to this Special Master wherein a state has ever attempted to prosecute an original action in this Court against a sister state under the facts and circumstances which are here shown to exist. In all of the many cases heretofore wherein two states have contested in this Court concerning a boundary, both states have had a clear, present and real interest in the matter. Always, in cases heretofore, the contest has been concerning where the disputed boundary *is*, not where the boundary *was* in some prior time.

Operating against Nebraska throughout this case was the rule stated by Mr. Justice Roberts in *Colorado* v. *Kansas*, 320 U.S. 383, at page 393:

> "* * * Not every matter which would warrant resort to equity by one citizen against another would justify our interference with the action of a State, for the burden on the complaining State is much greater than that generally required to be borne by private parties. Before the court will intervene the case must be of serious magnitude and fully and clearly proved. * * *"

The conclusion is inescapable that Nebraska has failed to establish either of the prerequisites restated by Judge Pence from prior authorities cited in his opinion.

Another objection to this Court's exercising original jurisdiction in the case at bar is raised by Iowa: There is no evidence that Iowa has ever advanced its claim of ownership to any tract by forcibly dispossessing any ad-

verse claimant; rather, the evidence is that at all locations where there were or are disputed claims, she has simply sought resolution of such disputes in the courts of competent jurisdiction. Usually the court of competent jurisdiction was the Iowa District Court of the County in which the tract was situated (since all tracts claimed by Iowa are now in Iowa) but on three occasions, the issue has arisen in the Federal District Courts of Iowa in eminent domain cases where the United States, at the behest of the Corps of Engineers, was seeking to obtain right-of-way for Missouri River improvement projects. The cases in state courts have generally been Quiet Title cases, sometimes commenced by the State of Iowa as Plaintiff, sometimes commenced by others against her which she has defended, and in one case at least, she has intervened in a case pending between private parties.

On the question of whether or not Iowa has violated the 1943 Boundary Compact hangs the answer as to whether or not Nebraska has tendered to this Court a justiciable controversy over which this Court should exercise its original jurisdiction. Iowa says, at this point, that since the evidence discloses only that she has sought to have her claims determined in courts of competent jurisdiction, Nebraska has failed to prove violation of the Compact by Iowa, because such conduct by Iowa though proved and admitted does not constitute violation.

Indeed, it seems to me that this Court or any court should be very cautious about enjoining any party from prosecuting or defending any action in any court of competent jurisdiction which would involve valuable rights to real estate claimed or owned by such party. Free access to the courts is a basic principle of our system.

Nebraska seeks to buttress her claim for such an injunction against Iowa by asserting that it is not fair for

Iowa to litigate these matters in her own state courts, the implication being that the Iowa courts are or may be biased where the state is a party. Nebraska further asserts that it is unfair and inequitable for Iowa, with her great resources for investigation and research, to be permitted to use those resources against the individual adverse claimants. Nebraska further asserts that the Iowa law, as promulgated by her courts, is unfair and inequitable to the adverse claimants of these river areas which Iowa claims to own; Nebraska particularly complains about application of the Iowa rule that there is a presumption in favor of accretion and against avulsion which can only be overcome by clear, satisfactory and convincing evidence of avulsion.

Let it be said first that there is no evidence of bias in the state courts of Iowa where the State of Iowa has been a party claiming to own river land. Two cases involving ownership of river land have reached the Iowa Supreme Court for decision: *State of Iowa* v. *Raymond, et al.*, 254 Iowa 828, 119 N.W.2d 135; and *Dartmouth College* v. *Rose, et al., State of Iowa, Intervenor*, 257 Iowa 533, 133 N.W.2d 687. In the *Raymond* case, Iowa's title to the disputed area was quieted; in the *Dartmouth College* case, Iowa's claim to the disputed area was rejected. A third case involving ownership of a river area with Iowa as a claimant reached appellate court, namely: *Tyson* v. *Iowa*, 283 F.2d 802; the Court of Appeals for the Eighth Circuit held that Iowa was entitled to the damages for taking of an easement across a disputed area and it inhered in the decision that Iowa was the owner of the area in dispute.

The above mentioned cases were not re-tried before me in the instant case, but some evidence of the underlying facts in them was introduced before me. Suffice to say that there is no evidence of bias on the part of any of the

courts involved, and there is no evidence tending to indicate that the three results were anything other than fair, equitable and correct.

It has never been held that a party cannot pursue his legal or equitable rights or remedies in courts of competent jurisdiction merely because that party may have more financial and manpower resources at his command than the opposing party. If this were the rule, all of our states, and the United States itself, and many large corporations would be barred from the courts most of the time.

Whether or not the courts of Iowa have been applying proper rules to determine ownership of river lands admittedly within her own borders is not for this Court to say because, as hereinabove pointed out, the several states are each and all entitled to apply their own title laws within their own borders, subject only to the requirement that such laws be constitutional.

On account of all of the foregoing, it is my finding and conclusion that (1) Nebraska has failed to carry her burden of proving that she has any real interest in the present controversy; (2) Nebraska has failed to prove facts such as to entitle her to maintain the instant case under the theory of parens patriae; (3) Nebraska has failed to prove any violation of the 1943 Boundary Compact by Iowa.

Therefore, Nebraska's Complaint should be dismissed and denied.

PRE-1943 HISTORY OF THE MISSOURI RIVER

The first recorded navigation of that part of the Missouri River which now constitutes part of the western border of Iowa and the eastern border of Nebraska was by the Lewis and Clark Expedition during the first decade of the 19th Century. The annals of that expedition are

available for all to read. Reading them, one must be filled with admiration at the bravery, perseverance and will of those hardy men. Probably the chief adversary the expedition had to fight was the river itself.

The channel was clogged with snags; when the river was at low stage, numerous sand bars appeared or lay just beneath the surface; it was difficult to select a channel among the snags and bars which would be navigable; the course of the river was tortuous and meandering; note is made that in one day, near where the cities of Onawa, Iowa, and Decatur, Nebraska, are now located, the expedition traversed a great loop of the river and arrived at nightfall little more than a mile from their starting point of the morning.

In 1846, Iowa was admitted to statehood with part of its western boundary (between the Iowa-Missouri boundary thence upstream to the mouth of the Big Sioux River near Sioux City, Iowa) described as the "middle of the main channel of the Missouri River", and in 1867, Nebraska was admitted with its eastern boundary described similarly. Thus, the two states came to be contiguous along an approximate 200 mile segment of the Missouri River.

Since rivers are natural boundaries, many rivers have become the boundaries between many of the states of the Union. These boundaries became the subject of considerable litigation, from which "the rule of the thalweg" evolved. "The rule of the thalweg" may be succinctly described as follows: Whenever a boundary, public or private, is defined as the "middle" of a stream, the word "middle" shall mean "thalweg". Generally, the term "thalweg" refers to the deepest part of the stream, which is generally the navigable channel. Two exceptions to the rule of the thalweg have been generally recognized: First, whenever the thalweg of a stream suddenly shifts by the process

known as "avulsion" from one side of a tract of land to the other, the boundary remains in the former and now abandoned channel, and does not move to the new channel. Second, whenever a stream is deep enough to be navigable in more than one place, and is in fact navigated along some course which is not the deepest, the thalweg and the boundary shall be the "boat track". But, both in fact and in law, it is considered that movements of the thalweg are usually and commonly by the process known as "accretion", which is the gradual process of the water washing away one bank and building new land behind its movement, and the boundary was considered to move as the thalweg moved in this manner.

The Iowa-Nebraska boundary would be governed by the rule of the thalweg, with its exceptions, modifications and refinements, until July 12, 1943.

The two states engaged in litigation one time before the instant case concerning a segment of their common boundary. The case was *Nebraska* v. *Iowa*, 143 U.S. 186, decree at 145 U.S. 519. The case involved a segment of the river near the Iowa town of Carter Lake, which is northeasterly a short distance from Omaha, Nebraska, then and now on the west side of the Missouri River. This Court applied the rule of the thalweg in that case, found that the town of Carter Lake had been cut off from Iowa by an avulsion, and that it was therefore in Iowa although west of the river. The Carter Lake locale is not one of the disputed areas in the present case.

Many locations up and down the Iowa-Nebraska boundary have been the subject of litigation in the state courts of both states and in the federal courts of original jurisdiction in both states, but these cases usually concerned the ownership of land as distinguished from location of the state boundary.

It seems that the business of commercial navigation has had two flowerings on the Missouri River, and that a third flowering of navigation is now taking place. First, there was considerable freighting on the river before the Civil War, ended by the Civil War when the War Department expropriated nearly all the river boats for use as troop transports, gun boats and material carriers on the Mississippi and other rivers where the fighting was going on. After the Civil War, a second flowering of river navigation occurred, which was ended when the railroads reached the area in the latter years of the 19th century. River transportation was so hazardous, uncertain and expensive that the steamers were unable to compete pricewise with the rails. Steamboating on the Missouri River remained in the doldrums until, in about 1952, the U. S. Army Corps of Engineers was able to assure a navigable channel to Omaha and Sioux City during about eight months each year.

Neither Iowa nor Nebraska appears to have paid much attention, as sovereign entities, to their common boundary along the Missouri River until about 1902, when there seems to have been a recognition by some citizens and officials in both states that the boundary was unsatisfactory and that a new one should be fixed and established. Negotiations for a new boundary went forward in a rather desultory manner until the mid-1930's. The reason why the boundary had become unsatisfactory was that its precise location at many places had become doubtful and uncertain; this doubt and uncertainty was a handicap and hindrance in matters of law enforcement, taxation, and land ownership.

Prior to about 1930, the U. S. Army Corps of Engineers had been concentrating its efforts to develop the Missouri River for navigation and flood control on that reach of the

river from its mouth near St. Louis upstream to Kansas City. In the late 1920's, the Corps began to receive authorizations and appropriations to develop the river upstream from Kansas City to Sioux City, Iowa. Planning went forward immediately and actual construction commenced in about 1933.

The Corps of Engineers found the same type Missouri River which Lewis and Clark had encountered more than a century before. It was wild, wide, sinuous, shallow, and choked with sand bars and snags. It was almost useless for commercial navigation. It usually flooded the valley regularly in April when spring came to Nebraska, Iowa, Minnesota and the Dakotas, and again in June when snow in the Rocky Mountains melted, and usually several more times each year from summer and fall rains.

The Corps had surveyed the entire river from Kansas City to Sioux City in 1923. They had caused aerial photographs of this entire reach to be taken in the winter of 1925-1926 and maps had been made from these photographs. The same was done in 1928 and again in 1930. The Corps apparently found that mapping from aerial photos was not sufficiently accurate for their purposes, so in 1931 and 1932, the river was again surveyed; in this survey, elevations of land along the river were noted, topography was noted, the channels were sounded and depths of water noted, and control lines were laid out on each side so that dikes and other improvements could be located with surveying accuracy.

Corps personnel who worked on the design and construction of the project were witnesses before me. From this testimony and from the documents, maps and photographs in evidence, I ascertain that the Corps design and plan was to narrow and confine the river into one channel, 700 feet wide, which would be a series of curves or bends

alternately from one side to the other. Within the 700 foot wide channel, they proposed to maintain a navigation channel with a minimum depth of six feet.

The precise alignment of the "designed channel" was dictated by a number of factors: For instance, the river had to pass under all existing bridges. In addition to bridges, there were "hard points", "bluff contacts" and cities and towns which it was desirable that the channel be close or contiguous to. Then there was an optimum degree of curvature to be attained as nearly as possible. Lengthy straight reaches were to be avoided. Economy dictated that the existing natural channel be utilized to the greatest extent possible.

At the outset, the river was trained to go into the desired curves by means of pile dikes, some of which were called "lead-off structures", some were called "baffles", and some were called "revetments". Work to cause the river to flow into a particular designed bend would generally commence at the upstream end of the bend. First, a lead-off structure would be built just upstream from the upper end of the designed bend, this so that the river would not flank the structures later to be built in the bend; the lead-off structure was parallel to the designed channel. Then, downstream from the lead-off structure, a series of baffles were built out from the shore to force the river to curve in the desired direction. Finally, revetments were usually built on the outside of the bends to contain the river to a designed width of 700 feet.

After the work had gone forward by the above methods for about four years, several canals were dredged in locations where the river had not moved into the designed channel with the alacrity deemed desirable by the Corps of Engineers.

By 1943, the Corps of Engineers reported that the project was 99% complete below Omaha and 78% complete between Omaha and Sioux City. The river was entirely within the designed channel except for three segments, totaling about 2000 feet in length, where it was not entirely within the design. The entire project had been accomplished by the pile dike method, except canals had been dredged at 11 locations.

THE IOWA-NEBRASKA BOUNDARY COMPACT OF 1943

As I have mentioned, negotiations for a new state boundary line had commenced in about 1902. It is probable that the early negotiations bore no fruit because, until the 1930's, there was no fixed line available to the two states which could be used to describe the new boundary; also, until the 1930's there was no way to know where the Missouri River would be from year to year, or from month to month, or even from day to day.

The Corps of Engineers "designed channel" fulfilled both of these needs. The Corps maps and records provided a "center line" which the states could utilize for description of the new fixed boundary. And it was reasonable to expect that the Corps would confine the river to their designed channel so that the new boundary would remain in the river for all time.

At its session in 1941, the Nebraska Legislature adopted the new boundary compact and notified the Iowa Legislature of its action. But this notification arrived too late for the Iowa Legislature to act in its 1941 session. In its 1943 session, the Iowa Legislature enacted the compact and notified the Nebraska Legislature of its action; the Nebraska Legislature re-enacted the compact; on July 12, 1943, Congress gave its consent and approval and the compact became effective as of that date.

The complete text of the Compact as adopted by Iowa may be found in the 1971 Code of Iowa at Page LXIV. The complete text of the Compact as adopted by Nebraska is identical except that the names of the two states are reversed where appropriate.

The new boundary line described was the center line of the proposed stabilized channel of the Missouri River as established by the United States Engineers' Office, Omaha, Nebraska, as shown on certain alluvial plain maps then on file in said office and copies of which were on file in the Secretary of State's offices in both states, except only at Carter Lake. The boundary at Carter Lake was so described that the town of Carter Lake remained in Iowa. Then, the Compact provided:

> "SECTION 2: The State of Iowa hereby cedes to the State of Nebraska and relinquishes jurisdiction over all lands now in Iowa but lying westerly of said boundary line and contiguous to lands in Nebraska.
>
> SECTION 3: Titles, mortgages, and other liens good in Nebraska shall be good in Iowa as to any lands Nebraska may cede to Iowa and any pending suits or actions concerning said lands may be prosecuted to final judgment in Nebraska, and such judgments shall be accorded full force and effect in Iowa.
>
> SECTION 4: Taxes for the current year may be levied and collected by Nebraska or its authorized governmental subdivisions and agencies on lands ceded to Iowa and any liens or other rights accrued or accruing including the right of collection, shall be fully recognized and the county treasurers of the counties affected shall act as agents in carrying out the provisions of this section: PROVIDED, that all liens or other rights accrued or accruing, as aforesaid, shall be claimed or asserted within five years after this act becomes effective, and if not so claimed or asserted, shall be forever barred."

POST-1943 HISTORY OF THE MISSOURI RIVER

Before the Kansas City-Sioux City navigation, bank stabilization and flood control was completed, the country became involved in World War II. During the war, the Corps of Engineers turned its attention, manpower and resources almost entirely to prosecution of projects which were directly concerned with the war.

Fort Peck Dam had been constructed on the Missouri River in Montana. But other upstream dams, later to be known as Garrison Dam, Oahe Dam, Big Bend Dam, Ft. Randall Dam and Gavin Point Dam, in North and South Dakota had not been constructed. Therefore, control of river stages had not been achieved and floods continued.

During and for a time after the war, the river ravaged the bank stabilization structures which the Corps had installed along the river between Kansas City and Sioux City. Below Boyer Bend, which is about 22 miles upstream from Omaha, although the structures were damaged, the river remained in the designed channel. Upstream from Boyer Bend to Sioux City, the river reverted to the wild, escaping from the designed channel in many places.

The most disastrous flood in history occurred in early 1952. (The great flood of 1881 still holds the record for having produced the highest river stage, but the 1952 flood far exceeded it in terms of dollar damages.)

Later in 1952, after the flood, the last of the Dakota dams was closed (Gavins Point Dam) and nothing comparable to the 1952 flood has occurred since, although minor flooding of lands near the river still occurs as a result of ice jams and local heavy rainfall.

At about the time that the Corps was gaining control over river stages by the upstream dams, they also began

giving their attention to repairing the damage to their navigation channel downstream from Sioux City. Downstream from Boyer Bend, because the river had not escaped from the 1943 designed channel, the Corps elected to simply repair and restore the structures so as to stabilize the channel in the same designed channel which had been designed in 1943. Therefore, from Boyer Bend downstream to the Iowa-Missouri state boundary, the mileage today is about 84 miles as it was in 1943, and the Nebraska-Iowa boundary line is still entirely in the river now as it was then, except only at Carter Lake.

Upstream from Boyer Bend to Sioux City, a distance of about 97 river miles, the Corps found it impractical to restore the river to the "state line designed channel" in its entirety. Some segments were restored to the former design, but a new designed channel was laid out for many other segments. This is demonstrated by the fact that mileage from Boyer Bend to Sioux City was approximately 109 miles by following the center line of the 1943 designed channel which is the state boundary, whereas it is now only 97 miles by following the present river. The Corps explains the change of design between Boyer Bend and Sioux City on two bases: (1) It would have been excessively expensive to restore the river to the old design in its entirety. (2) It was felt that some of the bends in the old design were too sharp and that the river should be generally less curvaceous.

About 50 miles of the river between Boyer Bend and Sioux City is in the same channel as was designed for it in 1943; in other words the state boundary is still in the river today for these 50 miles. For a total of about 29 miles in 12 segments, the present river is entirely in Nebraska; at these 12 locations, there is land subject to the sovereignty of Nebraska situated east of the river. For a total of

about 18 miles in eight segments, the present river is entirely in Iowa; at these eight locations, there is land subject to the sovereignty of Iowa situated west of the river. For a distance of about 29 miles in 12 segments, the state boundary is not in the river and is to the east of the river. For a distance of about 18 miles in eight segments, the state boundary is west of the river.

I recite these statistics to show the total effect of what the river did and what the Corps did to the river, after 1943, as regards the state boundary now being substantially different from the Missouri River between Boyer Bend and Sioux City.

The new design for the stabilized channel between Boyer Bend and Sioux City did not emerge from the drawing boards of the Corps of Engineers' offices at Omaha until about 1955. Until then, nobody knew where it would be; nobody knew what lands then existing would be destroyed to make way for the river; nobody knew what areas then in the river would become abandoned channel; nobody knew what construction methods the Corps would employ to move the river from wherever it then was to wherever the Corps might want it to be. Actual construction to place the river in the new design in 1948 at isolated spots was completed in 1960.

When the river reverted to its wild natural condition between Boyer Bend and Sioux City, it washed away lands and created new lands. Then, when the Corps stabilized it to the newly designed channel, they caused it to wash away lands and create new lands. Fresh questions arose as to the ownership of these newly formed areas, some of which are lakes, some of which are marshes, some of which are bars or islands, and some of which are land.

But one question which had always been present as regards areas farmed prior to 1943 had been eliminated by

the 1943 Iowa-Nebraska Boundary Compact. As regards areas formed before 1943, there was nearly always a question as to whether they formed in Iowa or Nebraska, because the pre-1943 state boundary was a moving line, governed by the rule of the thalweg. The 1943 Boundary Compact had created a fixed state boundary line which remained at the center line of the state line channel as that channel had been designed in 1943, and as that channel was produced on certain maps on file in the office of the Secretaries of State of both states, and the post-1943 boundary has not moved with movements of the channel and is not governed by the rule of the thalweg. There may be and are questions as to who may own some of these areas which have formed since 1943; but there can be no question as to which state they formed in; they formed in the state in which they now are located.

It is Iowa's position that ownership of all areas which have formed since 1943 in Iowa must be determined by Iowa law and that the proper forum to make these determinations is the Iowa courts. Nebraska denies both of these propositions and the issues thus existing between the parties will be dealt with in a later division of this Report.

As a result of events that have transpired along the river, both before and after 1943, the State of Iowa presently claims to own some 32 separate areas of land, water, marsh or mixture of the tress. During the trial of this case, these areas were referred to by names as follows (from Sioux City downstream): Dakota Bend, Omadi Bend, Between Omadi and Browers Bends, Snyder Bend, Glover's Point Bend, Winnebago Bend, Rabbit Island, Upper Monona Bend, Monona Bend, Blackbird Bend, Tieville Bend, Upper Decatur Bend, Middle Decatur Bend, Lower Decatur Bend, Louisville Bend, Blencoe Bend, Deer

Island, Little Sioux Bend, Ballard Bend, Soldier Bend, Sandy Point Bend, Tyson Bend, California Bend, Rand Access, Rand Bar, Wilson Island, St. Mary's Bend, Nottleman Island, Auldon Bar, Copeland Bend, Schemmel Island, and State Line Island. Two of the above listed areas are claimed by Iowa entirely by conveyance and not by operation of her law, and I therefore eliminate these two areas from the instant discussion; the areas thus eliminated are Rand Access and Rand Bar.

Eight of the 30 remaining areas formed before 1943; they are: Deer Island, Wilson Island, St. Mary's Bend, Nottleman Island, Auldon Bar, Copeland Bend, Schemmel Island, and State Line Island. Twenty-one areas have formed since 1943; they are: Dakota Bend, Omadi Bend, Between Omadi and Browers Bends, Snyder Bend, Glover's Point Bend, Rabbit Island, Upper Monona Bend, Monona Bend, Blackbird Bend, Tieville Bend, Upper Decatur Bend, Middle Decatur Bend, Lower Decatur Bend, Louisville Bend, Blencoe Bend, Little Sioux Bend, Bullard Bend, Soldier Bend, Sandy Point Bend, Tyson Bend, and California Bend. Iowa's claim of ownership at Winnebago Bend includes purchased land, land and water area formed before 1943, and land and water area formed since 1943. All 30 of the areas are in Iowa, undisputedly, because all are east of the boundary fixed and established by the 1943 Boundary Compact.

I am satisfied from the evidence adduced before me that each of the 30 areas along the river which Iowa claims to own by operation of its common law has its own individual history. Although some areas have points of similarity, it cannot be said that there is any typical set of facts common to any or all of them.

The immediate proximate cause for Nebraska's commencement of the present case appears to have been the

filing by Iowa of two quiet title cases in 1963: In one, Iowa claimed ownership of Nottleman Island in Mills County; the case is entitled *State of Iowa* v. *Babbitt, et al.*, in the Iowa District Court for Mills County. In the other, Iowa claimed ownership of Schemmel Island in Fremont County; the case is entitled *State of Iowa* v. *Schemmel, et al.*, in the Iowa District Court for Fremont County. These cases are still pending, further proceedings in them having been suspended until there is a final decision in the case at bar.

It is Nebraska's claim that Iowa violates the solemn commitment she made in the 1943 Boundary Compact by commencing and prosecuting these two cases because, Nebraska says, both Nottleman Island and Schemmel Island were in Nebraska prior to 1943, both were ceded to Iowa by operation of the Compact, and Iowa promised to recognize as good all titles to ceded lands which were good in Nebraska. I shall deal with the problems relating to Nottleman Island and Schemmel Island in later divisions of this Report.

Then, Nebraska wishes the Court to proceed, on the basis of evidence adduced relative to Nottleman and Schemmel Islands and on the basis of limited and incomplete evidence adduced relative to other areas, to pronounce what might be termed a declaratory judgment and issue permanent injunctions which would lay down rules and prevent or severely inhibit Iowa's future conduct as regards all areas she claims to own in the vicinity of the river. This portion of the case I will also deal with in another division of this Report.

Since 1943, because numerous segments of the boundary line fixed and established by the 1943 Boundary Compact are no longer in the Missouri River, the two states have commenced new negotiations for another new bound-

ary compact. No new agreement has yet been reached. Nothing concerning this proposed new compact is at issue in this case because it is well recognized that power to make a new compact rests exclusively with the two states, subject only to Congressional approval.

NOTTLEMAN ISLAND

A. Nebraska elected to adduce detailed evidence concerning the history and formation of two sites along the boundary which Iowa claims to own. She seeks by this method to prove that Iowa violated the 1943 Boundary Compact by conduct at these two sites. She also avers that these two sites are typical and similar to all the sites along the boundary which Iowa claims to own. Only brief, fragmentary and partial evidence was adduced by either party concerning the history and formation of the other areas—barely enough to provide the Special Master with a very general knowledge of the other areas.

One of the sites concerning which Nebraska elected to adduce detailed evidence is locally and commonly known as "Nottleman Island".

Today, Nottleman Island is a tract of land comprising some 1600 acres, situated in Mills County, Iowa, east of the Missouri River, and attached to the Iowa riparian shore. It lies in the curve of the river which is known as Rock Bluff Bend. By today's measurement of river miles, it extends approximately from Mile Post 583 to Mile Post 587. It is downstream approximately 8 miles from the place where the Platte River outlets its waters into the Missouri River and is approximately 30 miles downstream from the cities of Omaha, Nebraska, and Council Bluffs, Iowa. Opposite the island, across the river on the Nebraska shore, are two landmark promontories known as King Hill and Queen Hill. Between these two hills is found

the small village of Rock Bluff, Nebraska. King Hill is approximately opposite the middle of the island. Cass County, Nebraska, is opposite Nottleman Island; its county seat is Plattsmouth, Nebraska, a river town upstream a short distance from the island.

Nebraska contends that Iowa violated the terms of the 1943 Boundary Compact by filing a Quiet Title Action in the District Court of Mills County, Iowa, entitled *"State of Iowa v. Babbitt, et al."*, wherein she claims ownership of Nottleman Island by operation of Iowa's common law rule as to ownership of navigable river beds and islands formed therein. Nebraska contends that Nottleman Island formed in Nebraska prior to 1943, west of the thalweg of the Missouri River, and she attempted to prove this factual proposition. Nebraska contends that, regardless of in which state the island did form, Nebraska exercised sovereignty and dominion over it and Iowa acquiesced so that the island became part of Nebraska by the theory of prescription, acquiescence or recognition. Nebraska further contends that, by the terms of the 1943 Compact, Iowa's common law rule as to state ownership of navigable river beds was either repealed or modified so that it no longer applies along or in the vicinity of the Nebraska-Iowa boundary.

Iowa, on the other hand, contends that its commencement of said case did not violate the Compact; that since the land is undisputably in Iowa, determination of its ownership is properly and exclusively within the jurisdiction of the Iowa courts; that Nottleman Island formed in Iowa, east of the thalweg of the Missouri River and east of the Iowa-Nebraska state boundary line; that Iowa did not lose its sovereignty over the island prior to 1943 by any theory of acquiescence, prescription or recognition; that the 1943 Iowa-Nebraska Boundary Compact, although it

became a part of the law of Iowa, did not repeal or change Iowa's common law as to state ownership of navigable rivers and islands therein.

B. Evidence as to the location of the pre-1943 state boundary by locating the thalweg:

The original government surveys of Iowa and Nebraska, made in the 1850's and 1860's, show that at that time, the Missouri River ran approximately where it does today, and that the spot under the sky which is now occupied by Nottleman Island was almost entirely in Iowa. The right, or west, bank came down from the north, ran past Queen Hill in close proximity to its eastern base, thence southwesterly near to the town of Rock Bluff, struck the northerly base of King Hill which forced the river easterly or southeasterly along the northerly base of King Hill, thence it went southerly past the east base of King Hill in close proximity to the base. Adjacent to the right bank were the two hills made up mostly of limestone; they were hard points not erodable by action of the river waters. The left bank also came down from the north roughly parallel to the right bank, until it was forced a bit east in order for the river to pass by King Hill. The natural river was substantially wider than today's river (The Corps of Engineers has narrowed the river in order to obtain depth for navigation). The left bank ran through flat erodable soil on the Iowa shore. There were no islands in the spot under the sky which is now Nottleman Island.

The evidence by later maps and other records and testimony is clear that during the years following the original government surveys, the river widened out by eroding the soil along its left bank, while the right bank remained almost stationary along the bases of the two hills. By

1922, 2500 acres of Mills County, Iowa, farm land had been washed away, and the river was about one mile wide in Rock Bluff Bend.

As the channel became wider, it became more shallow, and its current was slowed, so that the river's natural sediment load was dropped in the bed. Thus, sand bars came to form and the channel became really a series of channels running between numerous sand bars, and the channels and bars changed in size, shape and location. Sometime prior to 1923, a sand bar or several bars joined together and arose above the waters of the river with such permanence that it became an island. The parties are agreed that the island later to become known as Nottleman Island appears on a map of the area made by the U. S. Army Corps of Engineers in 1923; the area is denoted on that map as "willow bar". All subsequent maps and aerial photographs show land in that location.

So, the beginnings of Nottleman Island existed as an island in the Missouri River in 1923, and those beginnings were in Iowa or Nebraska depending upon which side of the island the thalweg had been when the island first arose. Both parties adduced evidence upon this subject and numerous witnesses testified concerning the relative sizes of the two channels, one east of the island and the other west, and there is testimony as to where the few boats plying the river in those days went.

The evidence is conflicting as to when the island formed. Nebraska adduced evidence tending to show that it formed prior to 1900; Iowa adduced evidence tending to show that it didn't form until shortly before 1923. Annular rings were counted on samples taken from several trees found growing on the island; Nebraska's expert was of the opinion that the oldest of these trees commenced its growth

in 1900; Iowa's experts, counting the rings on the very same sample, were of the opinion that this same tree commenced its growth in 1922.

Nebraska's witnesses generally observed a substantial channel east of the island during the early years of its existence; Iowa's witnesses generally observed a substantial channel west of it. Many of the witnesses were unable to compare the two channels because they saw only one of them. Those witnesses who did attempt comparisons were in disagreement as to which was wider or deeper. Some witnesses saw boats plying the east channel; some saw boats plying the west channel.

Unfortunately, there was no official mapping of the river at Rock Bluff Bend between 1890 and 1923. The 1890 map by the Missouri River Commission shows a very small island in the approximate location of the oldest part of present day Nottleman Island; this small island was close to the Iowa shore; there is no indication on the 1890 map as to whether the thalweg was east or west of it, and of course, there is no eye witness testimony concerning conditions in 1890; furthermore, the evidence taken as a whole is persuasive that this 1890 island did not survive.

In 1923, the U. S. Army Corps of Engineers made a topographic and hydrographic survey of Rock Bluff Bend. All channels of the river which were deep enough to sound were sounded at irregular intervals from shore to shore. This map shows that the widest and deepest channel was west of the island. The island is denoted on this map as "willow bar" which negatives Nebraska's contention that there were 23 year old cottonwood trees growing on it at that time.

In 1922, landowners on the Iowa side organized a protection district to construct "retards" along the Iowa shore

to stop the river from cutting away the Iowa land, and the map for this protection district is in evidence. It is of no probative value as to the location of the thalweg.

After 1923, many mappings of the area were done, many aerial photographs were taken, and there is considerable testimony concerning the island and the channels. This evidence shows that generally, the main channel has remained west of the island from 1923 to the present time, although there is some evidence by eyewitnesses and maps tending to show that at times in the late 1920's and early 1930's, perhaps the east channel carried more water and was sometimes used for navigation. I would point out that all evidence and testimony concerning where the thalweg was after 1923 is irrelevant and immaterial. If the thalweg did in fact shift from one side of the island to the other after 1923, sovereignty over the island would not shift from one state to the other with these shiftings. This is the law of avulsion.

Having carefully considered all of the evidence relating to the question of whether Nottleman Island formed in Iowa or Nebraska, I find and conclude as follows:

(1) Commercial navigation of the Missouri River at Rock Bluff Bend was so sparse, occasional and infrequent at the time when Nottleman Island formed that there was no "boat track". Therefore, the "boat track" rule of which *Minnesota* v. *Wisconsin*, 252 U.S. 273, is an example, cannot be applied to determine in which state Nottleman Island formed.

(2) If a "boat track" did in fact exist, there is no preponderance of evidence as to where it was, and this is an additional reason why the "boat track" rule cannot be applied in this case.

(3) The deepest thread of the river, which is the "thalweg" by usual definition, was west of the island in 1923, and the island was on the Iowa side of it.

(4) There is no preponderance of evidence to establish when the island formed.

(5) There is no preponderance of evidence to establish that the deepest thread of the river was east of the island when it formed.

(6) Therefore, Nebraska has failed to carry the burden of proof which she assumed as Plaintiff in this case to prove that Nottleman Island formed in Nebraska.

It is my opinion that when Nebraska commenced this case, she not only shouldered the normal plaintiff's burden of proving her facts by a preponderance of evidence, but that she shouldered the heavier and more demanding burden of proving her case by clear, satisfactory and convincing evidence. It is presumed that Nottleman Island formed in Iowa. This is because of two well and widely recognized presumptions: First, is the presumption in favor of accretion and against avulsion. Second, is the presumption favoring the permanency of boundaries.

It is undisputed that the thalweg of the Missouri River was west of Nottleman Island in 1943 immediately before the Boundary Compact became effective. It is my finding, based on the 1923 Corps of Engineers' Topographic and Hydrographic Survey, that the thalweg was also west of the island in 1923. By the presumption in favor of accretion and against avulsion, it is presumed that the thalweg came to be west of the island in both years by the gradual process of accretion which would have carried the state boundary with it, and not by any sudden avulsion which would have left the state boundary in an abandoned channel east of the island. By this presumption favoring the permanency of boundaries, when applied to a river boundary, it is presumed that the main channel in which the thalweg always resides is always the boundary. The

two presumptions are very similar if not identical. Both of them say that Nottleman Island was in Iowa before the 1943 Boundary Compact and that the island was not ceded to Iowa from Nebraska by operation of the Compact. To overcome either of these presumptions, it was incumbent on Nebraska to prove that there was an avulsion at Rock Bluff Bend some time prior to 1923 and after Nottleman Island had come into existence by clear, satisfactory and convincing evidence. Since I have heretofore found that Nebraska failed to prove her claimed facts regarding Nottleman Island by a preponderance of evidence, it follows even more clearly that she has failed to prove them by any clear, satisfactory or convincing evidence. Also, in this connection, I am mindful of the language of Mr. Justice Roberts in *Colorado* v. *Kansas,* supra, quoted at page 9 hereinabove.

I should note at this point that it is the contention of Nebraska that the two presumptions which I have just been discussing are invalid and should be discarded so as not to apply in this case. This contention by Nebraska will be discussed later in this Report commencing at page 55.

C. It is Nebraska's further contention that, regardless of which side of Nottleman Island the state boundary was on when the island formed, and regardless of which state it formed in, it was in Nebraska prior to the effective date of the 1943 Boundary Compact by the theory known as prescription, acquiescence or recognition.

I summarize the facts which Nebraska proved to support this theory as follows: There is eye witness testimony to farming and residency on the island in 1929. There is a suggestion that there was human endeavor of some sort going on in 1926, but the aerial photographs taken by the Corps of Engineers in 1926 disclose no sign of human occupancy or farming in that year. Aerial photo-

graphs taken in 1930 show a small patch apparently under cultivation in that year. Mrs. Ruth Dooley testified that she spent the summer of 1929 on the island with her uncle and grandparents.

The earliest action which might be termed an exercise of Nebraska jurisdiction over the island was in August, 1933, when the County Surveyor of Cass County, Nebraska, apparently at the request of the then occupants, surveyed the island. He recorded a plat of his survey in his own office and another copy in the office of the Register of Deeds of Cass County, Nebraska. The first taxation of the island in Cass County, Nebraska, was for the year of 1934.

During the later 1930's (from 1934 on), and until the Boundary Compact in 1943, several people lived and farmed on the island. The Cleo Baker family occupied the south half of the island as tenants of John Nottleman; the Shipley family occupied the north half claiming to own it. There is no evidence that any of these people or John Nottleman entered upon the island with any claim of right or color of title; none of them owned any Nebraska riparian land which the island might have accreted to; they simply went out there and started occupying and farming.

These people were Nebraskans originally and they claimed to be Nebraskans after moving out to the island. After 1934, they filed Rock Bluff Precinct, Cass County, Nebraska, personal property tax returns; they registered their motor vehicles in Nebraska; they sent their children to the Rock Bluff, Nebraska, school tuition free; the birth of a Shipley child was registered as a Nebraska birth; the death of another Shipley child was registered as a Nebraska death.

In the late 1930's and early 1940's, several conveyances of portions of the island were recorded in the official records

of Cass County, Nebraska. One of these deeds recited that it was a substitution for a lost deed executed in 1928 but never recorded.

In 1940, the Shipleys quieted their title to the north half of the island in the District Court of Cass County, Nebraska, against the owners of Nebraska land which was riparian to the island. The Shipley title was quieted because the Shipleys were found to have been in peaceable possession for more than ten years.

The south half of the island was included as an asset in the estate of John Nottleman, deceased, who died March 31, 1940. The estate was probated in the County Court of Cass County, Nebraska. The property was sold by the Administrator in these proceedings and the deed was recorded in Cass County, Nebraska.

The foregoing is a brief statement of the evidence by numerous witnesses and many public records tendered by Nebraska to establish that Nebraska was exercising jurisdiction and dominion over Nottleman Island prior to 1943, the year in which it became certain for once and all and beyond dispute that the island was in Iowa by operation of the Boundary Compact.

There is no evidence that the State of Iowa or any officials of the State of Iowa had any knowledge of any of the aforementioned purported exercises of dominion by Nebraska over the island in or prior to 1943. Also, as I have already noted, these purported exercises of dominion had only transpired for a period of about ten years prior to the Compact. There was no construction of any roads or other public improvements on the island by Nebraska officials; no visible conduct on the land which Iowa or Iowa officials saw or should have seen.

I find and determine from this evidence that, as of 1943, Nottleman Island was not in Nebraska by reason of prescription, acquiescence or recognition for two reasons: (1) There is no proof whatsoever that Iowa or any responsible officials of Iowa had any knowledge of any of Nebraska's purported exercises of sovereignty over the island prior to the Compact, and (2) The approximate ten year period of Nebraska's purported exercise of sovereignty is entirely too brief.

Concerning reason (1) above, the following quotation from the Report of Special Master Gunnar H. Norbye in *Arkansas* v. *Tennessee,* No. 33 Original, filed July 29, 1969, at pages 11 and 12, is particularly apropos:

> "It is not necessary to discuss in detail the evidence regarding the alleged exercise of dominion and sovereignty of Arkansas as to the lands in question. There is evidence that as to certain parcels of land in the disputed area taxes thereon have been paid to the State of Arkansas by a limited number of individuals. And it is readily evident that certain individuals, mainly those who are residents of Arkansas, have considered that these lands belonged to Arkansas rather than Tennessee. Hunters and fishermen living in the State of Arkansas have procured Arkansas licenses to carry on such activities. Others have procured Tennessee licenses. There is evidence that officials of the State of Arkansas in enforcing the game and fishing laws have patrolled these lands in behalf of the plaintiff. Tennessee game wardens also have considered this area their territory. Some crop raising and timbering have been carried on by Arkansas residents. *But there is a total lack of evidence that the State of Tennessee as a soverign State has ever recognized or acquiesced in the claim of sovereignty of these lands by the State of Arkansas or its residents.*" (Italics added)

Concerning reason (2) above, the most recent case in this Court involving prescription which has come to my at-

tention is entitled *Illinois* v. *Missouri*, No. 18 Original, October Term, 1969, in which Special Master Harvey M. Johnsen was called upon to determine whether three islands were in Illinois or Missouri. Judge Johnsen first determined that "Cottonwoods" and "Roth Island" were in Missouri and "Beaver Island" was in Illinois on the basis of how they formed and where the Mississippi River was when they formed. He then found that "Cottonwoods" was in Missouri by prescription (this being an additional reason for awarding "Cottonwoods" to Missouri), but that neither prescription or acquiescence had been proved against Illinois as to "Roth Island" or "Beaver Island".

Missouri had exercised sovereignty over "Cottonwoods" for approximately 50 years by engaging in a realistic, systematic and progressive scheme of taxation, building and maintaining public roads in the area, recordation of muniments of title and other exercises of dominion. Illinois had engaged in prior litigation in federal court which involved sovereignty over the area and had been defeated. Judge Johnsen found that "Cottonwoods" was Missouri's by prescription although 50 years "is a shorter length of time than had ever been involved in the situations of the Court's previous decisions". Judge Johnsen states concerning "Roth Island" and "Beaver Island" that there was "no exercise of sovereignty of such character and for such period of time"; he noted that "Beaver Island" had been taxed in Missouri for only ten years and there was no evidence that "Roth Island" had been taxed in Missouri any longer.

Other prescription cases in this Court, where prescription has been found, have involved long periods of time: *Indiana* v. *Kentucky*, 136 U.S. 749, over 70 years; *Arkansas* v. *Tennessee*, 310 U.S. 563, 112 years; *Maryland* v. *West Virginia*, 217 U.S. 1, 122 years; *Rhode Island* v.

Massachusetts, 4 How. 491, 125 years; *Michigan* v. *Wisconsin,* 270 U.S. 295, 76 years.

But Nebraska contends that the period of Iowa's acquiescence and recognition did not end in 1943. She contends that Iowa continued to acquiesce and recognize until about 1960 when Iowa first publicly asserted her claim of ownership to the island. This would add some 16 years to the period, making a total of approximately 26 years. During this additional period from 1943 to about 1960, Iowa did nothing to eject the occupants from the island and permitted them to remain in possession. A member of the hired staff of the Iowa Conservation Commission wrote a letter in about 1952 disclaiming that the island was owned by the state. There is evidence that the Iowa Attorney General knew of the situation in about 1952 and took no action. The private claimants to the island started paying taxes on it in Mills County, Iowa, in about 1947. It was not taken off the tax rolls in Cass County, Nebraska, until 1952.

The difficulty with all of this evidence tendered by Nebraska as to what transpired between 1943 and 1960 has to do with *ownership* of the island; it has no relevancy as to where the Iowa-Nebraska boundary line was during that period. The two states had definitely fixed the boundary as west of the island and the island in Iowa by enactment of the 1943 Boundary Compact. This is a boundary case—not a quiet title case. It is not for this Court to say who may be the owner of Nottleman Island; ownership is not an issue in the case. It is my opinion that the question of ownership of the island, which involves the question of whether or not Iowa has become estopped, or been guilty of laches, or has acquiesced, is properly determinable in the state courts of Iowa, the state in which the land is now admittedly situated.

Only one of the parties who claim to own Nottleman Island—the State of Iowa—is a party to this case, and subject to any judgment and decree which may be rendered herein. The several parties who claim to own the island adversely to Iowa are not parties. This is an additional reason why this case must be considered strictly as a boundary case and not a quiet title case.

D. I summarize my findings and conclusions regarding Nottleman Island as follows:

(1) Nebraska has failed to prove that the thalweg and the boundary were east of Nottleman Island when the island formed.

(2) Nebraska has failed to prove that Nottleman Island became a part of Nebraska in or prior to 1943 by any theory of prescription, acquiescence or recognition

(3) Nebraska has therefore failed to prove that Iowa violated the 1943 Boundary Compact when Iowa claimed to own the island by commencing the case entitled *"State of Iowa* v. *Babbitt, et al."*, in the District Court of Iowa in and for Mills County.

(4) There was no title "good in Nebraska" as to Nottleman Island in 1943, which Iowa is now bound to recognize as "good in Iowa", because, in order for a land title to be good in Nebraska, it must be proved that the land was in Nebraska, and this was not proved.

(5) Therefore, Nebraska's prayer for relief as regards Nottleman Island must be dismissed and denied.

SCHEMMEL ISLAND

A. Today, Schemmel Island which is sometimes locally known as Otoe Island, is a tract of land comprising some 660 acres of land situated in Mills County, Iowa, east of the Missouri River, and attached to the Iowa riparian shore. By today's river mileage, it extends approximately

from Mile Post 554.5 upstream to Mile Post 557. It is downstream about five river miles from Nebraska City, Nebraska. It is upstream about two miles from the Iowa-Missouri state boundary. The Nebraska county opposite is Otoe County.

There are similarities between the facts at Schemmel Island and Nottleman Island, but there are also substantial differences between the facts relating to the two islands.

Nebraska contends that Iowa violated the terms of the 1943 Boundary Compact when on March 26, 1963, she filed a quiet title action in the District Court of Iowa in and for Fremont County entitled *State of Iowa* v. *Henry E. Schemmel, et al.*, and therein claimed title and ownership of the area identified herein as Schemmel Island, by operation of Iowa's common law rule of ownership of beds of all navigable rivers within Iowa, and to the islands formed therein. Nebraska asserts that Schemmel Island was in Nebraska prior to 1943 by the facts of its formation and by prescription. She further asserts that Iowa's common law of state ownership was revoked or superceded by the Compact so as not to apply to Schemmel Island.

Iowa, again, contends that she did not violate the terms of the Compact, and the determination of land titles is reserved to the individual states in which the land is located, and that as the land in question has been undeniably within the State of Iowa since July 12, 1943, the determination of the ownership of the area rests exclusively with the courts of Iowa; that the terms of the 1943 Compact are a part of the Iowa law, but that the same did not revoke or supercede Iowa's common law; that Schemmel Island formed as an island in the bed of the Missouri River east of the pre-1943 Iowa-Nebraska boundary as governed by the rule of the thalweg. That the evidence does not estab-

lish that Iowa lost dominion over the island prior to July 12, 1943, by any theory of prescription, acquiescence or recognition.

B. Nebraska undertook to prove that three avulsions had occurred at Otoe Bend prior to 1943. The first is alleged to have occurred between 1900 and 1905, another shortly after 1905, and the third in 1938.

The original government surveys of the area (in 1847, 1852, 1855, and 1858) show that almost all of that spot under the sky which Schemmel Island now occupies was in Iowa or in the river. The land along both banks at Otoe Bend was of the same general type—soft and easily erodable. Thereafter, the river moved laterally, both east and west, building up numerous sand bars and creating numerous channels of varying size and permanency. That by 1895 the left bank had by such movements proceeded about three-quarters of a mile easterly to what is now identified as the east bank of an abandoned channel referred to as the Iowa Chute. This is fairly admitted by both Iowa and Nebraska. However, Iowa contends there is no competent evidence that the thalweg of the Missouri River ever occupied the Iowa Chute or that it was anything more than one of many channels occupied by the river in an area where it took on the characteristics of a braided stream due to the influx of the Platte River some distance upstream. Nebraska, on the other hand, contends that by virtue of its composite of the pages from an "Ancient Plat Book" located in the records of Otoe County, Nebraska, referred to herein as the "Pierce Survey of 1895", the thalweg in 1895 was located near the east bank of the Iowa Chute. At this point it is sufficient to state that the question of how far the river moved eastward is not determinative of where the boundary between the two states was located at that point in time when the present day Schemmel Is-

land started to form. The land which constitutes present day Schemmel Island did not commence to form by rising above the waters of the Missouri River until at least 33 years later, in 1930.

Nebraska contends the river moved eastward to the Iowa Chute by erosion, building up land behind its movement by accretion prior to 1895, and then the river sometime between 1900 and 1905 moved back to a position just east of present day Schemmel Island by a process known as an avulsion, thus leaving a permanent Iowa-Nebraska boundary in the Iowa Chute. She then attempts to establish a second avulsion, by the witness Elmer "Buck" Garrison, from the 1905 position around the present day island to a position approximately where the Missouri River is today. To establish the first avulsion out of the Iowa Chute, leaving the state boundary in the abandoned channel, Nebraska introduced a tree sample, identified as taken from Tree No. 230, a tree growing in 1965 on what may have been the approximate right bank of the Iowa Chute, which her expert testified started to grow in 1895, but Iowa's two experts testified started to grow in 1903. Nebraska would conclude from this that the river had to move around this tree after 1895 by avulsion, with no evidence as to the size of the land area on which the tree took root, or that the left bank had not already accreted west sufficiently. To substantiate this theory, she introduced testimony of Dr. William N. Gilliland, a geologist and professor of geology at Rutgers University, formerly of the University of Nebraska. Dr. Gilliland's theory was that in and around 1900, the Missouri River at Otoe Bend was a typical meandering stream. It was Dr. Gilliland's opinion that the river could return westward only in two ways, i. e., by a neck cut-off where the river finally erodes until merging at the neck and leaving an abandoned channel in the old

curve, or a chute cut-off where the river in high water cuts behind the developed point bar suddenly.

Iowa's position about this matter is that even if the thalweg of the river ever did run through the Iowa Chute (a proposition which she denies), the evidence establishes that the thalweg retreated westward from the Iowa Chute in the same manner that it had gone eastward so as to get there; that therefore, if the state boundary moved eastward with the thalweg into the Iowa Chute before 1900, it also moved westward with the thalweg from the Iowa Chute after 1900 when the thalweg moved to its 1930 location. In other words, Iowa contends that all movements of the thalweg at Otoe Bend were by accretion and none by avulsion.

Iowa does not simply rely on the presumption in favor of accretion and against avulsion. Dr. Lucien M. Brush, an expert in the field of geomorphology of Princeton University, formerly of the State University of Iowa, took issue with Nebraska's Dr. Gilliland; it was Dr. Brush's opinion that the natural Missouri River from the mouth of the Platte River downstream to a point below Otoe Bend was not a "typical meandering stream", but instead was a "braided stream"; thus, it was his opinion that the elemental textbook principles which govern the movements of typical meandering streams did not apply to the natural Missouri River at Otoe Bend. Dr. Brush had examined the results of field investigations done by Dr. Robert V. Ruhe and Dr. Thomas E. Fenton at Otoe Bend and concurred in the expert testimony of Dr. Ruhe and Dr. Fenton. Dr. Ruhe was Senior Staff Geomorphologist for the U. S. Soil Conservation Service and Professor of Geomorphology at Iowa State University; Dr. Fenton was an Associate Professor of Agronomy at Iowa State University. Both testified concerning their detailed study of channel movements and

land formation in Otoe Bend. Maps and other data revealed in their investigation are in evidence.

Based on these studies and his previous experience and knowledge of the matters covered, Dr. Ruhe gave as his opinion that prior to 1930 there had been a general bulging or bifurcation, the left bank moving left and the right bank moving right. That the left bank of the river moved back west over a long period of time in stages, by the process of accretion from the Iowa Chute to just east of present day Schemmel Island. The most conclusive evidence of this gradual westward movement was the fact that a number of "scarps" facing westward were found west of the Iowa Chute, each of these marking a left bank position; the most conclusive evidence that no avulsion occurred as the channel moved westerly from the Iowa Chute was the fact that there were no scarps facing easterly in the area—in other words, all right bank positions were washed away as the river moved west. If there had been an avulsion as the channel moved westward, there would have been a scarp facing east.

It was Dr. Ruhe's and Dr. Fenton's opinions that Schemmel Island developed as an island and in his opinion this was established by the soil texture and the comparable ages of development of the various soils on the island. The oldest soil on the island is 1930, and the island developed basically as the result of the construction of the U. S. Army Corps of Engineers dikes and the resulting siltation below and behind the dikes as they were constructed between 1934 and 1939. That it was pretty well formed as an island by 1939, and the soil patterns established that it was built up with overflow, leaving the more coarse materials on the outside of the island, with finer siltation occurring in the central portion. That the soil patterns of the area between the island and the Iowa Chute

established that this area developed as accretion from the Iowa Chute, moving in a westerly direction over the years in stages, stopping sufficiently long in a set position to create natural levees and escarpments remaining today that coincide with the river's positions over the years as demonstrated by available maps and photos. That on the Nebraska shore directly opposite the island the land was formed by accretion as the direct result of the dike construction by the U. S. Army Corps of Engineers.

The Corps of Engineers commenced work on Otoe Bend in the spring of 1934. From the upper end of the bend to a point about six miles downstream, the natural river was too straight and too wide. Their design was for Otoe Bend to be a bend toward Nebraska and next downstream would be Hamburg Bend toward Iowa and thus, the straight wide reach would be changed into two bends in the shape of a letter "S". Aerial photos taken in 1930 and a Hydrographic Survey made in 1931 show the above situation and an updating of bank lines as of July 1933 the same situation continuing up until commencement of work. Superimposition of the outline of today's Schemmel Island on these maps and photos shows that today's island is precisely where the wide natural river was before work was commenced. The natural thalweg in 1931 was located closer to the Nebraska shore so that approximately 85% of the future site of Schemmel Island was east of the thalweg and in Nebraska. No "island" in the normal meaning of that word was in existence in 1930 and 1931; there were sand bars in the river near both banks. Otoe Bend as designed would be almost entirely within the banks of the wide natural channel; it would only encroach slightly on the Nebraska bank in the upper part of the bend and it would encroach slightly on the Iowa bank in the lower part of the bend.

The construction method employed at Otoe Bend from 1934 into 1938 was similar to that employed at Rock Bluff Bend and which I have heretofore described. A "lead off structure" was built along the Iowa shore at the upper end; then "baffles" were built out from the Iowa shore so as to force the river toward the designed channel near the Nebraska shore; then a "revetment" was built along the right bank of the designed channel to prevent the river from going too far into Nebraska and so as to obtain the designed width of 700 feet.

By 1938, the river had been narrowed into the designed channel in the upstream portion of the bend, and it was close to but not in the designed channel in the downstream portion of the bend. The Corps of Engineers decided at this point in time to accomplish the final movement of the main channel into the designed channel by dredging "Otoe Bend Canal". In 1938, the canal was dredged through the downstream portion of the bend and the river was diverted through it. Nebraska asserts that the dredging of this canal was a man-made avulsion, and in fact, that every canal which the Corps has ever dredged was, in law, a man-made avulsion.

It is my opinion and conclusion that some canals which the Corps has dredged have been man-made avulsions and some have not, and that the Otoe Bend Canal is one which was not, for two reasons: First, the Otoe Bend Canal went through an area which was in the river in 1934 when the construction work at Otoe Bend started. The so-called land which the canal went through was sediment which had deposited in that part of the channel between 1934 and 1938 as a result of the Corps construction in the upstream portion of the bend. In other words, the canal went through land which was just temporarily there during construction and because of construction. Second, the Otoe Bend Canal

did not cut off any substantial body of identifiable land; contemporary maps and photographs show that no identifiable land at all was cut off by the canal.

In any event, and even if the Otoe Bend Canal be considered a man-made avulsion, I must point out that such avulsion would not sustain Nebraska's contention that all of the Schemmel Island was in Nebraska prior to the 1943 Compact. The great bulk of the island (approximately 90% of it) had formed on the Iowa side of the thalweg between 1930 and 1938 and before the canal was dredged. If the canal be considered an avulsion, the state boundary was left in the abandoned channel where the thalweg was immediately before the avulsion, which I have heretofore noted was very close to the canal; the boundary did not revert to some place where the thalweg may have been at some prior time.

I would summarize my findings and conclusions regarding location of the pre-1943 state boundary at Otoe Bend by locating the thalweg as follows:

(1) There is no preponderance of evidence to establish that the thalweg and boundary were ever as far east as the Iowa Chute.

(2) There is no preponderance of evidence to establish that, if the thalweg was ever in the Iowa Chute, it left the Iowa Chute by an avulsion.

(3) There is no preponderance of evidence that there was ever any avulsion from any channel to the east of Schemmel Island.

(4) Since there is no preponderance of evidence to establish any avulsion at Otoe Bend, it follows even more clearly that there is no clear, satisfactory or convincing evidence of an avulsion.

(5) The thalweg of the Missouri River was at all times prior to July 12, 1943, the state boundary between Iowa and Nebraska at Otoe Bend.

(6) The thalweg was west of Schemmel Island in 1943; immediately prior to the Iowa-Nebraska Boundary Compact.

C. Again, as at Nottleman Island, Nebraska contends that if the Court should find that Schemmel Island formed in Iowa, or the evidence is inconclusive as to where it formed and thus in which state it was located on July 12, 1943, then the evidence submitted by Nebraska indicating that the people in the area considered it to be in Nebraska on that date must prevail and that Iowa acquiesced in Nebraska's acts of dominion and sovereignty over the area.

Originally, when Iowa and Nebraska were admitted to statehood, a part of that spot under the sky which is now occupied by Schemmel Island was above the river bank in Iowa and presumably it was taxed in Iowa; none of it was above the river bank in Nebraska or taxed in Nebraska. The Pierce Survey of 1895 by the County Surveyor of Otoe County, Nebraska, was for the purpose of adding land to the Otoe County, Nebraska, tax rolls, and it included the spot under the sky which would, some 35 or 40 years later, be occupied by the island; in the meantime, the spot under the sky was dropped from the Fremont County, Iowa, tax rolls and marked "in the river". When the river moved back west after 1895 and ultimately destroyed the Nebraska land in that spot under the sky, the Otoe County taxing officials did not remove it from their tax rolls. Nebraska claims on these facts that Nebraska has taxed Schemmel Island continuously from 1895, but this cannot be true because Schemmel Island did not come into existence until the 1930's, and the land which Nebraska commenced taxing in 1895 had been washed away before the 1930's. A claim similar to Nebraska's was made by Illinois in *Illinois* v. *Missouri*, No. 18 Original, Oct. Term 1969, and was disposed of by Special Master Harvey M. Johnsen with the following remarks:

> "And taxes upon avulsionarily destroyed property would seem, in both sovereign and taxpayer incidence, to be so unusual as to rather suggest that it probably was due to a lack of checking by the taxpayer, and thus represented a mistake which had simply been perpetrated through the years, and which then was later conveniently seized upon and sought to be magnified in relation to the present action."

It is interesting to note that this negligent or inadvertent taxation of Schemmel Island in Nebraska continued until 1949, or six years after the Boundary Compact. Nebraska's claim that the island was taxed in Nebraska from and after 1895 is not well taken.

Henry E. Schemmel and his two sons testified that they "posted" the island and scattered some grass seed on part of it in 1939. Nothing further was done by them in the direction of taking physical possession until about 1953, when they say they again "posted" it and "ringed" some of the cottonwood trees for the purpose of killing them. The Schemmels took their first crop from part of the island in 1956, and have been clearing and farming more and more of it continuously since.

Mr. Schemmel and a partner obtained their first muniment of title for the island, a Quit Claim Deed from one George Ward in 1939; they recorded this deed both in Otoe County, Nebraska, and in Fremont County, Iowa. Nothing appears of record in Otoe County, Nebraska, relating to the title of Schemmel Island prior to this deed in 1939.

The evidence is unclear as to precisely when Schemmel Island became an "island". Dr. Ruhe and Dr. Fenton say there was a "land mass" in part of the spot in 1930, but in their terminology, the "land mass" may have been just a sand bar and the 1930 aerial photos show that this is what it was. Nebraska's tree ring expert was of the opinion

that a tree found growing on the island had commenced its growth in 1932, but Iowa's two experts, counting the rings on the same tree, say that it didn't commence its growth until 1936 or 1937. The salient point is that Schemmel Island existed only for about ten years before the 1943 Boundary Compact, and therefore Nebraska couldn't have exercised sovereignty over it for any longer than about ten years. Actually, the earliest evidence of any exercise of sovereignty was in 1939, only four years before the Compact. Here again, as at Nottleman Island, there is no evidence at all that Iowa or Iowa officials had any knowledge of Nebraska's purported exercises of sovereignty, and nothing was done by Nebraska or Nebraska officials on the island which Iowa saw or could have seen to put her on notice that Nebraska was exercising sovereignty.

For the same reasons heretofore pointed out as to Nottleman Island, I find and conclude that Schemmel Island was not in Nebraska on July 12, 1943, by any theory of prescription, acquiescence or recognition, there being even less evidence to support such theory at Schemmel Island than there was at Nottleman Island.

D. From the foregoing, the Special Master finds that the State of Nebraska, Plaintiff herein, failed to prove any avulsionary action of the Missouri River in the Otoe Bend area that would have fixed the pre-1943 boundary between the states in the Iowa Chute, as alleged, or along any line east of present day Schemmel Island; that Schemmel Island formed in the channel of the Missouri River during the 1930's as the direct result of the dikes and other work of the U. S. Army Corps of Engineers narrowing and controlling the river in its present day channel, and the island formed east of the thalweg as it was pushed westerly by dikes constructed by the Corps of Engineers by the proc-

ess of accretion to the bed of the river; that there being no legal difference between accretion formed by natural river action and accretion formed by the efforts of third parties (U. S. Army Corps of Engineers), the island formed in Iowa and its ownership must be determined by Iowa laws; that the Iowa-Nebraska boundary immediately prior to the work of the Corps of Engineers in 1934 was the thalweg of the river and within the area now occupied by Schemmel Island, and was pushed westward with the river by the accretion land now constituting Schemmel Island to the position occupied at the time of the 1943 Boundary Compact, which is the position the channel occupies today. The island having formed in Iowa prior to July 12, 1943, it could not have been ceded by Nebraska to Iowa.

I further find and conclude that Schemmel Island was not in Nebraska prior to 1943 by any theory of prescription, acquiescence or recognition because (1) the period of purported prescription is entirely too brief, (2) the lands purportedly taxed in Nebraska prior to the early 1930's were destroyed and washed away, (3) the actions of Otoe County officials were not exercises of sovereignty by the State of Nebraska, (4) taxation by Otoe County after 1943 was in violation of the Compact and irrelevant, (5) all purported exercises of sovereignty by Nebraska after 1943 are irrelevant, and (6) there is no evidence of knowledge or acquiescence by the State of Iowa or any of its officials.

I summarize my findings and conclusions regarding Schemmel Island as follows:

(1) Nebraska has failed to prove that the thalweg and the State boundary were east of Schemmel Island when the island formed.

(2) Nebraska has failed to prove that Schemmel Island became a part of the State of Nebraska in or

prior to 1943 by any theory of prescription, acquiescence or recognition.

(3) Nebraska has therefore failed to prove that Iowa violated the 1943 Boundary Compact when Iowa claimed to own the island by commencing the case entitled *State of Iowa* v. *Schemmel, et al.*, in the District Court of Iowa in and for Fremont County.

(4) There was no title "good in Nebraska" as to Schemmel Island in 1943, which Iowa is now bound to recognize as "good in Iowa" because, in order for a land title to be good in Nebraska, it must first be established that the land was in Nebraska at the time such title was created, and this was not proved.

(5) This Court has no jurisdiction to consider present ownership of the Island as all claimants and interested parties are not before this Court, and for the further reason that such determination is within the exclusive jurisdiction of the courts of the State of Iowa.

(6) Therefore, Nebraska's prayer for relief as regards Schemmel Island must be dismissed and denied.

APPLICATION OF THE COMPACT TO OTHER AREAS

I have heretofore noted that altogether, and including Nottleman Island and Schemmel Island, Iowa claims to own 32 areas in Iowa and in the immediate vicinity of the Missouri River. Two of these, Iowa claims entirely by conveyance. Thirty of these she claims at least in part by application of her common law upon the facts as to how these 30 areas were formed. Eight of these 30 areas and part of a ninth came into existence prior to 1943. Twenty-one and part of the 22nd of these 30 areas have come into existence since 1943.

There is a marked and great difference between the pre-1943 areas and the post-1943 areas, which I have heretofore mentioned. An area formed pre-1943 may or may not have been in Nebraska and there may or may not have been a good title to it in Nebraska before it was ceded to Iowa by operation of the 1943 Boundary Compact. But in an area in which the land has washed away or in which new land has formed since 1943, the new river bed or new land cannot be said to have ever been in Nebraska, and there cannot be a good title in Nebraska to any of this new land or new river bed which has become new land or new river bed in Iowa since 1943. It is rudimentary in the law of accretion that when land is washed away, the title also is washed away; and when new land later appears in the same place, ownership of it shall be determined on the basis of whose land it formed as an accretion to. See *Tyson* v. *Iowa*, 283 F.2d 802.

Because this marked difference between the areas which formed before 1943 and the areas which formed after 1943 exists, I have chosen to discuss the other areas involved in this case by categorizing them into those two categories, and I shall first discuss the other areas which formed before 1943.

A. The other areas formed before 1943, besides Nottleman Island and Schemmel Island, are referred to in this record as St. Mary's Bend, Auldon Bar, Copeland Bend, State Line Island, Wilson Island, Deer Island, and a portion of Winnebago Bend. I will not describe in detail the locations of these other areas at this point in my Report; locations are shown on maps which are in evidence; and a series of aerial and ground level photographs taken by the witness Gerald J. Jauron are in evidence showing the general nature of them. Neither Nebraska nor Iowa attempted or purported to adduce in evidence before me all of the

facts and history concerning the formation of these other areas. Only enough evidence was adduced before me concerning them to provide a very general knowledge of where they are and when and how they formed.

An action to establish and quiet Iowa's title to Deer Island was commenced and prosecuted to completion in the District Court of Harrison County, Iowa, in which said court held and decreed that Deer Island is property of the State of Iowa. This decision was affirmed on appeal to the Iowa Supreme Court in the case entitled *State of Iowa* v. *Raymond, et al.*, 254 Iowa 828, 119 N.W.2d 135. The District Court Decree is dated October 20, 1959, and the Supreme Court Opinion is dated January 15, 1963. It appears to me that the ownership of Deer Island is no longer open to question because the judicial determination made in *State of Iowa* v. *Raymond, et al.*, was a finality.

It appears from the record made before me that Iowa has been in open, peaceable, notorious and adverse possession of Wilson Island for more than ten years and that she has made valuable improvements thereon to enable public enjoyment of the island. It therefore appears that the ownership of Wilson Island is no longer open to question.

This leaves us with five areas formed before 1943 to which my remarks now to be made may have some application, namely: St. Mary's Bend, Auldon Bar, Copeland Bend, State Line Island, and Winnebago Bend.

Concerning areas which formed before 1943, Nebraska asks this Court to (1) prevent Iowa from questioning titles flowing from Nebraska, (2) declare that by entering into the 1943 Boundary Compact, Iowa waived, relinquished and contracted away any claim to islands, bars or other land areas which had not been recorded as state owned in the Iowa General Land Office, (3) enjoin Iowa from applying

the presumption in favor of accretion and against avulsion so as to cast the burden on an adverse claimant to prove that any land now in Iowa was ceded to Iowa by the Compact, (4) declare an irrebuttable presumption that land now in Iowa over which Nebraska exercised jurisdiction in 1943 is ceded land, and (5) declare that wherever the Corps of Engineers have moved the thalweg of the river, such moving had the legal effect of an avulsion, and did not move any boundary.

Nebraska's prayer No. (1) for relief is entirely too broad; it goes beyond the terms of the Compact; it would foreclose Iowa from litigating questions which she should have the right to litigate. Iowa agreed in the Compact that "Titles, mortgages, and other liens good in Nebraska shall be good in Iowa as to any lands Nebraska may cede to Iowa - - -". This is the agreement Iowa should be bound and held to, and which she says she is willing to be bound and held to. But this Court should not bar or foreclose Iowa from questioning whether or not purported titles flowing from Nebraska were "good titles" and Iowa should not be barred or foreclosed from questioning whether or not the particular tract is "ceded land". Therefore, it is my recommendation that Nebraska's proposition No. (1) above be rejected.

Concerning Nebraska's proposition (2) above, it is my opinion and recommendation that said proposition be rejected because recordation of state owned lands in the Iowa General Land Office was a purely ministerial requirement, and the people of Iowa should not be deprived of their public lands simply because some official failed to perform a ministerial act. I would point out, also, that in 1943 and prior, it was a practical impossibility for Iowa to keep any accurate record of her state owned lands along the Missouri River because of the wild and restless nature

of the river. It was not mere dereliction of duty that Iowa officials in 1943 and prior, were not keeping a number of survey crews on station along the river to accurately survey, chart and record all movements of the channel and all land formations then being created or washed away.

As I understand Nebraska's proposition (3) above, she does not ask this Court to strike down the long recognized and well established presumption in favor of accretion and against avulsion. What she does ask is that the State of Iowa be barred from having the use or benefit of said presumption in litigation concerning the ownership of Missouri River lands. This Court and the courts of numerous states have recognized and employed the presumption in many accretion cases. See Report of Special Master Marvin Jones in *Louisiana* v. *Mississippi*, No. 14 Original, Oct. Term 1962; Report of Special Master Harvey M. Johnsen in *Illinois* v. *Missouri*, No. 18 Original, Oct. Term 1969; *Arkansas* v. *Tennessee*, 246 U.S. 158; *Nebraska* v. *Iowa*, 143 U.S. 359; *Jeffries* v. *East Omaha Land Co.*, 131 U.S. 178; *County of St. Clair* v. *Lovingston*, 23 Wall. 46; *Shopleigh* v. *United Farms*, 100 Fed. 287; *Plummer* v. *Marshall*, 59 Tex. Civ. App. 650, 126 S.W. 1162; *Municipal Liquidation* v. *Tench*, (Florida) 153 So. 728; *Gubser* v. *Town*, 202 Ore. 55, 273 P.2d 430; *Wyckoff* v. *Mayfield*, 130 Ore. 687, 280 Pac. Rep. 340; *Bouvier* v. *Stricklett*, 40 Neb. 793, 59 N.W. 550; *Kitteridge* v. *Ritter*, 172 Iowa 55, 151 N.W. 1097. The presumption favoring accretion and against avulsion and the presumption favoring the permanency of boundaries, which are very similar, and which produce the same result, are too deeply rooted in our law to now be uprooted. Nebraska argues that these presumptions are unfair and inequitable, but this argument is not well taken.

I perceive no reason why the State of Iowa should be deprived of the use and benefit of these presumptions in liti-

gation when they are operating in her favor. It would be a most unusual rule of evidence if it were to operate or not operate depending solely upon which party is claiming it. There is no terminology in the Compact which could possibly be construed as a repealer or partial repealer of the presumptions. I recommend that the presumptions be left unimpaired to benefit whomsoever they may benefit in litigation concerning ownership of lands in the vicinity of the Missouri River.

Nebraska's proposition (4) above would create an irrebuttable presumption where none has existed in the law heretofore and it is my opinion that no such new presumption should be now created. The evidence before me in the instant case demonstrates that the facts surrounding the formation of each of the nine areas which were formed before 1943 and the facts of Nebraska's purported exercises of jurisdiction over them prior to 1943 are different; each of the nine sites must be judged upon its own facts; this Court should not attempt to lay down any broad irrebuttable presumption to control all cases such as Nebraska proposes.

Nebraska's proposition (5) above is contrary to all case law on the subject heretofore. So far as I have been able to discover, the general and universal rule has been that when the thalweg of a stream moves, the boundary moves with it if the thalweg movement was by accretion, but the boundary does not move with it if the thalweg movement was by avulsion, and this is true regardless of whether the thalweg movement was caused by the forces of nature or by the forces of some third party man-made endeavor. The law of Nebraska is contrary to Nebraska's proposition (5). *Burkett* v. *Krimlofski*, 167 Neb. 45, 91 N.W.2d 57. The law of Iowa is to the contrary of Nebraska's proposition (5). *Solomon* v. *Sioux City*, 243 Iowa 634, 51 N.W.2d 472. This

Court has adopted and followed the general rule that whether the movement was natural or affected by artificial means is immaterial. *County of St. Clair* v. *Lovingston*, 23 Wall. 46, 23 L.Ed. 59. *Louisiana* v. *Mississippi*, No. 14 Original, Oct. Term 1962, 384 U.S. 24, 16 L.Ed. 330, 86 S.Ct. 1250.

There is reason and equity behind the general rule; there is no good reason to discard it and adopt Nebraska's proposal.

Summarizing my opinions and conclusions concerning the disputed areas which formed before 1943: (1) In prior Divisions hereof, I have stated my findings and conclusions concerning Nottleman Island and Schemmel Island. (2) Iowa's ownership of Deer Island and Wilson Island has been settled and determined and nothing herein should be construed so as to reopen any question concerning the ownership of them. (3) Nebraska should be awarded some specified time after final determination of this phase of this case in which to elect whether or not she desires to adduce additional evidence bearing upon whether or not the areas which Iowa claims to own at St. Mary's Bend, Auldon Bar, Copeland Bend, State Line Island, and the part of Winnebago Bend which existed before 1943, or any part of them, were in Nebraska by the facts of their formation or by recognition in and prior to 1943 and whether or not there were good titles in Nebraska to said areas, or any part of them, which Iowa bound herself by the Compact to recognize. (4) The presumption favoring accretion and against avulsion and the presumption favoring permanency of boundaries should apply in making determinations as to where the pre-1943 state boundary was. (5) The rule that the pre-1943 boundary moved with the thalweg when the thalweg moved by accretion but that it did not move when the thalweg moved by avulsion, should apply in mak-

ing all determinations of where the pre-1943 state boundary line was. (6) Iowa should not be enjoined from questioning all titles flowing from Nebraska. (7) Iowa should not be enjoined from claiming lands which were not recorded as being state owned in the Iowa General Land Office prior to 1943. (8) The usual and ordinary rules of prescription, acquiescence and recognition should apply in determining what lands were ceded and what lands were not by operation of the 1943 Boundary Compact.

B. Having discussed the areas which were in existence prior to 1943, we now have remaining for discussion the 21 areas (and part of a 22nd area) which Iowa claims to own and which have formed since 1943. There is no question as to where the state boundary line was when these areas came into existence because, in 1943, the two states had fixed and established the boundary as an unmoving line, to-wit: the center line of a designed channel as shown on certain maps. All the areas now under discussion are now in Iowa; hence it follows that they formed in Iowa. I should note that Iowa does not claim to own all areas which have formed in Iowa since 1943; only those areas which she considers to be state owned by reason of Iowa law and the facts surrounding their formation.

All of the areas formed since 1943 are upstream from Boyer Bend, which is approximately 21 river miles upstream from Omaha, Nebraska, and Council Bluffs, Iowa. The reason why there are no areas formed since 1943 downstream from Boyer Bend is that the river did not escape from the 1943 designed channel at any point in those approximate 84 miles. Hence, below Boyer Bend, the river has not washed away any land, created any new river bed, created any new land, or abandoned any channels since 1943. As I have hereinbefore noted, however, in the approximate 97 miles from Boyer Bend to Sioux City, the river escaped

from the 1943 designed channel at numerous places after 1943. In doing this, the river washed away substantial bodies of land along both banks, created new river bed, created new land, and abandoned its channel at many places. Then, when the Corps of Engineers re-designed the stabilized channel and placed the river in it, lands were washed away, more new river bed was created, more new land was created, and more channel was abandoned. These things happened on both sides of the Iowa-Nebraska Boundary but we are presently concerned with only the Iowa side because the 21 areas and part of a 22nd which Iowa claims to own are all on the Iowa side.

Concerning these areas which have formed in Iowa, east of the Compact boundary, since 1943, Nebraska asks this Court to declare and adjudge that the State of Iowa owns none of them because: (1) by operation of the Compact, Iowa's common law of state ownership of river beds, abandoned river beds and islands no longer applies to the Missouri River, (2) by operation of the Compact, Iowa waived, relinquished and contracted away all claims to land ownership in the vicinity of the Missouri River, (3) Nebraska riparian landowners retained precisely the same accretion rights in Iowa, after cession of their lands and river beds to Iowa by operation of the 1943 Compact, which they previously had when their lands and river beds were in Nebraska, and (4) private property boundaries along the river remained at the thalweg of the stream after the 1943 Compact, the same as they had been prior to 1943, and said private boundaries remained moving boundaries with later movements of the thalweg.

The sum total effect of Nebraska's propositions (1) and (2) above, were they to be adopted, would be to extinguish utterly all of Iowa's claims of land ownership, river bed ownership, and abandoned channel ownership

in the vicinity of the Missouri River, and this would be a very simplistic and final ending to the present case. But my most careful and prudent reading of the 1943 Boundary Compact discloses no terms, phrases or language which can be construed as saying that Iowa repealed her historic common law when she adopted the Compact. And although Nebraska has tried strenuously to adduce evidence concerning the circumstances surrounding negotiations leading up to the Compact, circumstances surrounding adoption of the Compact, and circumstances which have transpired since the Compact which would entitle or command this Court to so construe the Compact, she has failed. Therefore, it is my opinion and conclusion that the common law of Iowa regarding state ownership of river beds, islands and abandoned channels remained unchanged after 1943 and it was not repealed, altered, modified or changed by the Compact, and it continued to apply to lands along the Missouri River the same as it did over the rest of the state.

The reasons which impel me to reach the above conclusion are many and varied. I mention some of them, not necessarily in their order of importance. First, I search the Compact in vain for any language, phrases or terms which could possibly be construed or interpreted as saying that Iowa was repealing or changing her historic doctrine concerning state ownership of navigable river beds, abandoned river beds, and islands, or that Iowa was excluding the Missouri River from that doctrine's application. I search the record of negotiations leading up to adoption of the Compact in vain for any evidence that it was Iowa's intention or Nebraska's expectation that there would be any change in Iowa's common law doctrine. I search the evidence concerning Iowa's conduct after the Compact in vain for anything indicating that Iowa was unilaterally interpreting the Compact as a repealer or partial repealer of her common law doctrine.

As a matter of fact, the evidence before me discloses that on two separate occasions in 1939 and 1942, the Iowa Conservation Commission refused to sell Wilson Island; that in 1944, Iowa was causing a survey to be made of "Nobles Lake", a state owned oxbow lake then about a half mile from the Missouri River; that in 1947, Iowa was in court to enjoin the draining of Nobles Lake by a local drainage district; that during the 1940's and 1950's, the Iowa Conservation Commission was almost continuously studying and considering what best use the state owned areas along the Missouri River could be put to.

Next, my conclusion expressed above is in accord with the law of the Eighth Circuit as delineated in *Tyson* v. *Iowa*, 283 F.2d 902, and with the law of Iowa as delineated in *State of Iowa* v. *Raymond, et al.*, 254 Iowa 828, 119 N.W.2d 135, and numerous other cases decided in the Iowa Supreme Court since 1943. It inheres in *Tyson* and in *Raymond* and in numerous other decisions that the Iowa common law doctrine was unchanged and not repealed in whole or in part by the 1943 Boundary Compact, and I see no valid criticism of these decisions. For detailed discussions of the Iowa doctrine and its applications, in addition to the two cases cited above, see *McManus* v. *Carmichael*, 3 Iowa 1; *Holman* v. *Hodges*, 112 Iowa 714, 84 N.W. 950; *Kitteridge* v. *Ritter*, 172 Iowa 55, 151 N.W. 1097; *Payne* v. *Hall*, 192 Iowa 780, 185 N.W. 912; *Bigelow* v. *Herrink*, 200 Iowa 830, 205 N.W. 531; *Solomon* v. *Sioux City*, 243 Iowa 634, 51 N.W.2d 471; *Wilcox* v. *Pinney*, 250 Iowa 1378, 98 N.W.2d 720; *Dartmouth College* v. *Rose*, 257 Iowa 533, 133 N.W.2d 687.

Next, my conclusion is in accord with the rule against implied repeal, one of the restatements of which appears in *Reeves & Co.* v. *Russell*, (N. Dak.) 148 N.W. 654, at page 659:

> "The presumption against an intent to alter existing law beyond the immediate scope and object of the enactment under construction applies as well where the existing law is statutory as where it is promulgated by the decisions.
>
> "The principle is recognized that an intent to alter the common law beyond the evident purpose of the act is not to be presumed. It has indeed been expressly laid down that 'statutes are not presumed to make any alteration in the common law further or otherwise than the act does expressly declare; therefore, in all general matters, the law presumes the act did not intend to make any alteration, for if the Parliament had that design, they would have expressed it in the act' that 'the rules of the common law are not to be changed by doubtful implication.' "

See also *Bandfield* v. *Bandfield,* (Michigan) 75 N.W. 287; and Earl T. Crawford text on *Statutory Construction,* Sec. 228, page 422.

It is also in accord with the rule that any court, while it may construe legislation, must not legislate. Mr. Justice Davis in *U. S.* v. *Union Pacific R. R. Co.,* 91 U.S. 72, stated this rule at pages 85 and 86 as follows:

> "* * * But this is extending the operation of words by a forced construction beyond their natural and ordinary meaning which is contrary to all legal rules. Courts cannot supply omissions in legislation, nor afford relief because they are supposed to exist. 'We are bound', said Justice Buller, in an early case in the King's Bench, 'to take the Act of Parliament as they have made it; a casus omissus can, in no case, be supplied by a court of law, for that would be to make laws; nor can I conceive that it is our province to consider whether such a law that has been passed be tyrannical or not.' Jones v. Smart, 1 Term. Rep. 44-52. *Lord Chief Baron Eyre, in the case of Gibson v. Minet (1 H. Bl. 569-614), said: 'I venture to lay it down as a gen-

> eral rule, respecting the interpretation of deeds, that all latitude of construction must submit to this restriction, namely; that the words may bear the sense, which, by construction, is put upon them. If we step beyond this line, we no longer construe men's deeds, but make deeds for them.' This rule is as applicable to the language of a statute as to the language of a deed. * * *"

My conclusion is also in accord with the rule that a statute shall be construed so as to diminish the rights of the public only so far as is made necessary by an unavoidable construction. *Massachusetts* v. *New York*, 271 U.S. 65, 89; and cases cited therein.

If I were to construe the Compact as Nebraska proposes, I would be indicting the Legislature and other officials of Iowa who engaged in negotiation of the Compact for total abdication of their responsibilities to the citizens of Iowa and to the public generally. Whatever areas Iowa owned in 1943, and whatever areas she now owns as a result of channel movements since 1943, are public property. They were and are owned by the state in trust for the use, benefit and enjoyment of the general public. Iowa's rights are rights of the public. Particularly in this present era, when public lands and waters are no longer plentiful as they once were, and public recreational areas for camping, boating and the like are in such great demand, I believe there is more reason than ever to construe statutes, compacts and laws so as to diminish the rights of the public as little as possible consonant with unavoidable construction.

In addition to the legal difficulties which Nebraska encounters in putting forth her contentions for construction of the Compact, there are also very substantial practical difficulties:

If the Compact were construed as saying that by its operation, Iowa waived, relinquished and contracted away

all islands, bars and other land areas along the Missouri River, the inevitable question next to arise would be: Who are the gratuitous grantees and beneficiaries of Iowa's largess? Nebraska seems to be saying that this question should be answered by application of Nebraska law. But all of the areas involved herein are located in Iowa, and the law of Nebraska does not apply to them because her law applies only within the borders of Nebraska.

Another practical difficulty encountered, were Nebraska's proposition to be adopted, would be: Precisely where would the demarkation line be located as between the lands which Iowa waived, relinquished and contracted away and the lands which she did not? In other words, how far into Iowa would Nebraska law apply? Nebraska's terminology is simply "along the river"; this terminology is too vague and imprecise for legal purposes.

The proper place for Nebraska law to cease application and for Iowa's law to commence application is at the state boundary, and my conclusion is in accord with this rule.

For many reasons, only some of which I have mentioned above, I find, conclude and recommend that Nebraska's propositions (1) and (2) be rejected. In lieu thereof, I find and conclude that Iowa's law concerning ownership of lands, islands, bars, river beds and abandoned river beds in the vicinity of the Missouri River remained the same after 1943 as it was before, and its application remained state-wide including all areas in Iowa along the Missouri River.

There is a close relationship between Nebraska's propositions (3) and (4) relating to the areas formed since 1943 and stated hereinabove, and I shall therefore discuss both together.

At several places along the river, the 1943 Iowa-Nebraska Boundary Compact had the effect of changing the state boundary substantially. These places were the places where there had been avulsions prior to 1943 so that the pre-1943 boundary was not in the river; it had been left in some abandoned channel as a result of the prior avulsion. I make no attempt here to itemize where these places were, or may have been, because the evidence before me is incomplete as to many places, and from my limited information, I cannot determine where there may have been pre-1943 avulsions and where not. Suffice to say at this point that the places where there had been pre-1943 avulsions were relatively few.

Along perhaps 90 per cent of the boundary, both the pre-1943 boundary and the boundary established by the Compact were in the river, because in 1943 the river was in the designed channel; the thalweg was in the designed channel; and the new boundary was described as the center-line of the designed channel. Therefore, along this 90 per cent of the boundary, the Compact had little or no effect of moving the boundary from one place to another place.

Nebraska, in her propositions (3) and (4), is contending that although the Compact affected and changed the state boundary all along the river, it did not affect or change private boundaries or private land titles whatsoever. But it is my opinion that Nebraska overlooks or ignores a very important feature, perhaps *the* most important feature, of the Compact. By the Compact, Nebraska ceded to Iowa jurisdiction and sovereignty over all land east of the new boundary. She gave up and surrendered to Iowa all jurisdiction and sovereignty she may have formerly had over the lands east of the boundary. She said in effect that Nebraska law would no longer apply east of the

boundary. Nebraska should now be held and bound by it. Nebraska should not be permitted to project the operation of her law beyond the agreed line, and Iowa cannot project the operation of her law into Nebraska.

It is my opinion and conclusion that both Iowa and Nebraska intended when they entered into the 1943 Boundary Compact that henceforth and after 1943, ownership of the river bed would be determined by Iowa law on the Iowa side of the new boundary (center line of the designed channel) and ownership of the river bed on the Nebraska side of the new boundary would be determined by Nebraska law. In other words, good titles to Nebraska lands which Iowa agreed to recognize as good in Iowa became good Iowa titles; they did not become good Nebraska titles in Iowa. And good Iowa titles to lands ceded to Nebraska became good Nebraska titles, not good Iowa titles in Nebraska. Iowa is still entitled to have her law that the state owns the beds of all navigable rivers in the state and that private land titles terminate at the ordinary high water mark. Nebraska is entitled to have her law that private land titles shall extend to the thalweg. But the law of Iowa must stop at the boundary and Nebraska law must stop at the boundary.

This conclusion is in accord with the general rule that no state may extend or project the application of its laws beyond its own borders, and in matters of land titles, lex loci must be the controlling rule. Mr. Justice Johnson stated the rule in *Hawkins* v. *Barney*, 30 U.S. 294, 5 Pet. 457, 8 L.Ed. 190, as follows:

> "* * * the lex loci must be the governing rule of private right, under whatever jurisdiction private right comes to be examined."

The Court's comments at 30 U.S. page 300, are particularly apropos to the case at bar:

> "* * * It can scarcely be supposed, that Kentucky would have consented to accept a limited, crippled sovereignty; nor is it doing justice to Virginia, to believe, that she would have wished to reduce Kentucky to a state of vassalage. Yet it would be difficult, if the literal and rigid construction necessary to exclude her from passing this law were to be adopted; it would be difficult, I say, to assign her a position higher than that of a dependent on Virginia. Let the language of the compact be literally applied, and we have the anomaly presented, of a sovereign state governed by the laws of another sovereign; of one-half the territory of a sovereign state hopelessly and forever subjected to the laws of another state. Or a motley multiform administration of laws, under which A. would be subject to one class of laws, because holding under a Virginia grant; while B., his next-door neighbor, claiming from Kentucky, would hardly be conscious of living under the same government. If the seventh article of the compact can be construed so as only to make the limitation act of Virginia perpetual and unrepealable in Kentucky; then I know not on what principle, the same rule can be precluded from applying to laws of descent, conveyance, devise, dower, curtesy, and in fact, every law applicable to real estate."

More recently, see *Arkansas* v. *Tennessee*, 246 U.S. 158, at page 175, where this Court stated:

> "How the land that emerges on either side of an interstate boundary stream shall be disposed of as between public and private ownership is a matter to be determined according to the law of each State, under the familiar (sic) doctrine that it is for the States to establish for themselves such rules of property as they deem expedient. . . ."

Nebraska's propositions (3) and (4) were dealt with directly in the *Tyson* case, which I have hereinbefore men-

tioned. This case is important, it is the law of the 8th Circuit, and it warrants detailed discussion because, if I were to adopt Nebraska's said propositions, I would be disavowing and overruling it. The case is cited as *Tyson* v. *Iowa*, (1960) 283 F.2d 802.

The land in Tyson Bend which later became the subject of controversy began to form in 1948. The Missouri River had been in the designed channel in 1943, but between 1943 and 1948, the river escaped from the designed channel by washing away the left bank stabilizing structures and the land along the left bank. That is to say, the left bank moved into Iowa. The state boundary remained at the center line of the designed channel per 1943 Boundary Compact. After the left bank had moved a mile or thereabouts into Iowa, an island arose from the bed between the designed channel and the main channel. The island arose in Iowa. It was an island because when it arose and for several years thereafter, waters of the river continued to flow around both sides of it, the main channel flowing to the east of it and water continuing to flow through the designed channel to the west of it. In the 1952 flood, the designed channel was filled with sediment and the island was connected to the Nebraska shore. In 1958, the Corps of Engineers had determined to place the river back into the designed channel at Tyson Bend and to accomplish this by dredging a canal in the designed channel and then diverting the river through the canal. Eminent Domain proceedings were commenced to condemn an easement on the island so that spoil from the dredge could be cast upon it. The issue litigated was who was entitled to the compensation for the taking and this turned upon who was the owner of the island.

Three parties or sets of parties laid claim to ownership of Tyson Island. The State of Iowa claimed it as an

island formed over the state owned river bed in Iowa under the Iowa doctrine of state ownership. The Harrop claimants claimed it because they held the old Iowa titles to the land which had existed in that spot under the sky before the river began its escape eastward from the designed channel. The Tyson claimants claimed it as an accretion to Nebraska land or river beds belonging to them.

The decision in District Court was for Iowa and this was affirmed on appeal. The Harrop claim was rejected because the lands they once owned had been entirely washed away. The Tyson claim was rejected because the island had not arisen as an accretion to any land or river bed owned by them. Iowa was adjudged owner of the island and entitled to the compensation because the island had arisen from the state owned river bed in Iowa.

Nebraska's contention now put forward in this case that the private boundary of the Nebraska landowner continued to be a moving boundary after the Compact and moved into Iowa as the thalweg moved into Iowa was rejected in the *Tyson* case, where it was being put forward by the Tyson claimants. It is my opinion that the law of the *Tyson* case is good law; that the *Tyson* case should not now be overruled or disavowed.

Numerous reasons why the courts decided the Tyson case as they did and why the case should now be upheld are apparent. It is my opinion that rule of *Tyson* gives effect to the 1943 Boundary Compact as the two states intended an expressed their mutual intentions. The language of the Compact is "The State of Nebraska hereby cedes to the State of Iowa and relinquishes jurisdiction over all lands now in Nebraska but lying easterly of said boundary line - - -". To me, the courts were simply applying the above quoted language from the Compact when they decided the *Tyson* case as they did, and if this court were now

to adopt Nebraska's propositions (3) and (4), it would be ignoring or violating the plain import of that language.

Nebraska argues that the Compact should be construed so as to make it carry out the mutual desire of the two states to put at rest future controversies along the boundary. The rules and result of *Tyson* have this effect. The rule of *Tyson* is that Iowa law applies in Iowa and Nebraska law applies in Nebraska. Firm adherence to this rule should go far toward putting at rest future controveries.

The *Tyson* case did not deal with a situation where accretions to the high bank land of a Nebraska owner had formed and extended gradually from the Nebraskan's high bank land and then across the fixed state boundary and into Iowa. The evidence before me does not show that this has occurred at any of the areas which are involved in this case. Therefore, I don't believe I am called upon in this case to decide whether or not a landowner in Nebraska may accrete across the fixed state boundary into Iowa. Concerning this matter, I will simply say that I see no reason why a landowner in either Nebraska or Iowa should be barred from owning all accretions which may form gradually and imperceptibly to his riparian shore even though they may extend across the fixed state boundary and into the other state.

I would summarize my findings and conclusions concerning possible applications of the 1943 Boundary Compact upon the several areas which have formed since 1943 and which Iowa claims to own by the facts of their formation and by operation of the Iowa common law upon such facts, as follows:

(1) Each state ceded sovereignty and jurisdiction to the other over all lands, river beds and abandoned beds

situated beyond the new boundary, by operation of the Compact.

(2) The Iowa common law doctrine concerning state ownership of the river bed, abandoned beds and islands was not repealed or altered by the Compact and it applies to areas formed in Iowa since 1943 the same as it did before 1943.

(3) Titles to lands which Nebraska ceded to Iowa by the Compact became good Iowa titles and did not become good Nebraska titles in Iowa. Therefore the boundary of all land in Iowa riparian to the Missouri River is the ordinary high water mark.

(4) After 1943, Nebraska land titles have terminated at the agreed line fixed by the 1943 Boundary Compact.

(5) Since 1943, if there have been any occasions where accretion lands have formed gradually to the high bank land of a Nebraskan or an Iowan, his boundary shall include his accretions even if such accretions may extend across the fixed boundary and into the other state, and the same should apply to other accretion lands which may form hereafter.

(6) By the Iowa doctrine, if any accretions form to a riparian landowner's high bank and extend over the formerly state owned river bed, title to that part of the river bed which was formerly state owned and becomes occupied by such accretion lands passes from the state to such riparian owner whenever such accretions arise above the ordinary high water mark. But if an island forms upon the state owned river bed in Iowa, not attached to the riparian shore, such island remains state owned.

(7) By the Iowa doctrine, if a channel of the river becomes an abandoned channel by an avulsion, either natural or man made, title to such abandoned channel remains in the State of Iowa.

IOWA'S COUNTERCLAIM

Counsel for Iowa have stated throughout the pendency of this case that they desire consideration of Iowa's Counterclaim on only one condition, to-wit: If the Court were to construe the Compact so that it would repeal the Iowa common law doctrine of state ownership, or bar the Missouri River from application of that doctrine, or subject areas in Iowa to control by Nebraska title laws; then and in that event, Iowa would desire a further construction of the Compact to determine how and to what extent the common law doctrine of Nebraska was also repealed or changed by the Compact, or its application limited, or to what extent Iowa law might now apply in Nebraska as a result of the Compact.

As will be seen from what I have said hereinabove, I recommend a construction of the Compact which leaves the Iowa common law doctrine intact to apply to all lands and river beds in Iowa, and it is my opinion that Nebraska title laws stop at the boundary and do not apply in Iowa. Of course, the reverse of this is also true; Nebraska is entitled to have her own common law regarding ownership of river lands and river beds to apply to all areas on her side of the boundary. It is my opinion that the Compact did not repeal or change the common law of Nebraska; the common law of Iowa concerning ownership of river beds and river lands ceases applying at the boundary and does not apply in Nebraska.

Accordingly, it is my recommendation that Iowa's Counterclaim be denied and dismissed.

In The

Supreme Court of the United States

October Term, 1964

No. 17, Original

STATE OF NEBRASKA, PLAINTIFF,

VS.

STATE OF IOWA, DEFENDANT.

PLAINTIFF'S RESUME' OF EVIDENCE BEFORE THE SPECIAL MASTER HONORABLE JOSEPH P. WILLSON

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APPENDIX A

APPENDIX B

GENERAL HISTORY OF THE IOWA-NEBRASKA BOUNDARY PROBLEMS

Original Boundary and Litigation Between Nebraska and Iowa

The State of Iowa was admitted into the Union in 1846 with its westerly boundary as the "middle of the *main channel* of the Missouri River . . ." (Ex. P-2601). The State of Nebraska was admitted into the Union in 1867 with its easterly boundary described as "the middle of the channel of the said Missouri River" (Ex. P-2602). Over the years, the Missouri River has been notorious for the many natural changes and periodic flooding which occurred on numerous occasions. The result has been the creation of an alluvial plain between the bluffs on the Iowa side and the bluffs on the Nebraska side several miles in width, all of which has been part of the River from time to time. These changes have caused controversy and uncertainty all along the Iowa-Nebraska boundary.

In 1890 the State of Nebraska brought an original action in the Supreme Court of the United States against the State of Iowa to determine the boundary in the Carter Lake area. Although the Complaint (Ex. P-1722) in that action refers specifically to Carter Lake, allegations were made by the State of Nebraska that the Missouri was a river of the first class, navigable by steamers of heavy tonnage, it flowed through lands of soft sand loam, and its banks were not protected by rocks or the roots of trees or other matter against the operation of the waters. Its current was rapid, flowing from five to ten miles an

hour and its course was very circuitous, every few miles changing from one direction to another. The allegation was further made that the boundary or line dividing the States in the region described had never been settled, defined or established and people had settled in said lands and, because of the doubts excited by the disputes as to the boundary, defied the laws of both states.

Iowa answered in 1891 (Ex. P-1722) and, among other things, alleged:

> "Further answering, and by way of additional defense the defendant says that the Missouri river is a river of the first class; that the amount of water which flows down it is very large and varies greatly in amount; that within the limits and termini of the meander line described in the bill, it flows through a plain bounded by bluffs, which are four or five miles apart. The whole of the plain between said bluffs is composed of soft, friable, sandy loam, not protected against the action of the water and very easily susceptible thereto. It readily and rapidly yields to the force of the current and the banks formed of it afford a very slight resistance to the changes that the rapidly flowing river is constantly making. This plain is also level, being as low at the base of the bluffs on either side as it is in the centre, and therefore the force of gravity does not help to confine the river to any certain part of it. The current of the Missouri river is very rapid, varying at different places and with the time of year, and the stage of the water from five to ten miles an hour. The river is subject to annually and semi-annually recurring freshets, usually occurring in June and April, popularly known as the 'June rises' and 'April rises' during which, for a few weeks, the amount of water flowing down the river is increased to many times

> its ordinary and usual volume and the river leaves its accustomed channel and spreads over a large part of the plain. During these freshets the process of change is very rapid, especially while the water is subsiding. While the water is up over the banks, it frequently cuts through the necks of bends, entirely forsaking its former channel, and while it is subsiding, it cuts away its banks on one side and builds them up on the other as rapidly as ten to one-hundred and fifty feet within twenty-four hours."

Iowa also alleged that the bed in which the Missouri River flowed during the periods of low water each year was altogether uncertain, and that its real bed was the whole of the plain before described, and "It is liable to flow in any portion of said plain, and has, in fact, within the memory of man, flowed over nearly every portion of it, except a few hundred acres in the northwestern angle of the Iowa meander line, and, in view of the history and character of said river and plain, will probably do so again within as short a period.

Iowa then described the movement of the river in the area in controversy as follows:

> "The changes were so rapid that the river frequently cut away one bank and added to the other over one hundred and fifty feet in a single day and one hundred feet in twelve hours, and they were therefore perceptible, appreciable, and measurable. Strips of territory hundreds of feet wide and containing many acres, which at the beginning of the freshet were covered by the waters of the river, would within a few weeks or days be filled with earth and soil, and at the subsidence of the waters at the end of this short period appear as dry ground. Large

> tracts of ground covering many acres in extent were cut away by the river in a few days, and the current would flow where these tracts had been, and later in the same year, the waters would rapidly recede, depositing earth, and the identical tracts would again become dry ground. At various points within the limits of the termini aforesaid, land which was on the Nebraska side of the river was cut away rapidly, and the current flowed where said land had been, and then during the next freshed (sic) the river changed its course, leaving the said land far removed from the new bed of the stream." • • •
>
> "And the defendant alleges that the changes and facts above set forth are characteristic of the Missouri river between the two States, and that similar phenoma (sic) have frequently taken place, and may, from the character and history of said river and plain, be expected to take place in the future."

Iowa then alleged an avulsion and that it claimed jurisdiction over the land, maintained government thereon, and collected taxes therefrom and had asserted its authority and sovereignty over the land involved since the State of Iowa was admitted into the Union. Most of these same allegations were incorporated by Iowa into a cross bill.

In its opinion in the case of *State of Nebraska v. State of Iowa,* 143 U. S. 186 (Ex. P-2603), the court found that in 1877 the river above Omaha suddenly cut through the neck of an ox-bow and made a new channel and this constituted an avulsion. Consequently, the center line of the old channel remained the boundary between the states. The court went further and held that the usual principles concerning the laws of accretion and avulsion were applicable to the Missouri River, notwithstanding

the rapidity of the changes in the course of the channel. The court said that this was true not only in respect to the rights of individual landowners, but also in respect to the boundary lines between the states. The boundary line between Iowa and Nebraska remained a varying line, so far as affected by these changes of diminution and accretion in the mere washing of the waters of the stream except in such places where the stream suddenly abandoned its old and sought a new bed as an avulsion.

The decree is then found at 145 U. S. 519 (Ex. P-2604) wherein the court described this fixed boundary line in the abandoned channel by metes and bounds. This is the well-known area of Carter Lake, Iowa, which borders Omaha on the right bank of the present Missouri River.

Nebraska Legislative History Prior to 1943

Following the decision in the first case of *Nebraska v. Iowa* and commencing in 1901, the legislative history of both Nebraska and Iowa is replete with references to attempts to settle the boundary problems between the two states. In 1901 the Nebraska legislature passed an act authorizing the Governor of the State of Nebraska to appoint three commissioners on behalf of the state to jointly meet with a like commission from the State of Iowa in agreeing upon a boundary line between the said states (Ex. P-1851). In 1903 the Nebraska legislature passed another act authorizing the Governor of Nebraska to appoint three commissioners on behalf of the state to act with a like commission from the State of Iowa in agreeing upon a boundary line between the states (Ex.

P-1852). Again, in 1905, the Nebraska legislature adopted a resolution providing that the State of Nebraska would not claim title or ownership to lands then lying within the boundaries of the State of Iowa which have thereafter become within the boundaries of the State of Nebraska by virtue of the action of any commissions appointed by the states and ratified by the states (Ex. P-2301).

In 1913, the legislature of the State of Nebraska adopted an act providing for a boundary commission and the preamble states:

> "Whereas, the original boundary line between the states of Nebraska and Iowa along the river front of Douglas and Sarpy Counties in Nebraska, and Pottawattamie County in Iowa was changed by the great flood of 1881 so that a part of the original state of Iowa has for over thirty years been on the west side of the present channel of the Missouri river and part of the state of Nebraska has been for over thirty years upon the east side of the present channel of the Missouri river, and
>
> Whereas, under the rule of law in the United States, the state boundary in such cases still follows the old channel of the river unless an agreement is made between the states for its change, and
>
> Whereas, it is desirable for both Iowa and Nebraska that the boundary line between the states be made to conform with the natural boundary of the Missouri river, . . ."

The act then authorized the Governor of Nebraska to appoint three commissioners to act with a similar commission appointed by the State of Iowa to ascertain and report the facts relating to the boundary as far as it re-

lates to Pottawattamie County and Douglas and Sarpy Counties (Ex. P-1853).

In 1915, the Nebraska legislature adopted a concurrent resolution again authorizing the Governor of Nebraska to appoint three commissioners to act in conjunction with a like commission from the State of Iowa, "this commission to remain in office until settlement is made between the states, and the proper boundary determined, or the commission is sooner dissolved by legal authority" (Ex. P-1854).

In 1919, the Thirty-seventh Session of the Nebraska legislature approved another concurrent resolution, again repeating the language about the great flood of 1881, but not mentioning any particular counties. The preamble states:

> "Whereas, the original boundary line between the States of Nebraska and Iowa along the river front of counties bordering on, or through which the Missouri river flows, was changed by the great flood of 1881 so that a part of the original State of Iowa has for over thirty years been on the west side of the present channel of the Missouri and part of the State of Nebraska has been for over thirty years upon the east side of the present channel of the Missouri. . . ."

The Governor was authorized to appoint three commissioners to act with a similar commission appointed by Iowa and they were to report back relating to the boundary as the same relates to the counties of Iowa and Nebraska bordering on, *or through which* the Missouri River flowed (Ex. P-1855).

In 1941, the Fifty-fifth Session of the Nebraska legislature passed an act to establish the boundary

line in the center of the main channel of the Missouri River, but excepting Carter Lake by referring to the original action of *Nebraska v. Iowa.* This act was captioned "RELATING TO IOWA—NEBRASKA BOUNDARY." (Ex. P-1856).

Iowa Legislative History Prior to 1943

In Iowa, in 1902, a bill authorizing the Governor to appoint a commission to meet with a like commission from the State of Nebraska to agree upon a boundary line and report to the Governor was introduced in the senate and referred to committee, but no further action was taken (Ex. P-1790, P-1791).

In 1913, a provision was adopted by the Iowa legislature for the appointment of a boundary commission to act in conjunction with the commission from adjoining states under certain circumstances (Ex. P-1803). Also, in 1913, Senate Joint Resolution 9 was introduced, which provided for the appointment of a commission to ascertain and report facts relating to the existing boundaries between Iowa and Nebraska and the resolution had almost identical language to the 1913 Nebraska Act, Ex. P-1853 (Ex. P-1793). It was reported unfavorably and indefinitely postponed.

In 1923 Iowa passed a bill providing that the Governor appoint a boundary commission consisting of three disinterested persons. This bill provided:

> "The boundary commission shall at once, upon its appointment, proceed to ascertain and report the facts relating to the existing boundary between the states of Iowa and Nebraska so far as the same re-

> late to the counties of Iowa and Nebraska bordering on, *or through which* the Missouri river flows, to report drafts of compacts or agreements to be entered into by the states in settlement of said boundary. . . ." (Emphasis supplied.)

There was also a specific provision that the boundary as it then existed between Council Bluffs and Omaha at the point known as Carter's Lake be preserved (Ex. P-1796).

In 1927, the Forty-Second General Assembly of Iowa passed a bill to make an appropriation to pay the expenses of the boundary commission commenced under the acts of the Fortieth General Assembly (Ex. P-1798, P-1799). In 1935, a bill passed the Senate of the Forty-sixth General Assembly of the State of Iowa providing that the Governor shall appoint a boundary commission to act in conjunction with a similar commission appointed by the Governor of Nebraska to ascertain and report the facts relating to the existing boundaries between the States of Iowa and Nebraska "bordering on or through which the Missouri River flows" and to report drafts of compacts or agreements (Ex. P-1804).

In 1937, a bill was introduced in the senate of the Forty-seventh General Assembly of Iowa for an act to establish the boundary line between the State of Iowa and State of Nebraska and the proposed bill included the following language:

> "* * * WHEREAS, there has for many years existed as between the State of Iowa and the State of Nebraska, a question as to the true and correct boundary line between said states; and
>
> WHEREAS, it would be expensive and practically impossible, in view of the conditions as they now

exist, to locate the original boundary line between the State of Iowa and the State of Nebraska, the same having been established 'according to Nicollet's map'; and

WHEREAS, much of the land under dispute, except the Carter Lake district, is the harbor for criminals and squatters and is without police protection and educational facilities; and

WHEREAS, said lands remain unplatted and are not subject to taxation by either state; and

WHEREAS, the Executive Council of the state of Iowa, in the year 1935, acting under authorization duly given by the Legislature of the state of Iowa, appointed what was known as the Iowa Boundary Commission, which commission has heretofore made its final report; and

WHEREAS, said final report of said Iowa Boundary Commission indicates that the Missouri River channel is now relatively stabilized by work done under the direction and supervision of the United States Army engineers, and that a boundary based on the present main channel of the Missouri River would be, in all probability, fixed and permanent; and

WHEREAS, under the law, each state must agree to any new boundary wherever established; and

WHEREAS, said agreement, if any, between the state of Iowa and the state of Nebraska must be sanctioned by an Act of Congress;

NOW, THEREFORE . . ."

The act would have placed the boundary in the middle of the main channel of the Missouri River (Ex. P-1805). This proposal was referred to committee and no further action is shown.

In 1939, in the Journal of the Senate of the State of Iowa, reference is made to a proposal authorizing appointment of the Iowa-Nebraska Boundary Commission, which matter was deferred (Ex. P-1806). This is similar to the resolution passed in 1941 by the Iowa legislature providing that the Governor should at once appoint a boundary commission of three disinterested, competent persons to ascertain and report the facts relating to the existing boundary between Iowa and adjoining states and to report drafts of compacts or agreements to be entered into in settlement of the boundary (Ex. P-1807).

References in Newspapers and Periodicals Prior to the Compact

In addition to this legislative recognition of the boundary problems, references to the problems caused by the wild and unpredictable movements of the Missouri River have appeared in various publications and newspaper articles. The *Iowa Journal of History and Politics,* Volume XXI, published by the State Historical Society of Iowa in 1923 contained an article captioned THE LEGISLATION OF THE FORTIETH GENERAL ASSEMBLY OF IOWA, which article contained the following:

> "The Missouri River has always been notorious for its meandering and there are tracts of land which are first on one side of the river and then on the other. The people who live there are sometimes uncertain whether they are inhabitants of Iowa or Nebraska, and so are the tax assessors. To settle the question, the Fortieth General Assembly created a Boundary Commission to draft a compact definitely

locating the boundary between the two States. This compact is to be submitted to the Governors and General Assemblies of Iowa and Nebraska for approval." (Ex. P-2696).

An editorial appeared in the Des Moines, Iowa, *Register* on December 22, 1925, with the caption WAR ON NEBRASKA. The editorial stated that some fifteen thousand acres of land were in dispute and a commission had been appointed to work out a basis of settlement. It then continued:

". . . About 2,000 acres of former Iowa land now form a part of Dakota County, Nebraska and a corresponding area of former Nebraska land is in Woodbury County, Iowa. Homan's Island, opposite Onawa is on the Nebraska side of the river but is part of Iowa and its residents vote in Iowa. The D. D. Boyd farm in Harrison county, is completely surrounded by Iowa land and it is five or six miles from the river, yet Mr. Boyd is a resident of Nebraska. About 5,000 acres of land south of Council Bluffs also are involved, and there is an island comprising some 2,000 acres off Fremont County, Iowa, which is no-man's land.

All this is due to changes in the Missouri river channel. That is one thing which it is impossible to regulate effectively. The channel is likely to continue to change, but the human nature of which we hear so much has worked out governmental institutions which provide for orderly settlements of all the difficulties involved. The very difficulties have been minimized thereby. No one in Iowa is going to get excited over an impending loss of state territory; no one in Nebraska is going to demand forceful retention of the domain the river has alienated.

We shan't have war between Nebraska and Iowa . . ." (Ex. P-2500).

An article appeared in the Cedar Rapids, Iowa *Republican* dated January 2, 1927, entitled "FAIL TO FIX IOWA-NEBRASKA BOUNDARY". The article commences:

> "The boundary commission appointed by Gov. John Hammill to investigate border disputes along the Missouri river, between Iowa and Nebraska, yesterday reported it had failed to reach an agreement on definite recommendations with the Nebraska commission appointed to make a similar investigation." (Ex. P-2690).

In 1927, an article by the Iowa Historian, Eric McKinnley Erickson, appeared in 25 *Iowa Journal of History and Politics,* 233, 235, which stated:

> "This decision [Nebraska v. Iowa] settled for a time the boundary difficulties between Iowa and Nebraska, but the fickle Missouri River has refused to be bound by the Supreme Court decree. In the past thirty-five years the river has changed its course so often that it has proved impossible to apply the court decision in all cases, since it is difficult to determine whether the channel of the river has changed by 'the law of accretion' or 'the law of avulsion'. Where it has been possible to apply the decision awkward situations have resulted. For instance, East Omaha is legally in Iowa—in fact it is included in the corporation of Council Bluffs—yet it is located on the West side of the river in close proximity to Omaha, with which city its interests are much more closely united than with Council Bluffs." (Ex. P-2691).

On December 20, 1933, the *Omaha World Herald* carried an article captioned IOWA GOVERNOR WANTS BOUNDARY CORRECTED. It stated that Governor Clyde L. Herring of Iowa said he favors the establish-

ment of a more regular and natural boundary. The article also states:

> "Because of the zig-zagging of the Missouri river in which once laid the boundary line between the two states, many families are now inconvenienced and many sections of land are cut off from their rightful political jurisdiction. . . . One of the families suffering from the tricky wandering of the Big Muddy is that of Mr. and Mrs. Fred Kinart whose five children are cut off from the education facilities because of their location on the Iowa side of the river on land which legally is now Nebraska.
>
> Awaiting action in the Iowa Legislature now in special session is a bill providing for state aid in schooling the children of Iowa families similarly situated on the Nebraska side of the river. The bill, according to Senator Caroline C. Pendray of Jackson County, who is a member of the public schools committee has been recommended out of committee for passage and placed on the senate calendar." (Ex. P-1537).

An article appeared on March 4, 1935, in the *Times-Republican,* Marshalltown, Iowa, which begins:

> "Pranks played with the Iowa-Nebraska boundary line of the silt-laden Missouri river as it cut land off one state and added it to the other or left it stranded in its own broad channel, are to receive official attention of the two states.
>
> A joint commission on which Nebraska already has named members and to which Iowa plans to do so today will be the Court in which an attempt will be made to settle ownership of the parcels of land involved. . . . Most of the areas involved are small and uninhabited, but the land suggested for trading also included the town of Carter Lake, Iowa, adjoin-

ing Omaha, Neb., and the desolate squatter domain near Sargent Bluff known as Flowers island." (Ex. P-2692).

The *Omaha World Herald* of March 4, 1935, contained an article entitled "Might Swap Carter Lake" and "Iowa and Nebraska Getting Together on River Boundary". The story is shown as coming from Des Moines, Iowa, and contained language similar to the article in the *Times-Republican.* It then continued:

> "In their admission to statehood, Iowa's western and Nebraska's eastern boundaries were fixed as the middle of the main channel of the Missouri. But the troublesome ributary (sic) of the Missouri frequently changes its channel, and parcels of land thus segregated have caused supervision and taxation problems."

The article mentions that those active in seeking an agreement believed the Missouri River channel has been stabilized and a permanent exchange of ownership of isolated parcels of land would settle the questions. It mentions the squatter domain in Sargent Bluff known as Flower's Island and states:

> "Jurisdiction over Flower's Island involves the question of whether the 11 thousand acre stretch is accretion land which the Missouri gave Iowa, or whether title literally should 'go back to the Indians,' inhabitants of a reservation in bordering Nebraska.
>
> For a number of years the more than 50 children of Flower's island's 17 squatter families went without schooling.
>
> Then Iowa, through permission obtained from federal authorities with the understanding the action would have no bearing on land claims of the two

states, sent in teachers this year to hold class in an old log building." (Ex. P-1536).

The case of *U. S. v. Flower, et al.,* will be discussed elsewhere in this brief, but at this point it should be mentioned the boundaries of the private property owners in the Flower's Island area were decided by the United States District Court in Nebraska in 1938 and the State of Iowa appeared and attempted to intervene in that action.

The *Omaha World Herald* of November 20, 1940, had an editorial entitled "Let's Fix the Boundary" in which the following statements were made:

> "But between Nebraska and Iowa the boundary line is vague and irrational. Originally, that line followed the Missouri river. The river changed its course, but the lines stayed where it used to be. Now all up and down the river chunks of Iowa lie westward of it and pieces of Nebraska to the east.
>
> Why don't we fix up this boundary line the way it ought to be? Army engineers have stabilized the river now so that it will not change course again. Nebraska and Iowa, two good neighbors, ought to get together and fix the boundary in the center of this stabilized river, and settle it once and for all.
>
> Beginning in January, both Iowa and Nebraska will have republican governors. This strikes us as an admirable opportunity to do what both states for a long time have talked of doing. Governors Wilson and Griswold, are sponsoring the necessary legislation, can put an end to this business of children crossing the river to go to school; of Iowa land paying taxes in Nebraska and vice-versa; of some land going untaxed because nobody knows where it belongs." (Ex. P-1534).

On December 24, 1940, the *World Herald* had another article entitled "Action on the Boundary" which indicated that Attorney General Walter R. Johnson had started the ball rolling and discussed revision of the boundary with Iowa officials. The article then continued:

> "All up and down the river there are tracts on one side which belong on the other. Tax problems, school problems and law enforcement problems result; and all could be solved by the simple expedient of fixing the boundary where it ought to be—in the center of the now stabilized Missouri river." (Ex. P-1535).

In the *TRANSACTIONS OF THE AMERICAN SOCIETY OF CIVIL ENGINEERS,* Volume 107, 1942, an article appeared entitled MISSOURI RIVER SLOPE AND SEDIMENT by William Whipple, Jr. His name also appears on the A. P. maps of the Missouri River. In this paper, he states:

> ". . . The shifts of the river channel have been so numerous and intricate that at many points land known originally to have been in Iowa now lies on the Nebraska bank, and vice versa; and for practically all land adjacent to the river no conclusive determination of either state or private boundaries has been possible." (Vol. XIII, p. 1860).

Corps of Engineers Reports Prior to 1943

A very general history of the Missouri River can be found in the Annual Reports of the Chief of Engineers of the United States Army, printed by the United States Government Printing Office. These reports, or extracts from them, have been offered as Ex. P-2686 for the years 1877 through 1890, Ex. P-2689 for the years 1891 through

1919, Ex. P-2687 for the years 1920 through 1945 and Ex. P-2688 for the years 1946 through 1966. The first regulation works on the Missouri River by the Corps of Engineers were constructed at Nebraska City, Nebraska and Saint Joseph, Missouri, under the provisions of the River and Harbor Act of August 14, 1876. The first work at Nebraska City is described in the annual report of the Chief of Engineers of the U. S. Army for the year 1877. In discussing the proposed plan to change the direction of the current in the bend above Nebraska City, restoring it as nearly as possible to an old channel, Major Chas. R. Suter set forth a proposal to induce large deposits of sand by gradually obstructing and slackening the current and forming bars which would force the channel to follow the line desired and said:

> ". . . In carrying out this idea, I rely greatly upon the well-known instability of regimen of the Missouri River and the great rapidity with which natural causes are known to produce great changes . . ."

The 1878 report also made reference to improvement at Nebraska City, Nebraska and Eastport, Iowa and said:

> "The object of this improvement is to change the position of the river channel, in order to restore the water-front of Nebraska City, and to check a severe bank erosion of the Iowa shore near Eastport."

The 1878 report also contained the statement:

> "The survey made last year at this locality [Omaha, Nebraska and Council Bluffs, Iowa] showed that, owing to a recently formed cut-off, the banks of the river near Council Bluffs and Omaha were being eroded with very great rapidity, and that much valuable property, including the railroad-bridge over the Missouri

at Omaha, was threatened with destruction. A plan and estimate were submitted for the protection of the exposed bank near Omaha, where the threatened and actual damage was the greatest."

Attached to the 1878 report is a map of the Missouri River in the vicinity of Nebraska City made from surveys under the direction of Major Charles R. Suter in December, '76 & January, 1877 which shows Eastport Bend and the river going considerably away from Nebraska City and coming back towards Nebraska City from the East. It also shows Frazier's Island as attached to the Nebraska shore by accretion and the main channel is shown on the outside of a bend east of the island. Nebraska City Island is attached by accretion to the Nebraska side at that time. With reference to that work at Nebraska City is found the following:

"We built out to a distance of 758 feet from shore, and, to judge from the heavy cutting of the bank and the bars opposite, it seems plausible to assert that with a dike of 1,200 feet the channel would have been turned into the slough on the Nebraska side."

The 1878 report also has a description of the cut-off near Omaha which must be the Carter Lake Cut-Off and mentions that the channel and bars in the vicinity of Plattsmouth are subject to more radical changes than at almost any other portion of its course. The Assistant Engineer also made reference that:

"The neck of land between Pacific and Saint Mary's Bends is gradually becoming narrower, and a cut-off is imminent if the cutting continues, as there is no doubt it will.

In consequence of the cut-off at Omaha, which occurred in July last, the caving of the banks will be

more rapid, and will hasten the cut-off at Plattsmouth, which, if allowed to occur, would be disastrous in the extreme to the railroad companies and farmers below its location. Should, however, the cut-off be prevented from taking place, unless the upper side of the 'point' be also protected, Plattsmouth would in time lose its river-frontage from the gradual recession of the bends and their accompanying bars down stream."

The 1878 report mentions a survey intended to determine the cheapest and most feasible plan for the protection against the encroachment of the river of the Iowa bank immediately in front of the town of Sioux City and refers to a cut-off about two and a half miles above Sioux City by which the river shortened its course about one mile. It also referred to another cut-off which occurred about a year previously, and which shortened the river four miles at a point about twelve miles above the town. Reference is made to the fact that, owing to several cut-offs which have occurred above the town, the regimen of the river has been very much disturbed. producing an excessive slope and velocity besides directing the current against the town landing, which has been severely abraded. A map dated May, 1878, is attached showing the cut-off and "old River" just above Sioux City and Covington, Nebraska. The plan at Sioux City contemplated the construction of works necessary to prevent the steamboat landing from being destroyed.

Another map is attached to the 1879 report showing Nebraska City Island as accretion to the Nebraska shore and various shore lines on the Iowa side of the bend with the river considerably to the east of its present location.

There are miscellaneous references to cut-offs and

shifting channels in these reports. In the report of 1880 (Ex. P-2686) Chas. R. Suter, states with reference to the situation between Omaha and Plattsmouth:

> "The situation in brief is this: The portion of the Missouri River under consideration is extremely tortuous and has a heavy slope, averaging 8/10 of a foot to a mile. The banks are very unstable and are subject to great erosion, the results of which is an excessive width of water way, with ever-shifting channels and small navigable depth. The incessant erosion on the narrow necks between bends has already caused two cut-offs, one at Omaha and another at Saint Mary's, a few miles about the mouth of the Platte; and several others may be soon expected if measures are not taken to prevent them. The effect of cut-offs is to greatly increase bank erosion in the neighborhood and to impair the navigation over considerable distances. It is also desirable that a stable regimen be established through this stretch of river, as any changes here would have a very prejudicial effect upon the works of improvement now in progress at Omaha, above, and Nebraska City, below."

In the report for 1881 (Ex. P-2686) the Assistant Engineer at Brownville, Nebraska stated:

> "That portion of the reach between Otoe City and Peru was in 1867 and 1869 the scene of two remarkable cut-offs. The first was the more southerly and produced the greater effects, shortening the river by about 14 miles. The concentrated slope has been gradually distributed in both directions, but the slope above and below this cut-off is still excessive, from Peru to Brownville 1.1 feet per mile.
>
> I am indebted to Captain Carey who was the pilot of the first boat passing up the cut-off, viz., Colorado, for the following information: 'The neck was very narrow for a distance of 1000 feet, during a longtime

previous to the cut-off. Think it must have given way almost simultaneously throughout that distance. The cut-off occurred in the night. Left Peru the morning after the cut-off occurred. Knew nothing of the cut-off having taken place, and noticed nothing unusual until off the former neck. The cut-off had the appearance of a low reef or wier. Succeeded in passing up by following a slackwater chute on the east side. The current above the cut-off was very strong all the way to Nebraska City, the boat making only about one-third ordinary headway. One boat was sunk by the cut-off and another, after having traversed the old bend, was forced through the cut-off on attempting to pass it. One week after the cut-off took place, no difference in current above and below the cut-off was noticed.'

The second cut-off was merely a cut-off of the old neck, and forming Hog-thief Island. It is noticeable that the river now runs in the channel east of Hog-thief Island in a direction opposite to that in which it ran before the cut-off took place. Had this second cut-off occurred prior to the date of the first one, it is probable but that one cut-off would have occurred, leaving the river in a much better condition than it now is. The second cut-off must have had little, if any, effect on the slope as the channel length was not thereby changed appreciably."

This is the area immediately below the Schemmel land and appears on Ex. P-211, which is the 1890 Corps of Engineers map showing the area from Nebraska City south to McKissock's Island.

The 1881 report refers to a cut-off in the old Florence Bend leaving Florence Lake in the Omaha-Council Bluffs area, but this was back around 1825 and prior to admission of either state into the Union. Also mentioned is a

cut-off in 1835 then known as Hart's Cut-off and later known as Iowa Lake. Then reference is made to Cut-Off Lake resulting from a cut-off in 1877. This would apparently be the Carter Lake avulsion. Also the following statement is made:

> "A very unfavorable result of the floods was the cut-off in Kansas City Bend April 26. This neck was about 1,200 feet wide when the survey was made in that vicinity last winter. On the upper side was about 3½ miles of almost perfect river, having a narrow and deep section, and flowing in banks regarded as permanent for ten years previous. The river was shortened about 4½ miles, and the difference of level on the two sides was about 31 feet.
>
> A violent erosion of the Iowa shore opposite the cut soon resulted, and has not yet ceased.
>
> This is the third cut-off between Omaha and the Platte River in the last three years."

This same report discusses work at Sioux City and the Assistant Engineer mentioned a cut-off and the fact the river had regained the length lost when the cut-off occurred. The report also states:

> "This reach is in a condition susceptible of permanent improvement at comparatively small cost; unless this is effected in the near future, the narrow necks of land with cutting banks will become a series of cut-offs which will cause changes of regimen and produce an unsettled condition of river above and below indefinitely."

In the report of Major Chas. R. Suter, Major of Engineers, dated February 2, 1881, the following generalizations are made:

> " * * * It is navigable for nearly its whole length, for the portion above the Great Falls, near Fort

Benton, is already provided with several small steamers. . . The country through which the Missouri flows is mostly one of small rain-fall so that its really large discharge is due to the great area of its drainage basin and the mountain-snows and ice near its headwaters. Its most salient and striking features are the remarkable impetuosity of its current, and its slope, which is considerable for so large a stream. The rapidity of the current and the general instability of the banks and bed give rise to the excessive turbidity of its waters, which have earned for it the title of the 'Big Muddy'. It is, in fact, the greatest silt-carrier in the country, and the enormous mass of sediment which it brings forward forms the great bulk of that received by the Mississippi from its tributaries. . . The subject of its improvement, therefore, is not only of local interest, but is of the greatest general importance now that the improvement of the Mississippi is receiving serious consideration. . . The regular floods are two in number, and usually occur in April and in June. The first is extremely violent and of short duration, rarely lasting over a week or ten days; it seems to come largely from the upper river. The June rise, although generally higher, is of longer duration, being influenced by local rains and the general saturation of the soil. . . The rate of travel of the crest of these floods is, on an average, about six miles per hour. . . Both (rises) however, has sufficient power to produce tremendous effects and bring about the most astonishing changes. . . The general absence of the large, high, and well-defined terraces, which are usually found in valleys of this description, and the general prevalence in the surface soil of the very fine sand before alluded to, leads to the inference that the river, within comparably recent times, has scoured over the greater part of the area embraced between the limiting bluffs, at least in the narrow portions of the valley. . . The velocity of the current is very great. At low-water the average is

from two to three miles per hour, while in floods it amounts to ten miles per hour or more. Owing to this cause, and also to the large amount of very light material in the bed and banks, the amount of bank erosion and scour in fill of the bed is very great and very rapid. Bank erosion to the extent of 2,000 feet per annum over long distances, has been noted, and to a greater or less extent it is constantly going on, even during low stages."

The report then mentions the bars formed which, even at high water, obstruct navigation. They are constantly in motion and the position and shape change from day to day. It then continues:

". . . Where a point or projecting neck is attacked on both sides, a cut-off is soon formed, which also acts detrimentally by increasing the local slopes and inaugurating other destructive changes. The caving of the banks precipitates into the river countless trees, which form the snags which constitute, in the strong current, most serious dangers to navigation, and also assist in impeding the free flow of the stream. . . "

In the report of Mr. Chas. S. Pease, Assistant Engineer, Council Bluffs, Iowa, dated July 1, 1882, he states:

"Major: I have the honor to submit the following report of operations during the fiscal year ending June 30, 1882, in the vicinity of Council Bluffs, Iowa, and Omaha, Nebr. By a comparison of the maps of the Florence-Bellevue reach made from surveys of February and of November, 1881, it will be seen that little change has taken place during the fiscal year except at Steamboat Bend. It was extremely unfortunate that the cut-off of April, 1881, occurred in this locality, because an almost ideal piece of river was disfigured and nearly 5 miles of course lost; and, moreover, this cut-off was the third in three years

> between Omaha and Plattsmouth; it only made a bad matter worse. The previous cut-off had demoralized the slope and course of the river, but with the last event we had between Bellevue Bend and Plattsmouth about the most unsettled regimen imaginable. . ."

Then there is further discussion of the cut-off and how it was formed in the same manner as that at Vermillion, South Dakota.

In the 1883 Annual Report there is a map showing Nebraska City Island against the Nebraska shore with a slough or chute between it and the bank and trees on the island. The Missouri River is running around Eastport Bend considerably east of the present river. The statement is made that there were two channels in Pin Hook Bend, one closely hugging the bluff down through Van Horn Bend and the other following the Iowa shore. These united at Jones's Point and formed a single channel for a mile or so and then separated again and united in the lower part of Civil Bend. There was then another separation with one channel closely following the Iowa bank and the other the concave bank at Copeland's Bend which is immediately above Nebraska City. The report then continued:

> "These channels met at one time opposite the head of Nebraska City slough; and, until the mouth of the eastern channel cut itself below the head, very extensive erosion took place in the slough and fears were entertained that a cut off would occur and the water leave Eastport Bend for the shorter channel through the slough. All fear of such an event is passed for the present, however, as the action of the eastern channel is too far down on the island to affect the slough so as to produce an enlargement."

Later reports show Nebraska City Island with the river running through that slough on the west side of Nebraska City Island, as Nebraska City Island was cut off by the river and left on the eastern side as shown in December, 1886 on Exhibit P-371.

Various references are made throughout all of the early reports to activities by the snag-boats and work at various points along the river. This includes the work at Eastport and Nebraska City, Plattsmouth, Council Bluffs, Omaha and Sioux City, all of which work was carried on during the 1880's. There are also commerce statistics found in various other reports and the 1886 report contains an interesting comment:

> "SIR: In accordance with the directions of the Commission, that the 'Secretary procure statistics as complete as possible *of the commerce of the Missouri River'*, I have the honor to report as follows:
>
> The results of my endeavors to collect data, reaching to date, and full, have been very meager.
>
> Letters and lists of exact information wanted were sent to all addresses that could be heard of as likely to prove fruitful. Very few answers were received, and these very incomplete. Steamboat men are very unwilling to give definite information as to the trade of their companies, apparently from fear of the railroads. Even when assured that their disclosures would be kept confidential, their caution refused to be overcome * * *.
>
> The steamboats on the Upper Missouri are not in direct competition with railroads, as on the Lower River and perhaps never will be. This relieves the river men in that section from the necessity for silence which is felt below, but their statements are

to be taken with caution unless proved from other sources. . . ."

The report then mentions that there were no barges at that time on the Missouri River because insurance was too high. It also shows a list of steamboats on the Missouri River and one of those mentioned is the *Vienna* built in Plattsmouth, Nebraska, in 1879. Its length is shown as eighty-nine feet, eight inches, breadth twenty-four feet, zero inches, and depth two feet, eight inches. Plattsmouth, Nebraska was an active river port in the early days as indicated by a photograph appearing on the front page of the *Plattsmouth Journal* of June 26, 1967 of the early steamboats with the caption "Early Plattsmouth shown as Plattsmouth in 1862 when it was a main steamboat stop-off. On March 9, 1862 eleven steamboats were anchored here at one time." The photo has at the bottom "No. 9 Main Street 1862 Photo, By Sen. S. L. Thomas, Plattsmouth, Neb." (Ex. P-2248).

In the 1889 report reference is made to the "old river-bed at the head of Nebraska City Island" and accompanying the 1889 Annual Report, is a map showing the designation "old river bed" going around the left side of "Nebraska City Island."

In the 1890 report appears a list of steamers plying the Missouri River enrolled at the Port of Omaha, Nebraska, during the year 1889. Thirteen steamers are listed with managing owners from Nebraska, the Dakotas, Iowa and Minnesota. Also, in this 1890 report is a series of maps under the title MISSOURI RIVER COMMISSION LOCATION OF BORINGS IN THE VICINITY

OF BLAIR, NEB., SURVEYED 1883 BY GEO. S. MORRISON, and one of these maps shows an oxbow area a considerable distance from the river just northeast of Blair and written in this area are the words "CUT-OFF 1881". This cut-off of 1881 shown in Ex. P-2686 is in the California Bend area and shows an old abandoned river bed considerably to the east, and the old Soldier River used to come in at the top and in the middle of Iowa Section 35. This same area is shown as a water and marsh area on the 1947 Corps of Engineer tri-color map (Ex. P-2667), and will be referred to later in the brief.

There is another map showing the old river bed around Nebraska City Island with the river next to the bluffs on the Nebraska side.

Exhibit P-1619, entitled Call for a Missouri River Improvement Convention at Kansas City, Missouri, on December 15 and 16, 1891, is a report by the Commercial Club of Kansas City and includes remarks by S. H. Younge, Division Engineer. Although he stated that his remarks referred to the reach extending from the mouth to Kansas City, he also said they were applicable in a general way to the whole portion of the river known as the sandy river which extends about 2,000 miles above its mouth. He mentioned the fact that one hundred and forty-six thousand acres lie between the high water banks of the river between the bluffs from Kansas City to the mouth. The other five hundred thousand acres which were not river bed proper, were liable, sooner or later, to be washed away by the river unless the river is re-

strained by properly designed and constructed improvement works. He said:

> "There is probably not a square foot of land anywhere between the river bluffs that has not been occupied over and over again by the river in its meanderings."

Mr. Younge also mentioned that the width of the river below Kansas City between its high water banks varied from nine hundred to seven thousand feet with the low water widths varying from four hundred to two thousand feet. He discussed river structures and new land which would be made eventually and built up by improving the river as well as the safety of the additional land between the bluffs. He mentioned the land adjacent to the river which then had an average value of $25.00 per acre would be worth $75.00 to $100.00 per acre. He did state that he had not made an extended study of the reach between Kansas City and Sioux City, but the remarks he made in regard to the increased value of land, and the other benefits to be derived applied with equal force to the river between Kansas City and Sioux City.

In the 1891 annual report of the Missouri River Commission the following reference is made:

> "Soon after the passage of the appropriation act of September 19, 1890, the Commission decided on making a new shore-line survey of the river from Sioux City to the mouth. Since the topographic survey of 1878 and 1879 was made, numerous and important changes in shore line have occurred; so that the published maps of that survey have become quite unreliable as to the present shore line. . . ."

A map appears as a part of the report showing the "OLD RIVER BED" around the eastern side of Nebraska City Island with the river back against the bluffs along the Nebraska side. Reference is also made to the fleet at Nebraska City.

The 1893 report contains commerce statistics and shows enrolled at Omaha thirteen boats in 1889, ten boats in 1890, twelve boats in 1891 and eleven boats in 1892.

The 1895 report contains the following:

> ". . . The natural channels on the Missouri are tortuous and exceedingly unstable, constantly shifting in position and difficult to run by boats of any size, and it is quite safe to say that the delays incident to these features are quite as much of a detriment to profitable navigation as any lack of depth of water . . ."

The reports also make several references to cut-offs which occurred along the Missouri-Kansas border.

The 1898 report contains additional history of the Nebraska City situation and an attached map again shows the river on the Nebraska side of Nebraska City Island, the location of dikes constructed by the Corps, and the old "RIVER BED OF 1881" around the eastern side of Nebraska City Island.

The 1901 report contains further reference to several cut-offs in recent years above Sioux City causing a large amount of erosion on the banks opposite Sioux City.

The Missouri River Commission ceased existence in 1902 and the 1902 report is its last annual report. It

refers to the fact that there were some three hundred steamboats lying embedded in the sand of the river. It also stated that there were forty-two merchant steam vessels engaged in trade on the Missouri River below Sioux City which receive yearly inspections by the United States Inspector of Steam Vessels, and in addition fourteen or more gasoline boats.

The 1903 annual report of the Chief of Engineers commences:

> "The Missouri River has been navigated by steamboats since 1819; first boat to Council Bluffs, 1819; first to mouth of Yellowstone, 1832; first to head of navigation, 1859. . . .
>
> Government work on the river in the matter of removel of snags began as early as 1838 and continued thereafter, under annual appropriations (for the most part made jointly for the Ohio, Mississippi, Missouri, and sometimes the Arkansas Rivers) with occasional intermissions, for the next forty years. Prior to 1878 one or two small appropriations had been made for general improvement, but it was with the act of June 18 of the latter year that appropriations began on a large scale."

In 1904, reference is made to the falling off of commerce on the lower river, but an increase on the upper river. In 1905 is found the following:

> "St. Marys Bend, below Omaha, Neb.—By request of Congressman, Walter I. Smith, of Council Bluffs, Iowa, an examination was made of the river in the vicinity of St. Marys Bend in company with State Senator Shirley Gilliland, and Seth Dean, County Surveyor of Mills County, with a view of permitting

a cut-off to be made through the sandbar on the right bank, to relieve the erosion of the left bank."

The 1913 annual report states that the existing project providing for a six foot channel between Kansas City and the mouth was adopted by Congress on July 25, 1912. It reiterates that government work on the removal of snags began in 1838 and a project for the river from Sioux City to the mouth was adopted in 1884 and in 1890 the project was modified to provide for systematic improvement of the first reach, from Jefferson City to the mouth. It stated that the results of the expenditures at separate localities have been beneficial locally by protecting the banks and forming good navigable water fronts and incidentally preserving private property from the ravages of the river, but has given little, if any, encouragement to navigation.

The 1915 report states that, during the past decade, a snag boat had operated regularly during a portion of each season on the part of the river between Kansas City and Sioux City; and mention is made in the 1916 report of a small boat line in operation between Omaha and Decatur, Nebraska and water transportation between Kansas City and Omaha initiated in the spring of 1916 by small towboats.

In the 1919 report the statement is made that at Hamburg, Iowa, left bank, about mile 597:

"A land improvement company set six current retards equidistant along 6,600 feet of bank at a cost of $8,292. These are floating log gratings 100 feet in length, anchored to concrete piling jetted below the river bed."

Ex. P-2687 contains the Annual Reports of the Chief of Engineers from 1920 through 1945. The 1920 Report states that the width of the river from Kansas City to the mouth in its original condition varied from five hundred feet to over one mile and the river shifted in location and destroyed many acres of valuable bottom land. The section from Kansas City to Sioux City was similar to the section below Kansas City and, before improvement, the river was navigable throughout this entire section. The first regulation work is stated as having been constructed at Saint Joseph and Nebraska City under the provisions of the River and Harbor Act of August 14, 1876. In the 1921 report, in the vicinity of the Missouri-Iowa state line at mile 597 a system of eleven retards is shown as having been constructed for bank improvement consisting of eight hundred and seventy linear feet at a cost of $30,563.38. This is at the lower end of the Schemmel land and, in fact, the testimony was that the most northerly revetment along the Iowa bank appearing on the 1923 Corps of Engineer map was approximately 1,600 feet north of the Hamburg Landing Road whereas the bottom part of Iowa's traverse of the Schemmel land which Iowa is claiming extends to within 1,000 feet of the Hamburg Landing Road.

During the years the reports often refer to a considerable amount of private construction along the river. Reference is also made to the fact that in the autumn of 1924 the Western Barge Line operated its steamer *Decatur* with cargo box barge between Sioux City and Omaha, but withdrew at the end of the season upon finding commercial boating unremunerative.

The 1934 report for the fiscal year ended June 30, 1934 shows work at Frazer-Otoe Bend and the 1935 report shows work at Frazers and Otoe Bends and work at Tobacco and Rock Bluff Bends. From 1936 on, many entries give some general indication of the amount of work done on the Missouri River along the Iowa-Nebraska border. There are many references to dredging and canals. In the 1938 report, pilot canals are shown at Glovers Point Bend, mile 778.2; Papillion Bend, mile 638.8; Plattsmouth Bend, mile 637.1; Civil Bend, mile 616.7; Otoe Bend, improve existing canal, mile 601.3; Hamburg Bend, improve existing canal, mile 597.3; Hamburg Bend, 596.7; Omadi Bend, mile 796.6; Browers Bend, mile 788.2; Omaha Mission Bend, mile 764.3; and Little Sioux Reach, mile 725.1.

The 1938 report also makes reference to, ". . . one earth filled dam to divert the channel. . . ." In addition, it states:

> ". . . the cost of channel surveys made during the year *to determine results accomplished by the various works* was $25,281.20. . . ." (Emphasis supplied.)

The 1939 report refers to completion of two cut-offs at California Bend and at Peterson Bend and refers to three channel cut-offs having been effected under the existing project. The Chief of Engineers recommended adoption of a project for the Missouri River between Sioux City and the mouth so as to provide for a channel of 9 foot depth and width not less than 300 feet,

> ". . . to be obtained by revetment of banks, construction of permeable dikes to contract and stabilize the

water way, cut-offs to eliminate long bends, closing of minor channels, removel of snags, and dredging as required. . . ."

The 1940 report, in its summary of work done, includes:

". . . effecting three channel cut-offs, and removal of 49,641,454 cubic yards of material dredged from the channel to obtain project depth and width."

The 1941 report mentions Civil Bend Pilot Canal then under construction, and the 1942 report also mentions excavation at the Civil Bend Pilot Canal and nose protection at Omadi Bend Pilot Canal and Browers Bend Pilot Canal. It also shows work done at Rock Bluff—Frazers Bend and Otoe Bend and Tobacco Bend.

The 1943 report states that the work between Rulo and Omaha was approximately 99% completed and between Omaha and Sioux City approximately 78% completed.

The Iowa-Nebraska Boundary Compact of 1943

An article appeared in the *Omaha World Herald* of February 24, 1943 entitled "Offer Another Boundary Bill". This article states:

"The Iowa attorney general's office has prepared a bill calling for establishment of the boundary between Nebraska and Iowa conforming, in the main, to the channel of the Missouri river.

Attorney General John M. Rankin said the changing course of the river has left 12,500 acres of Nebraska land east of, and 6,700 acres of Iowa land west of the present channel."

The article states the bill would give Nebraska jurisdiction of all land west of the channel except the town of Carter Lake and would give Iowa jurisdiction over land on the east side of the channel. It continued:

> "The attorney general said considerable difficulty has been experienced in one Iowa consolidated school district whose boundaries include 800 or 900 acres west of the present channel."

The original bill in the Iowa legislature in 1943 to establish the boundary compact was offered as House File 437, dated February 26, 1943 (Ex. P-1618). It was similar to the Iowa-Nebraska Compact as finally agreed upon except that the original bill excepted the boundary line established and declared to be such in a judgment or decree entered in the Supreme Court of the United States and the bill identified the case of *Nebraska v. Iowa*. Attached to this bill is an explanation which states:

> "This measure is intended to fix the boundary line between Iowa and Nebraska now that the channel of the Missouri river is under control. It will be observed that this measure retains the Carter Lake territory in Iowa.
>
> Making the present channel of the Missouri river the boundary line will tend to simplify the question of jurisdiction over territory now in dispute."

The Journal of the House of the Fiftieth General Assembly, State of Iowa, 1943, shows an amendment was filed which specifically excepted Carter Lake from the agreement by metes and bounds description and which added the language of the compact presently found in the last paragraph of Sec. 1 which identifies the middle

of the main channel as the center line of the proposed stabilized channel of the Missouri River as established by the United States Engineers' Office, Omaha, Nebraska, and shown on the alluvial plain maps (Ex. P-1548). The bill was then passed by the House on April 6, 1943 (Ex. P-1548), passed by the senate, and shown as signed by the President of the Senate on April 8, 1943 (P-1549) and sent to the Governor of Iowa on April 8.

The Nebraska Legislative Journal for the 102nd day, dated May 27, 1943, has a letter from B. B. Hickenlooper, Governor of the State of Iowa, dated May 25, 1943, to the Clerk of House of Representatives of Nebraska enclosing a certified photostatic copy of House File 437, Acts of the Iowa Fiftieth General Assembly (P-1547, P-2303) and the Iowa-Nebraska Boundary Compact was adopted by the Nebraska legislature with the addition of Section 6 which repealed a 1941 proposed boundary compact bill and Section 7 which is the emergency clause (P-2302). It was passed by the legislature and signed by the Governor on May 7, 1943 (Ex. P-1008, P-1547).

The Compact as adopted by the State of Iowa appears as Exhibit "A" attached to the Complaint and was offered as Exhibit P-2605. After establishing the middle of the main channel as the boundary and identifying it as being the center line of the proposed stabilized channel of the Missouri River as established by the United States Engineers' Office, Omaha, Nebraska, as shown on the alluvial plain maps of the Missouri River which were then on file in the United States Engineers'

Office at Omaha and copies of which maps were on file with the Secretary of State of Iowa and the Secretary of State of Nebraska, the Compact then provided:

"Sec. 2. The State of Iowa hereby cedes to the State of Nebraska and relinquishes jurisdiction over all lands now in Iowa but lying westerly of said boundary line and contiguous to lands in Nebraska.

Sec. 3. Titles, mortgages, and other liens good in Nebraska shall be good in Iowa as to any lands Nebraska may cede to Iowa and any pending suits or actions concerning said lands may be prosecuted to final judgment in Nebraska and such judgments shall be accorded full force and effect in Iowa.

Sec. 4. Taxes for the current year may be levied and collected by Nebraska or its authorized governmental subdivisions and agencies on lands ceded to Iowa and any liens or other rights accrued or accruing, including the right of collection, shall be fully recognized and the county treasurers of the counties affected shall act as agents in carrying out the provisions of this section: *Provided,* that all liens or other rights accrued or accruing, as aforesaid, shall be claimed or asserted within five years after this act becomes effective, and if not so claimed or asserted, shall be forever barred.

Sec. 5. The provisions of this act shall become effective only upon the enactment of a similar and reciprocal law by the State of Nebraska and the approval of and consent to the compact thereby effected by the Congress of the United States of America. Said similar and reciprocal law shall contain provisions identical with those contained herein for the cession to Iowa of all lands now in Nebraska but lying easterly of said boundary line described in section 1 of this act and contiguous to lands in Iowa and also contain provisions identical with those con-

tained in sections 3 and 4 of this act but applying to lands ceded to Nebraska."

It should be noted Sec. 5 of the Iowa bill specifically required that Nebraska's Act should contain provisions identical with those contained in the Iowa bill for the cession of lands lying easterly of said boundary line ". . . and also contain provisions identical with those contained in sections 3 and 4 of this act but applying to land ceded to Nebraska."

The Nebraska act appears as Exhibit "B" of the Complaint (Ex. P-2606) and the bill was offered as Exhibit P-2302.

In the United States Congress Senate Calendar No. 401, Report 388, 78th Congress, First Session and the Report No. 551 of the House of Representatives are the following comments referring to the Compact:

"The purpose of the bill is to give the consent of Congress to the compact entered into by the States of Iowa and Nebraska establishing the boundary between Iowa and Nebraska.

Congressman Howard H. Buffett, of Nebraska, author of the Bill, has advised the committee—

If adopted this measure will settle a large number of jurisdictional disputes which have arisen over a long period of time. The States of Iowa and Nebraska, after lengthy negotiations, have entered into a compact satisfactory to both states. The measure, so far as I have been able to ascertain, is not controversial. The Honorable Ben F. Jensen and the Honorable Charles B. Hoeven, representing the affected Iowa districts and the Honorable Karl Stefan and the Honorable Carl T. Curtis, representing, along

with myself, the Nebraska districts affected, have all expressed their approval of H. R. 2794 as well as the compact which it approves.

Consent of Congress to the compact is required by reason of that part of Section 10, Article 1 of the Constitution which provides:

'No state shall, without the consent of Congress * * * enter into any agreement or compact with another State'." (Ex. P-1012, P-1015).

The A. P. maps as filed with the Secretary of the State of Nebraska were offered as Exhibit P-1770 and are of the scale of one inch equals one mile and show that they were filed with Frank Marsh on April 2, 1941. These maps do not show all of the agricultural levees which appear on later A. P. maps and each of them has a stamped note in the corner:

"Note: The area covered by the Missouri River on this map was compiled from aerial photographs taken by the U. S. Army Air Corps and field surveys made in 1939. The area landward from the Missouri River was compiled from uncontrolled mosaics of aerial photographs taken by the U. S. Department of Agriculture in 1936, 1937, and 1938."

They are dated January 30, 1940, and March 29, 1940, and all are shown as submitted by Wm. Whipple, 1st Lt. Corps of Engineers. There are no calls or distances given. The dikes on the A. P. maps are not all numbered. The d e s i g n e d channel is traced on the maps and, particularly north of Omaha, this design is shown as running through all kinds of bar and dry land area. Several cut-off lakes are shown. On A. P.—5 California Bend is clearly shown as a cut-off and at the top

of the map Peterson Cut-off is shown, although neither of these is so labeled. This is also true of St. Mary's Cut-off on A. P.—8. Nottleman Island is shown on A. P. —8 and on A. P.—9 the river can be seen running through what was the bottom part of Goose Island and the top part of a lower island and this area later becomes what Iowa now describes as Auldon Bar. The Schemmel land appears on A. P.—10. It is particularly noteworthy that, at the very end of the long dike extending from the Iowa shore to the middle of Schemmel Island there is a trail dike extending downstream, and at the end of this trail dike there appears to be a clump of trees. This will be discussed later as land which was cut off by the construction of the Otoe Canal by the Corps of Engineers. The Iowa Chute is also shown considerably to the east of the Schemmel land. Mule Slough can be seen on A. P.—9 immediately east of Nebraska City. There is no other identification of where Nebraska City Island may have been on this map.

These Alluvial Plain Maps will be discussed elsewhere. Suffice it to say at this time that they are obviously only general maps and are completely inadequate as surveys. It is impossible to lay out a line on the ground based upon the data in these maps and it is obviously impossible to determine the center of the designed channel as established by the Corps of Engineers from the information on these maps. It is also apparent from these maps that the river is shown in several places in other than the designed channel where designel channel is shown as going through land, bank, island or bar which on the A. P. Maps is dry ground. The maps also show

the designed channel in a series of curves and they show many islands and bar areas on both sides of the designed channel.

Nebraska Boundary Legislation Since The Compact

The Compact evidently did not decide all of the problems between the states because in 1947 the Nebraska legislature adopted an act RELATING TO IOWA-NEBRASKA BOUNDARY LINE COMMISSION. This act authorized the Governor of Nebraska to appoint three commissioners to act with a similar commission to be appointed by the Governor of Iowa to negotiate a Compact for submission to the legislatures and to Congress "Whereby land east of Omaha and lying west of the Missouri River in the State of Iowa may be ceded to the State of Nebraska upon such terms as may be deemed fair and equitable." (Ex. P-2234).

In 1957, the Nebraska legislature adopted another act relating to the boundary between Iowa and Nebraska and again providing that the Governor shall appoint a commission to negotiate a Compact to establish a new boundary between Iowa and Nebraska (Ex. P-2223 and P-2235).

In 1959 the Nebraska legislature adopted another bill providing for the appointment of commissioners for the purpose of negotiating a Compact to establish a new boundary (Ex. P-2340 and P-2233).

Then in 1961, following the publication by the State of Iowa of Part I of the Missouri River Planning Report (Ex. P-2609), the Nebraska legislature adopted Legisla-

tive Resolution 38 on June 13, 1961, Re: "Surveys to Determine the Boundary or Titles to Lands Along the Missouri River". This is a resolution requesting the Board of Educational Lands and Funds ". . . to direct the State Surveyor to make or cause to be made such surveys as may be necessary or helpful in determining the boundary of this state where the same is formed by the Missouri River, or may be necessary or helpful in protecting the interest of this state or the citizens thereof from the direct or indirect claims of other states to lands along the Missouri River . . ." and to collect documents and materials essential or helpful in determining the boundary or titles to lands along the river (Ex. P-1006 and P-1007). This action was taken promptly by the legislature within six months after the date of the Missouri River Planning Report of January, 1961.

In 1963, when it was apparent that Iowa was continuing to push forward aggressively with its program concerning ownership of lands along the Missouri River owned by residents of the State of Nebraska, the Nebraska legislature adopted Legislative Resolution 47 which is attached to the Complaint as Exhibit "Q" and was offered as Exhibit P-2607. This resolution is as follows:

> "WHEREAS, the State of Iowa is being most aggressive in asserting ownership of lands lying east of the stabilized channel of the Missouri River, many of which lands are owned by residents of the State of Nebraska; and
>
> WHEREAS, the State of Iowa in pursuit of this policy has initiated action in its own courts against

at least one resident of Nebraska, and in statements by its officers has indicated that further similar actions are contemplated against Nebraska residents and against lands which are a part of the State of Nebraska; and

WHEREAS, in certain instances this aggressive policy by officers of the State of Iowa may be in conflict with the solemn agreement of the State of Iowa on April 15, 1943, to recognize Nebraska titles; and

WHEREAS, individual owners of Nebraska lands and individual Nebraska citizens in defending their ownership of such lands cannot be in a position to match the financial and legal resources available to officers of the State of Iowa in the pursuit of their present policies in attempting to acquire title to the lands involved.

NOW, THEREFORE, BE IT RESOLVED BY THE MEMBERS OF THE NEBRASKA LEGISLATURE IN SEVENTY-THIRD SESSION ASSEMBLED:

1. That the State of Nebraska is deeply concerned on behalf of its citizens with the aggressive policies pursued by officers of the State of Iowa in the acquisition by that State of certain lands along the Missouri River.

2. That within the limits of appropriations specifically made for that purpose, the Attorney General of the State of Nebraska be directed to employ special counsel or assistant Attorneys General to examine into all such actions initiated or contemplated by the State of Iowa, and where such action appears to be justified to protect the legitimate interests of Nebraska citizens or the titles to Nebraska lands, or to assure compliance by Iowa officials with the 1943 Boundary Compact with the State of Iowa, that he

intervene on behalf of the State of Nebraska in any such actions or proceedings initiated by officials of the State of Iowa, or that he initiate any and all necessary original actions in the Supreme Court of the United States to accomplish the objectives outlined herein."

Then this action was filed by the State of Nebraska on July 20, 1964.

Iowa Legislative and Governmental History Since the Compact

In 1957 the Iowa legislature adopted a resolution to create a special committee to confer with the legislature of the State of Nebraska and make a study of the present boundary line between the States of Nebraska and Iowa (Ex. P-2293, 2294, 2295, 2298). The preamble of the resolution recites that until 1943 the boundary between the States of Nebraska and Iowa was the center of the main channel and in 1943, by acts of the legislatures of the two states and concurred in by Congress, the boundary was changed "so as to follow a line surveyed and mapped by the U. S. Army Corps of Engineers which at that time was the center of the main channel of the Missouri River as altered by the U. S. Army Corps of Engineers and presumed to be permanent, and WHEREAS, the U. S. Army Corps of Engineers has not maintained the channel of the Missouri River on this line . . ." and ". . . in some instances the entire river now flows through the state of Nebraska and Iowans do not have access to it except by going through parts of the State of Nebraska . . ." The explanation is "The purpose of this act is to draft legis-

lation to accomplish a correction in the Iowa-Nebraska boundary line and to meet with members of the Nebraska Legislature in an effort to secure similar action by that state and to secure the concurrence of the United States Congress."

The 1959 Journal of the House (Ex. P-2297) and Journal of the Senate of the State of Iowa (Ex. P-2296) include a REPORT OF IOWA-NEBRASKA BOUNDARY STUDY COMMITTEE pursuant to the 1957 acts of the Iowa legislature. This report starts with a discussion of the historical background and then contains a section on the reason for the current study and states:

> "The Missouri River is historically known as a turbulent stream and has changed its main channel frequently during recent years as it had been doing since the stream has been known by mankind. The U. S. Corps of Army Engineers was given the job of attempting to stabilize the Missouri River channel and the United States has spent many millions of dollars in doing so. The Corps of Engineers found that it was not expedient and practical to hold the channel of the Missouri River on the boundary line as established in the 1943 compact and in its work of stabilizing the channel primarily between Omaha and Sioux City changed the course of the river in many localities so that at the present time approximately twenty-six (26) miles of the Missouri River lies west of the established Iowa-Nebraska boundary and wholly within the State of Nebraska whereas approximately thirteen (13) miles of the Missouri River lies wholly east of the Iowa-Nebraska boundary line and is within the boundaries of the State of Iowa, which involves several thousand acres of land.

> An example of the change in the course of the Missouri River as brought about by the work of the Corps of Engineers is in the bend in the river known as the 'Decatur Bend' which lies from three to five miles west and approximately one and one-half miles south of the City of Onawa. At the present time the new channel at the 'Decatur Bend' is now flowing under the bridge, which was formerly a dry land bridge, and is entirely within the State of Nebraska, at least insofar as the 1943 compact and map AP-3 described the stabilized channel." (Ex. P-2297).

There is then a section on problems caused by the present location of the boundary which includes the following:

> "As indicated above, the legally established boundary line, as it now exists, no longer, in many instances, follows the middle of the channel of the Missouri River but is wholly an intangible line which may be several hundred feet from the river, thus making it most difficult to ascertain the location of the line, without a survey, which causes difficulty in determining whether the Iowa or Nebraska laws apply in regard to law enforcement, title to real estate and other problems which may arise as to which state has jurisdiction. This condition is aggravated by the fact that in the normal flow of the Missouri River it may change its course several hundred feet in a year's time, cutting away land on one side of the stream and by alluvial deposit leaving additional land on the other side."

Then it is stated that the stabilization work had progressed to some extent north of Omaha but was less than fifty per cent completed to Sioux City. Mention was made of a cut-off in DeSoto Bend which ". . . when

completed will place from 3,000 to 4,000 acres of land on the east side of the Missouri River and it is the belief of your committee that there cannot be delegated to the U. S. Army Corps of Engineers authority to fix the boundary line between Iowa and Nebraska by using the middle channel of the Missouri River at such place as their work might place it."

The committee concluded:

"We, the members of the Iowa-Nebraska Joint Boundary Commission, find that the existing boundary line between Iowa and Nebraska creates many problems regarding land titles and the administration of various laws in both states. However, it would serve no useful purpose at this time to recommend the creation of a new boundary line until the Missouri River channel is stabilized, which work is now only approximately 50 per cent completed by the United States Corps of Engineers between Omaha and Sioux City.

To fix any boundary line other than the middle of the channel of the Missouri River would merely continue the existing problems.

It is therefore our judgment and decision that no action be taken at this time for the change of the Iowa-Nebraska boundary line, but that this Committee or a similar Committee be continued so that when the Missouri River channel is stabilized to the extent that the channel of the Missouri River can be used as a natural boundary line between the two states that this Committee or its successor can recommend a proposal for a new boundary line which will be readily definable and visible and which may be reasonably acceptable to the majority of the residents of the territories whose change in citizenship will be involved."

The recommendation was made that the committee be continued.

The JOURNAL OF THE HOUSE OF THE FIFTY-NINTH GENERAL ASSEMBLY, STATE OF IOWA, 1961, refers to a bill, H. F. 571, to establish the boundary in the middle of the proposed stabilized channel, but the reference in Section 4 is to taxes for the year 1961 instead of 1943. The explanation at the end of the bill states:

> "This bill resolves the dispute now existing between the states of Iowa and Nebraska in regard to the boundary line between the two states by establishing a specific boundary line according to the United States Government Survey." (Ex. P-2304, P-2299).

The bill was referred to Committee and no further action taken.

The 1961 IOWA JOURNAL OF THE SENATE (Ex. P-2300) and JOURNAL OF THE HOUSE (Ex. P-2305) contain a "Report of Iowa-Nebraska Boundary Study Committee". The report states that the committee appointed by the 1957 legislature had made a study and determined that the stabilization of the river had not been sufficiently attained to warrant a committee recommendation to proceed with boundary line negotiations at that time. The committee was reactivitated in December of 1959 and the Iowa and Nebraska Committees during 1960 concluded from reports of the District Office of the Corps of Engineers and visual inspections that a sufficient degree of channel stabilization had been attained to attempt a boundary line determination. This

report recommended the Iowa and Nebraska Committees proceed with boundary negotiations based upon the premise that the twenty-eight miles of wild river would be under contract with completion date in August, 1961, with the exception of some five miles. The report also states that in a one hundred and twenty-one mile span of the river from Sioux City to Omaha, the Missouri River straightening by the corps has eliminated, or will eliminate, some forty miles of river bends on the Iowa side with losses in river frontage prineipally at Blackbird Bend, Tieville Bend and Decatur Bend. The Iowa Committee adopted a resolution proposing that the boundary line be the middle of the main channel of the proposed stabilized channel, and a recommendation to except Carter Lake lost in committee.

In the 1963 Iowa House, a bill was introduced by twelve members to establish the boundary and appears to be quite similar to the 1943 Compact provisions. At the end of the bill there is an explanation as follows:

> "This bill resolves the dispute now existing between the states of Iowa and Nebraska in regard to the boundary line between the two states by establishing a specific boundary line according to the United States Government Survey." (Ex. P-2306).

Also attached is a REPORT OF SUB-COMMITTEE OF JUDICIARY 1 on House File 263 (Ex. P-2306). This report states that one of its meetings ". . . was with representatives from the State Conservation Commission at their request." The following statements are then included in the report:

"The sub-committee finds that as a result of the

straightening and controlling of the channel of the Missouri river, with the exception of Carter Lake, Iowa, this left a considerable amount of property of Iowa within the State of Nebraska, and property of Nebraska in the State of Iowa. The proponents of House File 263 complain that ownership of property along the entire Iowa-Nebraska border cannot be determined, that titles are confusing and that taxes are uncollectable. This is difficult for the sub-committee to understand, for while it is not within the province of the committee to determine titles, *an arbitrary changing of the main channel of the river certainly would have no effect on titles to property where individual ownership previously existed.* The only land to which title would seem questionable would be that to which ownership had not previously been established, which in all probability would only be swamp or waste land prior to the straightening of the channel. If private ownership was not previously established to this property, it undoubtedly belonged to the respective states. The respective states, by statute in all probability can exchange titles to such waste lands. Whether or not adjoining land owners acquire title to any such land would be legal questions, and the sub-committee fails to see how changing state lines by House File 263 would assist in determining titles to such land. Nevertheless, it is definitely desirable to change the state boundary to the center of the new channel of the Missouri river as straightened and stabilized by the Army Engineers except for Carter Lake, Iowa.

In passing however, the sub committee makes this observation. The proponents of House File 263 have alleged that changing of the boundary lines to the states is desired in order to enable the Conservation Commission in Iowa to develop these lands which would change state status. The sub-committee fails to follow this reasoning. *Ownership of land*

definitely established prior to changing of the channel would not be affected by changing state statutes, and the Conservation Commission could only acquire title to such land by purchase or condemnation. *The right of the Conservation Commission of Iowa to develop such areas which were swamp or waste lands prior to the straightening and stabilizing of the Missouri river is indeed questionable because of the legal questions pointed out above. At least no one has pointed out to the sub-committee that this question has been legally determined.* Since this is immaterial to the duty of the sub-committee in determining the desirability of passing House File 263, no legal opinion has been sought." (Emphasis supplied.)

The sub-committee then recommended passage of House File 263 to change the boundary to the middle of the Missouri River except for Carter Lake. In light of the evidence which has been submitted in this case concerning the alleged effect upon riparian rights and private titles because of the Iowa-Nebraska Boundary Compact of 1943, it can be seen that the legislative sub-committee was misled in some of its conclusions. They are in error in assuming land belonged to the several states if private ownership was not previously established. However, the legislative sub-committee seems to accept the fact that a title previously established should not be affected by the changing of the state line. Some of the statements in the report would seem to cast doubt upon the conduct of the Iowa State Conservation Commission in now asserting title to lands which had been established in private owners prior to the Compact.

Ex. P-2319 is a letter to the Honorable Harold E. Hughes, Governor of the State of Iowa, dated December

1, 1964 from the Governor's Advisory Committee on the Iowa-Nebraska boundary together with a Report of the Governor's Committee. The letter states:

> "Because there is a question as to where the present boundary exists and because many acres of land on the river bottoms have been claimed and improved and titles to some land are questionable, we recommend:
>
> 1. That the State of Iowa and the State of Nebraska respectively establish a Board comprised of three members from each state to locate the present boundary where possible and to survey and record title to real estate in the respective jurisdictions prior to the ratification of a new boundary compact.
>
> 2. That the General Assemblies of the respective states pass identical resolutions creating the center of the channel of the Missouri River as the boundary for submission to the Congress of the United States for ratification.

The report indicates that:

> "The problems that existed during the period of the previous study committees still exist and have been compounded because of much of the land area along the river channel has now been converted to productive agricultural use. Much of this land has heretofore been unclaimed and titles to much land unestablished. In a letter from the United States Corps of Engineers dated February 28, 1963, it was stated that the present state boundary between Iowa and Nebraska cannot be located throughout from maps in their files. At one time it was possible to locate the state boundary from their 1″=400′ construction maps as the river alignment as shown on these maps conformed to the alignment shown on the Alluvial Plain Maps. However, since the present boundary compact

> was ratified, numerous channel realignments have been made and the basic 1″=400′ maps which show the alignment in accordance with the alignment on the Alluvial Plain Maps were not retained and the Alluvial Plain Maps are too small a scale and do not contain sufficient details to locate the state boundary . . . ″

The report then has sections relating to law enforcement, title controversy, boundary problems and taxes. It includes the following statement:

> "Presently we have people claiming land across each other and across what must be the boundary because the riparian owners hesitate to become involved in seemingly endless litigation on a piece-meal basis until such time as their titles can be completely cleared. In the meantime some people are obtaining title by adverse possession. In this confused situation assessors are not getting the land on the tax rolls. Many thousands of acres are tax free."

It mentions that the U. S. Corps of Engineers has moved the river completely into Nebraska for 39.6 miles between Council Bluffs and Sioux City and that " . . . industrial firms are faced with uncertain title and tax structures not knowing what state they are in, retarding the potential development of this area." The report also said that there are approximately 21 areas, consisting of 11,807 acres on the Iowa side of potential recreational development, with 192 miles of water recreation shoreline. The Committee then included among its recommendations:

> "That the State of Iowa and the State of Nebraska shall file a friendly suit in the U. S. Supreme Court to establish guide lines to determine title of lands

> transferred in a boundary compact with reference to individual land owners and claims upon lands by states, and such other questions as the attorneys may desire."

Included as a part of the exhibit are pages from the Journal of the House and Journal of the Senate of the 1965 Iowa Legislature which includes the Governor's Address in which he stated:

> "I would urge the Assembly to ratify the settlement of the Iowa-Nebraska Boundary dispute recommended by the boundary committees of both states, in order to settle long-pending questions of land ownership and to open up the Western Slope of Iowa to commercial, industrial and recreational development."

He also made the following statement in that address:

> "The settlement of the Iowa-Nebraska boundary dispute, recommended elsewhere in this message, will open up a vast potential area for wildlife and outdoor recreation in western Iowa."

Part 1 of the Missouri River Planning Report

The State Conservation Commission of Iowa published a document entitled PART 1 OF THE MISSOURI RIVER PLANNING REPORT dated January 1, 1961 (Ex. P-2609), and it is this document which first publicly discloses a considered effort on the part of the Iowa State Conservation Commission to assert claims to the title to lands along the Missouri River under the doctrine of state sovereign ownership to the beds and abandoned beds of the Missouri River. The letter at the beginning of the Report by Lester F. Faber, Assistant Director, to the Director says:

"As you know, Jerry Jauron has done most of the field work."

The Introduction states:

"There is little doubt about the fact that public demand for outdoor recreation carries with it a demand for land and water on which the needed facilities can be provided.

In Iowa, for the most part, every acre developed for recreational use must come from private ownership and must be subtracted from cropland, pasture land or from lands under other agricultural uses.

Thus, when an opportunity arises where a vast recreation resource can be developed without conflict with other land use, it should be explored and developed to its fullest capacity. Such is the situation along the Missouri River from Sioux City to Hamburg.

For the past several months the Conservation Commission has been studying the possibilities for development of thousands of acres of marsh, water and islands along the 192 miles of the Missouri as it passes the western border of this state. These studies have included reconnaissance by air, by boat and on foot of all the major potential recreation areas. The entire study has been carried out by permament commission employees on a special assignment basis. The only additional funds expended were for added travel expenses of one man and miscellaneous costs such as films, maps and similar items. Army Engineer's plans for channelization work have been carefully reviewed.

The results of the survey and study to date are presented here as part one of the Missouri River Planning Report. This report sets out the possibilities for development, it includes comments on some

of the problems of land ownership and some of the problems in relation to the boundary between the state of Iowa and the state of Nebraska.

This report records the basic data on the 25 areas that show real possibilities for development for recreational use. Included herein are recommendations based upon the information now available. * * *

It should be remembered that this is a preliminary planning report for the Missouri River and it is designed primarily to describe the various circumstances in enough detail for the Conservation Commission to decide its future actions. All recommendations presented herein should be considered as preliminary and will be continuously refined in light of more information and more planning.

As soon as the problem of land ownership on the various areas is settled each operating section of the Commission should then examine these areas and the detailed planning carried out to be followed with actual development work. * * *" (Emphasis supplied.)

Under the heading THE PRESENT SITUATION the following is found:

"In years past the Missouri has been a fast running river, subject to regular flooding and often carrying heavy silt loads.

The uncontrolled river moved about freely, cutting new channels, abandoning old, always adding to and subtracting from the shoreline on both banks.

The construction of upstream reservoirs now makes it possible to better control water levels, thereby reducing the damaging floods. In addition, the Corps of Engineers of the U. S. Army are nearing completion of the channelization work on the river as it passes Iowa. Channelization work is complete from DeSota Bend on the Harrison, Pottowattamie County

line down to the Missouri state line. Some work still remains to be done upriver to Sioux City.

Between Missouri Valley and Sioux City there still are many oxbows that will be cut off when the newly designed channel work is done. These are the areas that have a great present value and a high potential for use as public recreation areas. These are the areas that must be saved from destruction by sand-carrying river flows. These are the areas that offer places for development for future generations to hunt, fish, boat, camp and similar outdoor activities.

Chapter V of this report shows the general location of the cutoff areas. The number of areas that will be either on the Iowa or Nebraska side of the new channel is also indicated. The problem of location of the boundary line between Iowa and Nebraska is more fully discussed in Chapter III and in detail in Chapter V. The problems of ownership of these lands and waters and the legal actions in relation to ownership are discussed in Chapters II and V. Chapter IX carries initial recommendations for settling disputed ownership problems and suggestions for development.

A second major recreation potential along the river is provided by the several islands. These islands range from low sand bars and mud flats to high ground that should not be flooded. These islands offer possibilities ranging from duck blinds or cropping for waterfowl through the development for camping, picknicking and other park uses. Here again the boundary problems and the doubtful ownership problems become involved. The problems are discussed in Chapters II, III and V of this report.

At present there are 30 possible recreation areas along the 192 miles of river from Sioux City to the Iowa-Missouri state line. Of the 30 areas, one, the DeSota Bend area is already being developed by

the Federal Fish and Wildlife Service and four areas cannot yet be considered because of Corps of Engineers plans for channel changes.

Of the remaining 25 areas, four are on the Nebraska side of the new channel and 21 on the Iowa side. The 21 areas on the Iowa side total some 14,000 acres of which 4,000 acres are in Nebraska and privately owned (see Chapter V) * * *."

Under LAND AND WATER OWNERSHIP the report states:

"The past violent fluctuations in river water levels have been so frequent that changes in channels, bank location, sand bars, etc., *made it virtually impossible to describe the state boundary or to determine land ownership on the Iowa side. It hasn't been necessary to tie down the line between state and private ownership because development for recreation was not considered feasible because of constant change.*

Now, with the water level controlled and channelization work nearing completion, the development of the river for recreation becomes a possibility and a necessity.

Two basic problems of land and water ownership affect the development of the Missouri River for recreational use. One is the difference in state laws in Iowa and Nebraska affecting public ownership and, two, in Iowa, the matter of quieting title to lands believed to be state-owned.

IN NEBRASKA

Nebraska law provides that the riparian owners have title to the bed of the river to the center of the channel or to the described boundary line, whichever the case may be. Thus, all lands in a proposed project area lying west of the Iowa boundary but

east of the new channel are in Nebraska and owned by private owners and must be purchased if needed for project development. The question arises—can the state of Iowa own lands in another state?

IN IOWA

Iowa law states that all lands below the mean high water mark and the center of the channel or a described boundary line are in the name of the state of Iowa. It is conceivable that Iowa could sell lands to Nebraska owners that lie west of the new channel. By Iowa law, jurisdiction over meandered streams is conferred upon the State Conservation Commission. *The Commission must, in exercising its duties to provide for fish and game conservation and other outdoor recreation, do whatever is necessary to manage these lands. It must also, as it deems necessary, establish and mark boundary lines between state property under its jurisdiction and privately owned property.* Islands in meandered streams are also held to be the property of the state.

During the years of constant change in the river there were private individuals who made claims to or at least made unauthorized use of lands that technically belong to the state of Iowa. In some cases the state's right to these lands have been challenged in the courts. (See pages 32 and 34).

One issue, the Tyson Bend case, was brought to Federal District Court as the result of a condemnation initiated by the Federal Government. Land was condemned for the relocation of the river. The case was presented to the District Court to determine who owned portions of the condemned land and would be eligible for the funds being paid for the land. The District Court ruled that certain portions did belong to the state of Iowa. This decision was appealed to the Circuit Court of Appeals at St. Louis.

This court upheld the lower court decision. *This action will help in declaring islands to be state-owned.* It is believed that as the Conservation Commission proceeds with its legal assignments there will be more cases where quiet title actions will be taken to the courts.

As the situation now stands project development is hampered by the cloudy title to lands on the Iowa side of the state boundary. The rapidity of development on many project areas will be gauged by the settlement of land ownership problems. A lack of knowledge on exact ownership lines also prevents the state of Iowa from acquiring lands needed for access to water or for other shoreline development." (Emphasis supplied.)

Under the heading THE STATE BOUNDARY PROBLEM appears the following:

"When Iowa became a state the boundary between Iowa and Nebraska was set as the center of the channel of the Missouri River. In 1943 a boundary compromise between the two states established the boundary as the center of the channel as shown in the alluvial plain maps of the Missouri River as identified in the Code of Iowa, 1958.

The 1943 compromise became necessary because by that time a great deal of channel stabilization has been completed. *Because the new channel did not always follow the old river bed* it became necessary to redefine the location of the state's boundary. At present the boundary line follows the center of the stabilized channel except for Carter Lake, Iowa from Council Bluffs south to the state line.

In recent years channelization work has been going on from Council Bluffs north to Sioux City. This work has brought about a situation whereby 39.6 miles of the river lie wholly in the state of Ne-

braska. This condition can happpen because the boundary does not change with the location of the new channel and because the new channel does not follow the maps as adopted in the 1943 compromise. This has resulted in the situation whereby several thousands of acres of lands and waters are within the state of Nebraska but east of the new channel and the same applies to Iowa lands and waters.

Several of the cut-off oxbows being considered for development are east of the new channel and are made up of Iowa and Nebraska lands. This situation presents two major problems. One, it is unlikely that Iowa funds will be expended for development because the main benefits may accrue to citizens of Nebraska. For the same reason it may be difficult to use Iowa funds, even if it can be done legally, to acquire Nebraska lands because even though state-owned, citizens of another state may derive the major benefits. Under these circumstances it may also prove to be difficult to acquire and develop shorelands adjacent to these areas of dual ownership. It seems unlikely Iowa could spend state funds for access to an island area within the state of Nebraska.

As long as federal funds are used for this purpose no such problems exist. To be practical, however, it is obvious that the federal government will not do all the acquisition and development needed. If, for example, a Nebraska owner refused to sell his land needed for a project the entire operation could be halted. *The state of Nebraska does not have eminent domain.* If the boundary is set as the center of the new channel these lands would be in Iowa and could be acquired by condemnation if necessary.

If the oxbows are completely cutt (sic) off from the river a Nebraska resident would have to enter the area over Iowa ground. This will result in real enforcement problems on fish and game laws for ex-

ample. At present Nebraska does not have legislation allowing a reciprocal agreement with Iowa on boundary waters. Complicated agreements will have to be worked out in order to allow residents of both states the use of such areas. *All this would be cleared up immediately when the boundary is set as the center of the newly designed channel.*

One possibility remains—the federal government could acquire and/or condemn all such lands and transfer the administration to the state of Iowa. This approach does not seem practical or even likely.

The development of the Missouri River for recreational use would be expedited to a large degree if the state boundary is set as the center of the new channel." (Emphasis supplied.)

The report then mentions TWENTY-FIVE POTENTIAL RECREATION AREAS and provides:

"The very title to this chapter is exciting in promise for the future it offers. The statement itself indicates the possibility of 25 new recreation areas, and with proper planning and development 192 miles of river *plus* 25 recreation areas adjacent to the river will be made available to the public.

From field studies made to date along with close analysis of the channelization plans prepared by the Corps of U. S. Engineers it appears there can be 30 possible recreation areas along the river from Sioux City to the Iowa-Missouri state line.

Of the 30 areas, the 9,400 acre DeSoto Bend area is already being developed by the Federal Fish and Wildlife Service, and four areas cannot yet be finally identified because channelization plans have not been indicated. The four areas are mentioned here only to point out the possibility of more to come.

Of the remaining 25 areas, four will be on the Nebraska side of the new channel and 21 on the Iowa side.

The 25 areas contain an estimated 15,567 acres of water, land, marsh and sand dunes. There are now 11,807 acres on the Iowa side of the boundary and 3,760 in Nebraska. To get a better picture of the real situation, however, it is best to consider the 21 areas that will be on the Iowa side of the new channel. These are the areas of most interest to Iowans. Iowa now owns land west of the new channel but development is unlikely because these areas could be reached only by water, crossing the river. These acres could be sold or traded for land east of the new channel.

All acre figures presented herein are estimated from maps and aerial photos and do not include acres that will be within the new channel.

The 21 areas on the Iowa side total to 13,497 acres and are made up as follows:

Water	4,132 acres	Marsh	1,960 acres
Land	6,115 acres	Sand dunes	1,290 acres

Of this total acreage, 10,182 acres are now in Iowa and the remaining 3,315 in Nebraska but east of the new channel. A few acres are now privately owned in Iowa and will have to be acquired.

Impervious levees are needed at the upper end of seven areas and on one area at both the upper and lower ends. New levees are already approved and money appropriated by Congress on one area. Three of the proposed areas are strictly access sites to the river itself and will be purchased.

Much natural habitat for fish, furbearers and waterfowl has been lost by the narrowing of the channel. More acres having recreational potential have been

lost from the first flood plain because floods have been controlled. This has allowed private owners to clear thousands of acres of timber and brush. A total of 39.6 miles of river is now entirely in Nebraska, reducing the Iowa shoreline by that length. It is absolutely essential that any remaining resource be protected and developed for the public. This is the plan for the 13,497 acres making up the 21 areas on the Iowa side.

The possibilities for every form of outdoor recreation will be explored on all of these lands and as funds are made available the required facilities will be provided.

Through the next 50 pages each of the possible 25 areas are discussed. Each is located in relation to the river and the nearest town. Each is described as it exists now and recommended action is included. Aerial photographs, both color and black and white are provided to give a clear understanding of the physical aspects and future problems in connection with each unit."

The report then considers various named areas and has comments such as the one on page 12 concerning Browers Bend:

"RECOMMENDED ACTION: First quiet title in the name of the state. *If state is granted title* this land could be used as trading stock for land in the Snyder Bend area now owned by Nebraskans. . . ." (Emphasis supplied.)

On that same page is found:

"FUTURE PUBLIC ACCESS: No access by land from the Iowa side. This island has been partly cleared and some acreage is under agriculture. Some new fencing has been done recently so *if we receive a favorable title from the circuit court of appeals,*

> *we should quiet title on this area at once.* It should also be considered to start suit to quiet title on this area at once because records show that it was an island and is partially so at present. This island has some very good agricultural land." (Emphasis supplied.)

This is the *Darmouth College* case which eventually was decided against the State of Iowa. At page 14 a discussion of Snyder Bend appears and under RECOMMENDED ACTION it states:

> "This cut-off should be saved by construction of cut-off levees by the Corps of Engineers. If this attempt is successful an access area of 15 acres should be acquired along the eastern shoreline of Iowa. . . . A quiet title action may be necessary to prove state ownership of the water area between the boundary line and the present Iowa shoreline."

At page 16 under RECOMMENDED ACTION concerning Glovers Point, the report states:

> "Quiet title to Iowa land in the name of the state so in the event of sale or trade clear title could be granted. . . ."

At page 18 under Winnebago Bend the RECOMMENDED ACTION is:

> "Quiet title to 1050 acres as shown above. *If title is granted to State of Iowa* a 15 acre public access area should be acquired somewhere along the southeastern portion of the area." (Emphasis supplied.)

This is the area considered in the *Flowers Island* case and will be discussed elsewhere in this brief.

At page 22 under Monona Bend the statement is made:

"If the State of Iowa can trade land here for lands in Blackbird Bend, immediately below, then a quiet title action would become a prerequisite part of this trade."

At page 28 under Upper Decatur Bend the report says:

". . . Quiet title action should be initiated at once. *If title is established in the state of Iowa* an access can be built off the bridge grade and access and ramp facilities off Sunset Island to the river proper and the lake side . . ." (Emphasis supplied.)

At page 30 under Middle Decatur Bend the following is shown as recommended:

". . . Title to water area on the Iowa side should be quieted and efforts made to acquire Nebraska lands and waters to the new channel. If the State of Iowa *gains title to lands in the southern tip of this area and across the new channel,* these lands could be traded for Nebraska lands in the Middle Decatur area." (Emphasis supplied.)

At page 32 the report discusses Deer Island and under RECOMMENDED ACTION states:

"A quiet title action has been completed in Harrison County District Court. If this case is decided in favor of the state of Iowa, commission planners may proceed to work out a development and public use project . . ."

This is the *State of Iowa v. Raymond* case and was decided in favor of the State of Iowa.

At page 34 the Planning Report discusses Tyson Bend and under RECOMMENDED ACTION the Report states:

> "It was in this area that the question of whether or not a Nebraska landowner can accrete across a state line arose. This case was tried in Federal District Court and the owner ruled against. The case was appealed to the Circuit Court of Appeals. The lower court's decision was upheld."

This case also will be discussed in a different portion of the brief. We would point out here that the Planning Report emphasizes Iowa's position in the *Tyson* case that a Nebraska landowner's title is cut off at the state line and Iowa used the jurisdictional line as the basis for the commencement of its title under the doctrine of state ownership of the beds of the Missouri River. This is a situation where the establishment of a fixed line by the Iowa-Nebraska Boundary Compact of 1943 definitely caused a changed result from what would have been the situation had the Compact not been adopted and had the boundary still been a movable river boundary. It is Plaintiff's position that the Compact did not change private property rights so as to create this result.

At page 36 the Planning Report discusses California Bend and under PHYSICAL DESCRIPTION the report says:

> "This area is all east of the channel and is entirely in Iowa since it is also east of the state boundary as set in the 1943 compact. The area is made up primarily of abandoned river channel with the acreages of the various types shown in the following table. The 1960 spring flood nearly ruined the area but with a small amount of dredging the area could be made into an excellent fish propagation and wildlife area."

Then under RECOMMENDED ACTION the Report states:

> "*The title to this land should be quieted, probably under the principle of abandoned channel ownership.* An impervious levee is needed at the upper end. The dredging or drag lining to build this levee would be of value in developing fish and game habitat. Because of its nearness to the DeSoto Bend area just to the south and the possibility of development on the Wilson Island area no development is planned here except for those activities needed to improve it for a fish propagation area and for the wildlife refuge. The area has been posted as a wildlife refuge by the Conservation Commission since 1956." (Emphasis supplied.)

This area will also be discussed elsewhere in the brief and we will only point out here that Iowa's claim to quiet title to this area is "probably under the principle of abandoned channel ownership." This is the same area that was cut off by the Corps of Engineers in 1938 when they dug a canal completely in Nebraska and condemned land against the Menckes and, at the time of the Compact, the entire river channel was located in Nebraska.

Page 42 considers Nottleman Island. Under PHYSICAL DESCRIPTION the Report states:

> "This is one of the five islands between Council Bluffs and the Iowa-Missouri state line. All five are on the Iowa side of the new channel and have obviously been formed as islands. Of the 1550 acres, 1200 acres are under cultivation and can be considered as very good land."

Under PRESENT PUBLIC USES the Report says:

> "No uses by the public are made since it is being claimed by individuals as private property."

Under RECOMMENDED ACTION the statement is made:

> "*It is believed* that this island as well as the others from hereon south are state-owned and therefore the title to these islands must be quieted in the courts in the name of the state of Iowa. *In the event the title is quieted in the name of the state* then parts of them could be used for recreational purposes and perhaps some of it could be cropped in such a way to hold migratory waterfowl." (Emphasis supplied.)

Under FUTURE PUBLIC USE the Report says:

> "None planned now until title to the islands is assured."

Also, under FUTURE PUBLIC ACCESS the Report states:

> "This would be planned once title is quieted."

Page 44 mentions Auldon Bar Island and under PHYSICAL DESCRIPTION says:

> "This area is another one of the areas between Council Bluffs and Hamburg which are definitely formed as islands and since the redesigning of the channel is complete here, they lie entirely within Iowa and east of the 1943 compact. Of the total acres, 600 acres are now under cultivation and being used by private interest."

Under RECOMMENDED ACTION:

> "The basic action here is to quiet title. *If the title is quieted in the name of the state* then future plans can be made for development for recreational uses. No further action is recommended at this time." (Emphasis supplied.)

FUTURE PUBLIC ACCESS includes the statement:

". . . This also will depend on whether or not the state *gains title to this land* and what use it can make of it once title is gained." (Emphasis supplied.)

Page 46 considers Copeland Bend Island and includes the following language:

"This island differs from Auldon Bar Island only in that it has less land under cultivation. Of the total acreage 600 acres is under cultivation, 600 acres is in mixed timber and 200 acres in low swampy land and marsh."

Under RECOMMENDED ACTION:

"For the time being only action recommended here is that the state claims this island and has title quieted in its name."

Page 48 then describes Otoe Bend Island and states:

"This island is another of the series on the Iowa side of the state boundary that have obviously been formed as islands but have been occupied by private interests and put under cultivation. Of the total of 550 acres, 450 are under cultivation. The remaining 100 acres are mixed timber and swampy marshlands."

Under RECOMMENDED ACTION the Report says:

"Quiet title in the name of the state. If title is granted in the name of the State of Iowa then plan for the use of these islands. No further recommendations are made because of the possibility of a long time before the title is quieted and, of course, plans would be determined then based on need."

Page 50 discusses State Line Island and describes it as:

> "This 110 acres is the portion of a much larger unit lying mostly in Missouri. At the present time it can be considered as timber land. The area has been surveyed by state crews."

Under RECOMMENDED ACTION:

> "Since the state has already made surveys on this land the initial step has been made towards quieting title in the name of the state. In the event title is settled in the name of the state of Iowa then planning for recreational use can begin at that point."

In all of these areas they are described as being on the Iowa "SIDE OF NEW CHANNEL". Consequently, the "NEW CHANNEL" has some bearing upon the Report. Some of the areas are on the Nebraska side and some on the Iowa side. The present so called "State Boundary Line" is also marked on the description of most of the areas so Iowa is using their concept of the present or Compact boundary line in connection with their claims. Other areas are described in the report but have not been specifically mentioned here.

At pages 58 and 59 the "existing recreation facilities" are mentioned and "existing river access sites" and for the most part they do not include the areas Iowa is asserting are state-owned in the Planning Report.

The Report also states at page 60:

> "* * * The Missouri River is just becoming a major recreation center. Only recently have the people begun to use the river itself for boating, skiing and sport fishing. More use is being made of the beau-

tiful sand dunes for picnicking, and camping. With the river under control and the potential cut-off lakes constructed these activities will increase by leaps and bounds. Pressure for use by the public will reach a point that would have been unbelievable only ten years ago.

It is normal to expect that industrial development will expand along the Missouri. This will result in more people living in western Iowa and by the very nature of this type of occupation the pressure for recreation areas will increase in proportion.

Early planning and development is in order to be prepared for the demand to come."

Under WORK OF OTHER AGENCIES found at page 62 the report recognizes that: ". . . the Corps is involved in the construction and control of the upstream reservoirs and the channelization work being done on the river itself. Many of the Corps activities directly affect recreational development and public use of the river." The RECOMMENDATIONS are found at page 64 and include:

"*RECOMMENDATION I*

Those interested in the recreational development of the Missouri River must know the potential loss to recreation if immediate action is not taken. The channelization of the river has caused the loss of thousands of acres of wildlife habitat and this loss will continue if the remaining oxbows are not saved.

RECOMMENDATION II

Make every effort to secure needed legislative appropriations for the construction of cut-off levees and impervious levees where required to make the cut-off oxbows slack water lakes and marshes. On

current new channel cut-offs, approval of and funds for these levees must be obtained at once to allow the U. S. Corps of Engineers to do the necessary construction.

RECOMMENDATION III

Follow through all the legal processes to clarify and or obtain good title to all lands and waters belonging to the state of Iowa along the entire stretch of the river from Sioux City to the Iowa-Missouri state line. This activity has been started (see text) but every effort must be continued.

RECOMMENDATION IV

Explore all the legal aspects in relation to the state of Iowa gaining title to all lands within the state of Nebraska but lying east of the newly designed channel. Early action is essential on this point because if the center of the newly designed channel is not designated as the Iowa-Nebraska common boundary then the legality of the state of Iowa purchasing land in another state must be considered. Legislation during the 59th General Assembly may be needed.

RECOMMENDATION V

Proceed immediately with the study of a possible overall waterfowl refuge system along the 192 miles of boundary river.

RECOMMENDATION VI

Proceed immediately with the study of a multiple development and use plan on those lands and waters now under the jurisdiction of the Conservation Commission and, secondly, to begin the same study of those lands and waters likely to be under the Commission's jurisdiction. These to be followed by an action program.

RECOMMENDATION VII

The Conservation Commission should take a more active part in the proceedings of the Missouri River Inter-Agency Committee, the Missouri River States Committee and the Missouri River Reservoir Operations Committee. Serious study should be given to the need for a Lower Missouri River Conservation Committee functioning along the same lines as the Upper Mississippi River Conservation Committee, a highly successful group in relation to recreation.

RECOMMENDATION VIII

The Conservation Commission should maintain close liaison with all governmental agencies who have an interest in the river and help work out the most productive working relationship with these agencies.

RECOMMENDATION IX

Further emphasis should be placed on biological and economic studies of this river to provide a better base of operations for more detailed planning and development. This should include studies relating to use of the river itself in addition to the potential oxbow lakes and the changes to inland lakes resulting from the channelization work.

RECOMMENDATION X

This river offers an enormous potential recreational area to the citizens of Iowa. Every effort must be made to do whatever is required to carry out the above nine recommendations and to carry the ball toward a completed plan and development."

Plaintiff asked the Defendant in Interrogatory No. 20:

"Does Part I of the Missouri River Planning Report of the State Conservation Commission of January

1961 represent the present policy of the State of Iowa or any branch thereof concerning acquisition of or proof of interest in lands referred to in such report?"

Iowa's answer to Interrogatory No. 20 was:

"Yes. We believe that a fair and reasonable construction and interpretation of Part I of the Missouri River Planning Report constitutes a fair statement of Iowa's present policy, but this is not to say that the construction and interpretation placed thereon by Nebraska constitutes any fair statement of Iowa's present policy. Nebraska construes and interprets the document as a statement that Iowa intends to acquire all sites mentioned therein by court action which it construes to be in the nature of 'land grabs', but Iowa points out that this is no fair construction or interpretation of the document because in truth and in fact Iowa proposes in the document to acquire many of the sites mentioned therein by purchase or exchange." (Vol. XI, p. 1593).

THE NOTTLEMAN ISLAND AREA

On March 18, 1963, the State of Iowa filed a Petition in Equity in the District Court of Iowa in and for Mills County captioned "*State of Iowa, Plaintiff, v. Darwin Merritt Babbit, et al.*, Equity No. 17433", attempting to quiet title to certain land in Mills County, Iowa, presently bordering the Missouri River on the eastern or Iowa side. (Ex. "C" attached to Complaint and Ex. P-2615.) The only allegations in this Petition which would indicate to the defendants the grounds for the action are that the plaintiff State of Iowa is the absolute and unqualified owner of the real estate described and that

the defendants make claim to the real estate but ". . . all such claims are spurious and wholly without right."

Paragraph 4 of the Petition also stated:

> "That the plaintiff has been credibly informed and believes and hereby alleges that one or more of the defendants have stated or published remarks to the effect that any attempt by any agents or employees of plaintiff to view, inspect or survey the subject real estate of this case, *such agents and employees would be physically and violently stopped and prevented from so doing.* That in order to ascertain the precise boundaries of the subject real estate of this case, a survey will be necessary; that an order of this court should issue pursuant to Iowa Rule of Civil Procedure No. 131 permitting plaintiff by its officers, agents and employees to enter on the subject real estate and on lands adjacent thereto if necessary for the purpose of inspecting, viewing, measuring, surveying, photographing, locating section corners and locating monuments as may be necessary in order for plaintiff to make and file herein an exact legal description of the subject real estate and in order for plaintiff to prepare for trial of this case." (Emphasis supplied.)

The petition was signed and verified by Michael Murray with the names of Evan Hultman, Attorney General of Iowa, and William J. Yost, Assistant Attorney General of Iowa, also appearing in the signature block. Iowa then filed a First Amendment to its Petition in Equity on March 26, 1963, and on January 14, 1964, the State of Iowa filed a Second Amendment to Plaintiff's Petition in which it made some changes in the description of the property claimed.

Then when the owners attempted to find the basis

for Iowa's claim by way of interrogatories, the State of Iowa gave the following answers:

"*Interrogatory 1.* Describe specifically by what acts or instruments plaintiff claims ownership of the land described in plaintiff's petition.

Answer 1. Plaintiff's claim of ownership of the land described in plaintiff's Petition as Amended is not based on any acts or instruments.

Interrogatory 2. Describe what event, instrument or act commenced plaintiff's claim of ownership to the land described in plaintiff's petition and the date of said event, instrument or act.

Answer 2. Plaintiff acquired its ownership of that part of the bed of the Missouri River which then lay within the State of Iowa when the State of Iowa was admitted to the Union in 1846. As the Missouri River changed its bed after 1846, plaintiff acquired title to all beds which the river occupied from time to time within the State. This principle of law was first announced by the Iowa Supreme Court in the case of *McManus v. Carmichael* in 1856, 3 Iowa 1, and this legal principle has been continuously applied by the Iowa Supreme Court down to the present date in all cases involving ownership of the beds of navigable streams within the State of Iowa. Insofar as the description of real estate contained in plaintiff's Petition as amended constitutes a description of river bed (areas below ordinary high water mark), the above constitutes its answer to Interrogatory 2. The land contained within the real estate described in plaintiff's Petition as Amended formed as accretion to the State-owned bed of the river. State ownership of it never ceased. The State continued ownership of said land even after it arose above ordinary high water mark because the land formed as an accretion to the State-owned bed of the river. No

exact date when this land arose above ordinary high water mark can be given because the process was gradual and occupied a period of several years. For answer to Interrogatory 2, plaintiff states that the first portion of this land to arise from the river bed above ordinary high water mark so arose within ten years prior to 1923.

Interrogatory 3. State whether plaintiff has continuously claimed ownership of the property described in plaintiff's petition since the time of the event under which plaintiff now claims ownership.

Answer 3. Yes.

Interrogatory 4. State whether plaintiff is now in possession of the land described in plaintiff's petition and, if so, describe the extent and nature of such possession.

Answer 4. (Plaintiff objects to Interrogatory 4 on the ground that it inquires into matters which are irrelevant and immaterial to any issue in this case, it not being legally or equitably possible for any claim of ownership adverse to plaintiff to be based or founded on adverse possession as against plaintiff. For this reason, plaintiff has made no investigation concerning exactly who is or may be in possession of parts or portions of the disputed area adversely to plaintiff and plaintiff should not be required to make an investigation concerning possession merely for the purpose of answering interrogatories. The matter of possession is irrelevant and immaterial for the further reason that mere possession cannot have any significance in law or equity unless the same, from its inception, be coupled with color of title, and in this case, none of defendants have ever had any color of title. Interrogatory 4 is objected to for the further reason adverse possession is not at present an issue in this case, and if the same is to become an issue, it can only do so

by means of defendants raising the same as an affirmative defense. That therefore, before plaintiff should be required to answer any interrogatories or present any proof concerning possession of that area in controversy, defendants, or some of them, must plead and offer some proof of adverse possession. That the burden of pleading and proving adverse possession rests with the defendants in this case, and Interrogatory 4 is an improper attempt under IRCP to shift the burden of research and investigation on said issue to the plaintiff.)

Subject to the Court's rulings on the foregoing objections, plaintiff's answer to Interrogatory 4 is that plaintiff is now in possession of that part of the area in controversy which presently constitutes Missouri River bed; that is to say, that part of the area which is presently below ordinary high water mark of the river. Plaintiff is also in possession of all parts of the area which are above ordinary high water mark and which have not been taken under possession by private parties or persons. The extent and nature of plaintiff's possession is that all portions possessed by it are in the public domain and not adversely possessed by private parties or persons.

Interrogatory 5. State whether plaintiff has ever been in possession of the land described in plaintiff's petition and, if so, describe the period of time involved and the extent and nature of such possession in plaintiff.

Answer 5. (Same objections as noted in Interrogatory 4.) Subject to the Court's rulings on the foregoing objections, plaintiff's answer to Interrogatory 5 is that plaintiff is now in possession of all that part of the described area which is presently below ordinary high water mark and therefore presently constitutes Missouri River bed. As various

portions of the described area arose above ordinary high water mark, plaintiff continued in possession of them until the defendants and their immediate and remote grantors illegally, improperly and without any right to do so, took possession of various portions from time to time. The extent and nature of plaintiff's possession was and is that all portions possessed by it from time to time were in the public domain and not possessed by any private parties.

Interrogatory 6. State whether or not the defendants are in complete, actual and sole possession of the land described in plaintiff's petition and, if not, state who is now in actual possession of said land.

Answer 6. (Same objections as noted in Interrogatory 4.) Subject to the Court's rulings on the foregoing objections, plaintiff's answer to Interrogatory 6 is "No". For further particulars, plaintiff refers to Answer 4. Concerning portions of the area which are not presently in plaintiff's possession, plaintiff hereby states that some portions of the area have been cultivated and farmed for several years last past. Plaintiff, deeming the entire matter of possession to be irrelevant and immaterial, has no information as to how long the various tracts in the area have been cultivated or by whom this has been done, nor any exact descriptions of the tracts cultivated by different parties.

Interrogatory 7. State whether plaintiff has in its possession any deed, abstract of title or other instrument tending to establish in the plaintiff ownership of the land described in plaintiff's petition, and, if so, give a specific description of the same.

Answer 7. No.

Interrogatory 8. If plaintiff claims a portion of the land described in its petition was an island in the Missouri River state at what time did said island

first rise above the ordinary high water mark, and in which state did said island form, and who owned the bed upon which said island formed.

Answer 8. As stated heretofore, plaintiff claims all parts of the described area which are now above ordinary high water mark because the same formed as an island in the Missouri River, and plaintiff claims other portions of the described area as accretions to said island. The island first arose above ordinary high water mark between 1913 and 1923 in the State of Iowa. The State of Iowa owned the bed upon which said island formed. The formation of accretions to said island has continued since the original formation of the island down to the present time, and accretions are still forming to the island.

Interrogatory 9. State whether or not plaintiff has ever filed in the office of the Mills County Recorder of deeds any statement in writing duly acknowledged describing the real estate involved in plaintiff's petition or any part of it, the nature and extent of the right or interest therein claimed by plaintiff, and stating the facts upon which the same is based, or has any other instrument of any nature been filed by plaintiff.

Answer 9. (Plaintiff objects to Interrogatory 9 on the ground that it inquires into matters which are irrelevant and immateral (sic) to any issue in this case, plaintiff's claim to the area involved in this case being bottomed on the law of the State of Iowa which all parties to this case were and are presumed to know and to have known.) Subject to the Court's ruling on the foregoing objection, plaintiff's answer to Interrogatory 9 is "No".

Interrogatory 10. Has the plaintiff, State of Iowa, any contract, agreement or understanding with any commission or political subdivision of the State of Iowa in connection with the filing and prosecution

of this suit in the name of the State of Iowa as plaintiff? If so, state whether such contract, agreement or understanding is oral or written, and identify the same and state the substance of the same.

Answer 10. (Plaintiff objects to Interrogatory 10 on the ground that it inquires into matters which are irrelevant and immaterial to any issue in this case.) Subject to the Court's ruling on the foregoing objection, plaintiff's answer to Interrogatory 10 is "No".

Interrogatory 11. Is the State Conservation Commission of the State of Iowa a party of interest in any capacity in this litigation?

Answer 11. (Plaintiff objects to Interrogatory 11 on the ground that it inquires into matters which are irrelevant and immaterial to any issue in this case.) Subject to the Court's ruling on the foregoing objection, plaintiff's answer to Interrogatory 11 is "No".

Interrogatory 12. What is the interest, if any, of the Iowa State Conservation Commission in this litigation?

Answer 12. (Plaintiff objects to Interrogatory 12 on the ground that it inquires into matters which are irrelevant and immaterial to any issue in this case.) Subject to the Court's ruling on the foregoing objection, plaintiff's answer to Interrogatory 12 is that the Iowa State Conservation Commission is a political subdivision or department of plaintiff, possessing the power, authority, and duty of managing and controlling the area involved in this litigation if it be determined that same is owned by plaintiff.

Interrogatory 13. Has the State Conservation Commission of the State of Iowa ever relinquished claim to the land described in plaintiff's petition or any part of it?

Answer 13. No.

Interrogatory 14. Is the land described in plaintiff's petition or any part of it generally known as Nottleman's Island? If so, how long as it been so known?

Answer 14. Yes, for approximately 26 years.

Interrogatory 15. Was the land described in plaintiff's petition or any part of it at any time in the State of Nebraska? If so, during what period of time?

Answer 15. No.

Interrogatory 16. Was any part of the land described in plaintiff's petition in the State of Nebraska in 1941? If so, what part?

Answer 16. No.

Interrogatory 17. Was any part of the land described in plaintiff's petition subject in 1943 to the provisions of the Iowa-Nebraska Boundary Compromise, Chapter 306 H. F. 437 Acts 50th General Assembly, effective April 21, 1943? If so, what part?

Answer 17. No.

Interrogatory 18. Has the plaintiff, State of Iowa, and the defendant Mills County, Iowa, collected taxes on the land described in plaintiff's petition for more than fourteen years last past? Have the defendants and their predecessors in title paid such taxes?

Answer 18. (Plaintiff objects to Interrogatory 18 on the ground that it inquires into matters which are irrelevant and immaterial to any issue in this case, because any taxes which any of the defendants may have paid to plaintiff on the land involved in this case were infinitesimal. Interrogatory 18 is objected to for the further reason that the matter of payment of taxes can only become material in this case if the defendants or some of them elect to plead some affirm-

ative defense based thereon, and no such affirmative defense has been pleaded by any defendant at the present time; therefore, at present, the matter of taxes is irrelevant and immaterial. That Interrogatory 18 is an illegal, improper and unauthorized attempt by defendants to shift the burden of proof from themselves to plaintiff on an issue which is not now an issue in the case and on which, if it becomes an issue, the burden of proof will be on them. That plaintiff should not be subjected to the burden of researching, investigating and proving the facts concerning said issue unless and until some burden is cast upon it by reason of the defendants or some of them having pleaded and offered sufficient proof on said issue to shift some burden to plaintiff. That any facts concerning taxes are either already in the possession of defendants or are as readily available to defendants as to plaintiff and therefore, Interrogatory 18 is not for discovery purposes and is not authorized by IRCP). Subject to the Court's ruling on the foregoing objection, plaintiff's answer to Interrogatory 18 is that taxes have or have not been paid on the land involved in this case as shown by the books and records of the County Treasurer of Mills County, Iowa. Therefore, for particulars as to Interrogatory 18, plaintiff incorporates into this Answer said books and records of the Mills County Treasurer and makes the same a part of this Answer by reference.

Interrogatory 19. Does plaintiff claim that any part of the land described in plaintiff's petition was formed by accretion? If so, state when said accretion or accretions occurred, in which state said accretion or accretions occurred, and who was the owner of the lands to which said land accreted.

Answer 19. Yes. The accretions to the bed of the river started forming between 1913 and 1923 and have continued forming continuously until the present time and are still forming. All said accretions have

formed and are forming in the State of Iowa and to the bed of the Missouri River which has been at all times owned by plaintiff.

Interrogatory 20. Does plaintiff claim that any of said land originated with an avulsion? If so, state when avulsion occurred, in which state said land was located at the time said avulsion occurred, and who was the owner of said land before said avulsion occurred.

Answer 20. No.

Interrogatory 21. State the names, addresses and present employers of all persons who are known to have information or knowledge concerning the formation of said land and the possession of said land since its formation and at the present time.

Answer 21. Plaintiff at the time of answering these Interrogatories does not know of any persons who have personal eyewitness knowledge concerning the formation of said land. R. L. Huber, formerly employed by the U. S. Army Corps of Engineers, now retired, of Omaha, Nebraska, possesses knowledge and information concerning the formation of said land by reason of having studied books, records, maps, photographs, and other data in the possession of the U. S. Army Corps of Engineers office at Omaha, Nebraska. He also possesses eyewitness knowledge concerning formation of that part of the land which was formed since about 1936. Gerald J. Jauron, Earling, Iowa, an employee of plaintiff, possesses knowledge by reason of extensive investigation and study of records, maps, pictures and data of numerous government agencies, including U. S. Army Corps of Engineers and by reason of on-site studies and investigation. Ivan Windenberg, Des Moines, Iowa, an employee of plaintiff, has surveyed the area and made a study and investigation of the area and possesses in-

formation gained thereby. Plaintiff presumes that there are perhaps some residents of the vicinity of said land who possess information and knowledge concerning the formation of said land and the possession of it since its formation, but interviewing of such possible persons has not been accomplished at this time and therefore names, addresses, and present employers cannot be furnished at this time.

Interrogatory 22. State who now has record title to said land and which persons have record title as to which parts.

Answer 22. (Plaintiff objects to Interrogatory 22 because it calls for information irrelevant and immaterial to any issue in this case. Also, because it does not call for the best evidence of who now has record title to the land involved herein and which persons have record title to which parts, the best evidence of said matters being the records in the various county offices of Mills County, Iowa.) Subject to the Court's ruling on the foregoing objection, plaintiff for answer to Interrogatory 22 states that it is informed and believes that some of the defendants and immediate or remote grantors of the defendants attempted in about 1946 to record various spurious, fictitious instruments in Mills County, Iowa, which purported to establish that they had been the owners of various portions of the land involved herein when said land had been located in Nebraska and under and by virtue of the laws of the State of Nebraska, but plaintiff hereby states that said purported instruments of title were and are spurious and fictitious and of no force or effect to serve as the commencement of any record title in Iowa because no part or portion of the land involved herein was ever in the State of Nebraska or subject to the laws of the State of Nebraska or subject to jurisdiction of the courts of the State of Nebraska. Plaintiff is informed and believes that the county recorder and other county

officials of Mills County, Iowa, refused to accept said spurious and fictitious instruments for recording in said county and that thereupon the persons seeking to record said instruments commenced an equity action against said county officials to force them to so do. Plaintiff was not a party to said action and had no notice or knowledge thereof and therefore is not bound by any decision rendered therein. Plaintiff is informed and believes that this Court ordered the county officials of Mills County to accept said spurious and fictitious instruments for record and said county officials have complied with said Court Order. Plaintiff in answering Interrogatory 22 hereby states that the recording of said spurious and fictitious instruments in Mills County, Iowa, did not commence any lawful record title to any of said land, and if it be claimed by defendants that they now have record title in Mills County, Iowa, to any of the land involved in this case, based upon the recording of said spurious and fictitious instruments of title in about 1946, such record title is also spurious, fictitious, and of no legal force or effect.

Interrogatory 23. State how long each of the persons referred to in the answer to Interrogatory No. 22 and their immediate and remote grantors have continuously been shown by the record of title to have held chain of title to said land.

Answer 23. Same answer as to Interrogatory 22.

Interrogatory 24. State on which side of said land the main channel of the Missouri River now flows.

Answer 24. West.

Interrogatory 25. Did the main channel of the Missouri River ever flow on the other side of said land? If so, state when said change occurred and over what period of time said change took place.

Answer 25. Plaintiff's opinion is negative."

The above Interrogatories and Answers appear as Exhibit "E" and Exhibit "F" of Plaintiff's Complaint herein and also as Exhibit P-2615.

It can be immediately seen from Iowa's answers that, at the time they filed the law suit against the owners of Nottleman's Island, they disregarded all matters of record concerning the land, all matters of possession by the defendants, the payment of taxes by the defendants upon the land, and all eyewitness knowledge concerning formation of the land. They also took the position that they weren't required to make any further investigation into these matters and that the instruments of record were "spurious and fictitious" instruments.

Iowa's answers indicate that Mr. R. L. Huber and Mr. Gerald J. Jauron, both witnesses for Iowa in this case, had knowledge concerning the formation of the land by reason of having studied records, maps, photographs and other data from the Corps and some personal knowledge of formation of the land since 1936. Mr. Windenburg had also surveyed the area. This is apparently the extent of Iowa's knowledge or information or scope of investigation as indicated by those answers to interrogatories. As is also true in the Schemmel case, this is another situation where Iowa merely filed a quiet title action against the landowners without investigation of their titles and where Iowa has attempted to shift the tremendous burden of tracing and proving the past history of this land to the individual farmers, ignoring everything that has happened in connection with the land except certain assumed facts concerning its formation. As is evident

from the voluminous evidence presented in this case, the problem of proving formation of the land along the Missouri River is extremely difficult, expensive, and time consuming and is particularly so after the long passage of time during which facts, witnesses, and records may have long since disappeared or become obscured by the passage of time.

Iowa's answer to Interrogatory 17 also arbitrarily takes the position that no part of the land described was subject to the provisions of the Iowa-Nebraska Boundary Compromise of 1943. They apparently have summarily dismissed any impact of the Boundary Compact even though their westerly line purportedly followed the Compact line.

Physical History of Nottleman's Island

The historical evidence shows that the Missouri River was originally in about the same position which it presently occupies in the Nottleman Island area but that, from the time the two states were admitted into the Union, it commenced to work easterly and cut away land on the Iowa side. Behind this movement, an island originally platted as Nebraska land which was immediately north of the area involved and referred to on early Corps' maps as Tobacco Island, began to enlarge both to the east and downstream on the Nebraska side of the river. The main navigable channel of the Missouri River was to the east or left side of this island or accretion area as it built on to the Nebraska side and, although at various times there may have been shallow water or chutes on the western side of the island, the main navigable channel constituting the boun-

dary between Iowa and Nebraska was on the eastern side until the island was divided by a channel of the Missouri River. In the 1930's, the United States Army Corps of Engineers placed the river in the designed channel and shut off the eastern channel by the construction of dikes. The river was consequently diverted to the west side of the island by man-made works without washing away the island. However, regardless of how the area formed, it was always considered to be a part of Nebraska until ceded to Iowa by the Compact and this was generally recognized by all the people in the area as well as by the actions of the two states.

For purposes of identification, the Nottleman Island area as shown by the Windenburg traverse in Iowa's Second Amendment to Petition in the case of *State of Iowa v. Babbit*, is located along the east or left bank of the Missouri River south of Plattsmouth, Cass County, Nebraska. The precinct line between Plattsmouth and Rock Bluff Precincts, which is three miles south of the Plattsmouth Bridge, is opposite the extreme northern part of the traverse and the area extends approximately three miles to the south. While on the Nebraska tax rolls, this area was described as lots in Sections 3, 4, 9, 10, 15 and 16, T. 11 N., R. 14 E. of the 6th P. M. The center of the area is immediately east of Queen Hill, a prominent hill which adjoins the north part of the old town of Rock Bluff, Nebraska. Queen Hill has also been referred to as Rock Point and is slightly over a mile and three-quarters south of the precinct line. The lower tip of the area extends to immediately above another prominent rock hill located on the

Nebraska side called King Hill, or in earlier history Calumet Point.

If Iowa sections were projected west to this same area, it would be in Sections 17, 18, 19, 20, 29, 30 and 31, T. 71 N., R. 43 W. of the 5th P. M. Keg Creek or Watkins Ditch enters the Missouri River at the present time about a mile north of the northern tip of the traverse on the Iowa side. The Detsauer place (also known as the Buckingham, Carl Phelps, Diller or Dilley place), which has the painted garage and is along the main road from Bartlett to Pacific Junction, Iowa, is three-quarters of a mile east of Nottleman Island measured along the road to the area which is on the section line between Iowa Sections 17 and 20, T. 71 N., R. 43 W. of the 5th P. M. The lower southern tip of this area is one mile west of the site of Egypt School, or three-fourths of a mile west of Twin Lakes, which are in Iowa. The county line between Mills and Fremont County, Iowa, is one mile south of Egypt School and intersects the Missouri River opposite the lower part of King Hill.

For further purposes of reference, attached hereto and marked Appendix A is a reduced photographic reproduction of a portion of Ex. P-1039 which is the 1946-1947 Corps of Engineer tri-color map of the Nottleman Island area. The Windenburg traverse is not reproduced on this map and the water areas do not depict the situation exactly as it appears today.

Maps and Documentary Evidence

The maps documenting the location of the Missouri River in the Nottleman Island area were introduced along

with the testimony of Mr. Willis Brown, State Surveyor of the State of Nebraska. Mr. Brown was 56 years old and has been State Surveyor since 1960. As State Surveyor, he conducts surveys as requested by the Board of Educational Lands and Funds for school lands; he arbitrates disputes between surveyors; he is ex officio secretary of the Board of Examiners for Land Surveyors; and he is custodian of the records of surveys in Nebraska including the original government surveys. His duties are prescribed by the Nebraska statutes. He is a registered land surveyor in the states of Nebraska, Iowa and Missouri. He began surveying in 1930 for the U. S. General Land Office and worked with them until the fall of 1935, and since 1935, has been a Deputy State Surveyor on either a full or part-time basis until 1960 when he was appointed State Surveyor.

Along the Missouri River, Nebraska descriptions come from the 6th Principal Meridian and Iowa descriptions are designated from the 5th Principal Meridian. The right and left banks of the Missouri River are determined by facing downstream. The original government survey of Iowa was made in 1851 and 1852 in the Nottleman Island area and showed no islands in the river with Keg Creek running parallel to the Missouri River on the Iowa side the entire length of the area shown on the map. Keg Creek entered the Missouri River south of the Nottleman Island area (Ex. P-712). The Nebraska original government survey of 1856 shows an island on the Nebraska side of the Missouri River as being surveyed in Nebraska with the designation of Nebraska Sections 28, 33 and 4 (Ex. P-710 and P-711). The notation

"SLOUGH" is shown between the island and the Nebraska mainland. This island is also shown as being in Nebraska on the government connection survey of Hopkins and Haddock of 1857-58 (Ex. P-714). Mr. Brown testified that a mylar overlay (Ex. P-713) was prepared under his direction which shows the 1852 original government survey left bank (Iowa) and the 1856 original government survey right bank (Nebraska) and these banks were placed in position with information taken from the government tie survey. This exhibit shows the island on the Nebraska side of the Missouri River which was surveyed as a part of Nebraska and also provides a comparison indicating that, when extended, the Nebraska and Iowa section lines do not meet.

Mr. Brown testified that he reproduced these overlays to the same scale on a transparent material so that one plat could be laid on top of the other and the relationships between them could be seen. Some of the maps were to different scales and had different features shown, but all of the exhibits had several identifying features so that he was able to put one exhibit on top of the other to get it in the proper location. He placed targets on the overlays so that comparisons between the maps could be made and his controls were selected as close to the area in question as possible to minimize any error that might appear. He spent a good deal of time comparing the maps and they are placed exactly as they should be to the best of his ability. He concentrated his control on the island area and the error in the island area is very minimal.

Mr. Brown also prepared a mylar overlay of the present day Nottleman Island as described in the Second Amendment to Plaintiff's Petition in the case of *State of Iowa v. Babbit, et al.,* (Ex. P-1691). This outline of the island corresponds to the traverse as made by the Iowa surveyor, Mr. Windenburg, and may also be referred to as the Windenburg traverse or survey. When the present day Nottleman Island area (Ex. P-1691) is placed upon the composite of the original Iowa and Nebraska government surveys (Ex. P-713), the west 25% of the Nottleman Island area is shown in the Missouri River with the remainder appearing on the Iowa side. The Nebraska island appears to the northwest of Nottleman Island and still some distance from its present boundaries.

The U. S. Corps of Engineers Survey of the Missouri River of 1879 (Ex. P-715) and the mylar overlay prepared by Willis Brown (Ex. P-716), shows a large accretion area which is an apparent extension of the Nebraska island to the south and east. It is now labeled Tobacco Island and extends almost down to Rock Bluff on the Nebraska side. When the traverse of Nottleman Island (Ex. P-1691) is placed upon the 1879 survey (Ex. P-716), the approximate eastern one-half of the present Nottleman Island is still on the Iowa bank, but the large addition of accretion area appearing on the 1879 survey as a part of Tobacco Island on the Nebraska side of the river overlaps the northwest part of the Nottleman Island traverse. The river has moved to the east so that Keg Creek now enters into the Missouri River at mile 635 (1879 mileage) which is at the northern tip of the present

day Nottleman Island and is opposite Tobacco Island on the 1879 map. To the south, across from Calumet Point (King Hill) on the 1879 map (Ex. P-715) there is a reference to "Old Keg Cr."

The next Corps of Engineers Map is the Missouri River Commission Survey of 1890 which was published by the Missouri River Commission in 1893 (Ex. P-717 and P-718) and shows Tobacco Island with a great deal of accretion built up towards the south on the Nebraska side all the way downstream to below Rock Bluff. Keg Creek enters the Missouri River at about the same place as it did in 1879 (mile 630 of 1890 mileage), but the left bank below the mouth of Keg Creek has moved a little bit to the east. The right bank remains approximately in the same location but with the additional accretion, and Tobacco Island is now enlarged and extends nearly to Rock Bluff Point and is at least double its size from 1879. When the Nottleman Island traverse (Ex. P-1691) is placed upon the 1890 survey overlay (Ex. P-718), the area designated as Tobacco Island is now partially on the northwest portion of Nottleman Island and the accretion area below Tobacco Island and out from Rock Bluff Point is partially on the Nottleman Island area. The 1890 left bank runs through about the middle of the present island so that about one-half is to the right of the left bank and about one-half is to the left of it. There is a slight bend developing to the left and there is a little island shown in the river on the 1890 survey.

The river is shown as having cut further to the east in the Seth Dean Survey of January 23, 1895 (Ex. P-

1668 and P-1668-A). The field notes for the Seth Dean 1895 survey are found in Surveyor's Record No. 3 in the Office of the Mills County, Iowa, Auditor and the records show that the survey was made by order of the Board of Supervisors of January 18, 1895, as follows:

> "That the County Surveyor make a survey of the Missouri River for the full length of the County on the west, and make plat of same. Also any Islands in the said river which may be wholly or in part the property of Mills County, and file same with the Auditor at his earliest convenience." (Ex. P-622)

The field notes of Seth Dean, Mills County Surveyor, contain the following statements:

> "The meander line as described above was run to correspond with the High water mark or boundary as defined by the Iowa Supreme Court, i. e. Taking the line as shown by the limit of the permanent growth of vegetation *no sandbars or Islands were found that had become permanently fixed so as to be subject to taxation.* The accretion was divided according to law among the several abbutting (sic) tracts in proportion to their original water frontage." (Emphasis supplied.) (Ex. P-622)

Mr. Brown has shown this 1895 Iowa bank line with relation to the 1852 original Iowa government survey (Ex. P-1668 and P-1668-A). The 1895 bank line runs parallel and to the east of the original Iowa government survey left bank from the northern part down as far south as the middle of Iowa Section 30 which is southeast of Rock Bluff. This is also illustrated by a comparison of the 1895 Seth Dean Survey (Ex. P-1668-A) with the 1890 Missouri River Commission Survey (Ex. P-718). When the traverse of Nottleman Island (Ex. P-

1691) is placed upon the 1895 survey (Ex. P-1668-A), it now appears that approximately two-thirds of the present Nottleman Island area is to the west of the 1895 left or Iowa bank.

A 1920 soil map attached to the soil survey of Mills County, Iowa, U. S. Department of Agriculture, Bureau of Soils (Ex. P-719) shows the river in the Nottleman Island area with a distinct easterly developed bend and, when the overlay of the 1920 Soil Survey (Ex. P-720) is placed upon the overlay of the 1890 survey (Ex. P-718), the left bank of the Missouri River is about 4500 feet to the east of the left bank of the 1890 survey along the road which leads into Nottleman Island which is also along the section line between Iowa Sections 17 and 20 extended. At that point, the river has cut completely east of the Nottleman Island traverse. It has also cut at the north at mile 635 (1890 mileage) where Keg Creek came into the river.

The 1920 Soil Survey does not purport to portray the true right, or Nebraska, bank of the river. However, there is a rough outline which apparently shows a large land area on the Nebraska side in the bend and the Missouri River is shown as being very narrow at this place. (Although there is a purported line with the designation "State Boundary" which, if the actual state line, would have placed almost all of Nottleman Island in Nebraska, this map was not offered to show the boundary, but was only offered to show the location of the river bank. Such a line purporting to show the state boundary also appeared on the 1905 U. S. Geological Survey Map in the

Schemmel area (Ex. P-214) but that map also was not offered to show the boundary, but only the location of the river. The unreliability of these state line designations was illustrated by Mr. Willis Brown when he testified that the United States Geological Survey map for the Sioux City South Quadrangle, Nebraska-Iowa-South Dakota of 1963 showed a line in the river referred to as the Nebraska-Iowa Boundary but which the witness examined and found to be in error from the Compact line by approximately 2,300 feet (Ex. P-1749). The witness stated this was just one of the many places where he had found a difference between the line represented on the geological survey quadrangle sheets and where the state line really is.)

This cutting of the Missouri River into the State of Iowa is further documented by records found in the Mills County, Iowa Auditor's Office in Ditch Book 3 (Ex. P-622). In 1922 several landowners including Catharine Fulton and J. W. Watts filed a PETITION FOR RIVER PROTECTION asking for a river protection district pursuant to "sections S 1989-a-1 and succeeding sections of Drainage Laws of Iowa of 1921 . . ." and the petition commenced:

> "Your petitioners all being owners of land that will be taxed for the cost of the proposed protection work if the prayer of the petition be granted, respectfully call your attention to the present situation of the lands bordering along the Missouri River in sections 35-36 Township 72, range 44 and sections 31, Township 72, Range 43, sections 5-6-7-8-17-19-20-29-31 and 32, Township 71, Range 43, Mills County, Iowa, where the river is now cutting the east bank and threatening the destruction of valuable farming lands."

The petition asked for the examination of the entire river from the Plattsmouth Railroad Bridge southward to the Mills-Fremont County Line to determine at what points this protection work could be put into effect. The Board of Supervisors of Mills County appointed Seth Dean to make a survey and report on the expediency of such improvement. His report was submitted under date of September 25, 1922, and appears as REPORT OF COMMISSIONER in which he stated he had ". . . caused a pretty complete survey to be made of the river channel and present shore line from the C. B. & Q. R. R. Bridge near the south line of section 25 Township 72, Range 44, south to Mills-Fremont County line . . ." The report mentions that there are attached two exhibits:

> ". . . 'Exhibit A' is a map of the proposed district showing the east and west shore lines of the river and the channel now occupied by flowing water, a number of more or less permanent Islands and sand bars also appear. Exhibit 'B' is a descriptive list of lands within the proposed district with the name of the owner."

The report then states:

> "The east bank of the river was meandered by the U. S. land surveyors in 1851 and was again surveyed by Mills County for taxation purposes in 1895. These lines are shown on the map. *I find that between the years of 1851 and 1895 the river carried away about 1140 acres of land and that since the official survey of 1895 there has been 1296 acres more taken making a total of 2436 acres.* Some of this land had little value, but most of it was well worth preserving." (Emphasis supplied.)
>
> Dean found that much work had been done between

Council Bluffs and Omaha by the railroad companies and private landowners at various points on both sides of the river to secure the bank against erosion and contracts had been made with Woods Brothers Construction Company of Lincoln, Nebraska for considerably more work along this portion of the channel. Therefore, he didn't include the territory north of the Plattsmouth Bridge in this district. His report then continued:

> "The total length of river front between the Plattsmouth Bridge and the Fremont County Line is about 39,850 feet or 7.55 miles and along this front the river is now cutting away the land in three places, viz: in section 31-72-43 and sections 5 and 8 in 71-43 for a length of about 8000 feet.
>
> "In sections 17 and 20 for a distance of about 6000 feet and in section 32-71-43 for about 1500 feet a total length of 15,500 feet, for 2.9 miles; with a strong probability of increasing the length of shore line necessary to protect as the bends are cut still farther to the eastward.
>
> "Just how far east the river can cut its way under present conditions of railfall (sic), volume of flow and timber protection along the shore, it is impossible to say, but the present east slough bank and sections 5-7-20 and 29, 74-43 and sections 4-8-9-21-28 and 33 in 71-43 mark the east shore line of the rier (sic) at sometime in the past."

His report then discusses methods of controlling the river and he then stated:

> "To divert the current into a permanent channel and protect the land I recommend that ten retards be constructed at points along the east shore as follows, viz. . . ."

His report further stated:

> "With an assumed market value of $100.00 per acre the total cost would be fully covered by the loss of 600 acres of land, or about one fourth of the amount the river has already taken from the owners along this front since 1851."

The Board of Supervisors of Mills County contracted with Woods Brothers Construction Company for the construction of the retards. The records in the Mills County Auditor's Office show letters and reports dated 1924 and 1925 stating that, following construction of the retards, the river cut behind some of them and destroyed others.

The Mills County records then show that certain landowners filed an action against Woods Brothers Construction Company, the Board of Supervisors of Mills County, and the Treasurer of Mills County, on July 20, 1925, enjoining the county officials from levying taxes to pay for the improvements and claiming that they were not constructed according to plans and specifications and the work had been useless and of no value (Ex. P-1080).

The case was tried in the District Court of Mills County, Iowa, and then appealed to the Iowa Supreme Court. The Seth Dean map appeared in the ABSTRACTS AND ARGUMENTS of that case captioned *F. E. Dashner, et. al. v. Woods Brothers Construction Company* in the Iowa Supreme Court Library in the State Capitol in Des Moines. The map (Ex. P-721), which is the same as "Exhibit A" referred to in Seth Dean's report, shows an easterly developed bend in the Nottleman Island area with a large island where Nottleman Island was located and a chute running around the west side of the island.

The "U. S. Meander Line 1851" is shown and to the east of that the "East Bank Missouri River Feb. 1895". On the island are shown the words "Island" and "Timber" and "Willows". The words "Missouri River" are written around the east side of the island. There is a "Sand Bar" immediately opposite where Watkins Ditch or Keg Cr. enters the river in Section 6 and right opposite the Duval place in Section 17 are a couple of sandbars with "Willows" shown on them. The river at the road into Babbitt's land between Sections 17 and 20 reaches the center section line of Section 20 and immediately above the road in Section 17 the river has cut a little bit further to the east. This map shows the retards along the Iowa bank on the east side of what is now called Nottleman's Island.

The opinion of the Iowa Supreme Court in the case of *Dashner v. Woods Brothers Construction Company,* 205 Iowa 64, 217 N. W. 464 (1928), begins as follows:

> "The vagaries and meanders of the Missouri river contiguous to Iowa on its western boundary is a matter of common knowledge. The legislature of this state took notice of this fact, and in the enactment of the drainage law provided that, with reference to improvements along or adjacent to the Missouri river, the word 'levee' shall be construed 'to include, in addition to its ordinary and accepted meaning, embankments, revetments, retards, or any other approved system of construction which may be deemed necessary to adequately protect the banks of any river or stream within or adjacent to any county, from wash, cutting, or erosion.' Section 7423, Code 1924."

The opinion discusses the appointment of Seth Dean as commissioner and the necessity to keep the bank from cutting along the river and the fact that the river was cutting in three places along the bank, a distance of 8,000 feet in one place, 6,000 feet in another place and 1,500 feet in another. The Iowa Supreme Court opinion also indicated that, at the time the contractor began its work, the river was cutting in numerous places and for this reason the retards were not built in all places where the preliminary survey tentatively located them. The court said:

> "It is necessary to keep in mind, in the reasonable construction of the contract in question, that the definite location of the retards was necessarily left to the future judgment and determination of the engineer by reason of the constantly changing conditions of the river bed."

The case really determined that the board had power to bind the landowners by accepting the work, but it does constitute further documentation of the serious erosion and cutting of the river into the Iowa farms. The mylar overlay of the Seth Dean map (Ex. P-722) when placed under the traverse of Nottleman Island (Ex. P-1691) shows almost all of Nottleman Island was west of the left bank except a little bit in the southeast corner. Much of that large island on the Seth Dean 1922 map is the same as present day Nottleman Island.

When the Seth Dean map overlay (Ex. P-722) is placed upon the 1890 survey (Ex. P-718) and the Windenburg traverse (Ex. P-1691) is then placed upon these two, it can be seen that the north part of the large island on

the Seth Dean map of 1922 coincides in large part with what was shown as Tobacco Island on the 1890 map (Ex. P-718) and that the Windenberg traverse covers the southern 70% of the island shown on the Seth Dean survey of 1922. The chute around the west side of that island on the Seth Dean map corresponds to a topographic feature which is apparently a depression running along the right side of Tobacco Island on the 1890 map.

This series of Exhibits and the testimony shows that Tobacco Island, which was originally a little bit north of the Nottleman Island location, extended to the South and to the East until it had built up and covered about 70% of the Windenberg traverse area in 1922 and that there was a chute along the west side of the island. The east side was designated as "MISSOURI RIVER" on the 1922 Seth Dean map and the retards were built along the eastern or Iowa shore where the river was cutting. The physical evidence of the trees on the island and the testimony all indicate that this land did not wash away and the documentary evidence establishes that the island formed on the western or Nebraska side of the main or navigable channel of the Missouri River.

The United States Corps of Engineer map from the survey of May, 1923 (Ex. P-723 and P-724) shows several retards marked along the left bank in the Nottleman Island area, and shows a definite island there. This map also shows "Tobacco Island 1890" and just to the right of that the words "Chute 1890" appear in dashed letters. The left bank of 1890 as shown on the 1923 map runs through Nottleman Island. Just above the island on the

Iowa side are the words "Retard under construction" and there are four retards shown on the left bank on the east side of the island. A "Dry chute" is also shown on the island. This map apparently shows a channel of the Missouri River as having broken through the island which Seth Dean had shown on his 1922 map, leaving part of the island on what was shown as "Tobacco Island 1890" on the Nebraska mainland, and the remainder with water flowing around both sides. The bank lines from the 1890 survey are shown on the 1923 survey and when the 1923 overlay (Ex. P-724) is placed upon the 1890 overlay (Ex. P-718) the banks coincide closely.

The next map of the area was the 1926 Corps of Engineer Map, revision from airplane photographs of December 14, 1926. This map shows the "Channel line in miles, survey of 1890" as a dashed line with asterisks. The 1926 map also shows retards on the left bank in Rock Bluff Bend and the words "Rock Bluff Bend" run around the east side of Nottleman Island. The middle part of the island has the designation "Willows" and the 1890 channel line runs through the middle of that area. Mr. Brown located Tree No. 259 on the 1926 map (Ex. P-726) and that tree, which Mr. Weekly testified started to grow in 1900, is to the west of the 1890 channel line. When the 1926 overlay (Ex. P-726) is placed upon the 1890 Corps overlay (Ex. P-718) the 1890 "Channel line" runs right along the left or Iowa bank and to the east of the small island located immediately above mile number 627.9 and west of the name "McDonald" as shown on the 1890 map. The witness Huber for the State of Iowa misplaced his so-called "deepest thread" of the Missouri

River in 1890 by going around the right or Nebraska side of that small island (Ex. D-605-A) instead of up against the left bank on the Iowa side as was actually shown by the Corps of Engineers 1890 channel line.

When the 1926 Corps survey (Ex. P-726) is placed upon the 1923 Corps survey (Ex. P-724), the area designated as "Tobacco Island" on the 1926 map is a lot farther north and some east or is really above the designation of Tobacco Island which appears in dotted letters on the 1923 survey (Ex. P-724). With the 1890 overlay (Ex. P-718) placed on top of the 1926 overlay (Ex. P-726), the 1926 Tobacco Island is clearly north of what was called Tobacco Island on the 1890 map. Consequently, the area called Tobacco Island in 1926 was quite different from the Tobacco Island of 1890.

When the Windenburg traverse overlay of Nottleman Island (Ex. P-1691) is placed upon the 1926 Corps overlay (Ex. P-726), the tree area of the Corps survey is right in the middle of Nottleman Island. The island as shown on the 1926 map is principally within the traverse.

The 1928 Corps of Engineer map and overlay (Ex. P-727 and P-728) and the 1930 Corps survey (Ex. P-729 and P-730) also show willows and scattered timber on this same island area with the high part of the island appearing upon all of these maps.

Testimony of Witnesses As To Early Location of the Missouri River

The testimony of the witnesses confirms this easterly

movement of the Missouri River in the Nottleman Island area and that Nottleman Island built up on the Nebraska side behind the movement of the river.

Floyd D. Fulton, who was born on September 17, 1897, in Fremont County, Iowa, testified by deposition that his family moved to the Billy or William Leeke place when he was three or four years old. That farm was located right west of Egypt School and about a mile north of the Fremont County Line. It was directly north of the George Powles place. Queen Hill, or Rock Point, was northwest of them and across the river about a mile or a mile and a half and the south end of their place was beyond King Hill which was across the river and to the southwest of them. His father farmed and did commercial fishing. When they first moved there, the house was about a half mile from the Missouri River and when they moved away when he was eleven years old, it was thirty-three steps from their house to the river. The river was cutting in pieces "half as big as this building" (the building in which the deposition was taken) on the west side of their place. The river started cutting in the spring and they moved the house away when the corn was just a little bigger than roasting ears. All of the ground between their house and the river went in. There was a big island right straight across from their place, but there were no islands at that time on the eastern or Iowa side of the river. The main river was on the east side. On the west side of that big island was a narrow strip of water which they always called a chute.

Mr. Fulton testified the river cut in the farms a mile or two north of their place a year or two before it got to

cutting down on where the witness lived. The witness mentioned the names of several places which cut into the river including that of Catherine and George Fulton. He particularly remembered the Fulton place because they had a good orchard there and in the fall of the year his dad would go up there and buy apples from them.

He saw boats practically every year he was there as they used to have snag boats and show boats come up the river. He remembered one time when he was a boy that a show boat came up the river and pulled up right at the river bank at the road on the north side of their place, and they put the gangplank down and unloaded four head of horses and drove to Bartlett to get a load of coal. He said they would always run down to the river when they saw the steam boat coming. The witness remembered the Haffke place about a mile or so north of them and testified there was a road which came by the Egypt School House and went west towards the river and then turned north, but that road is not there any more. The river cut it in. The island which was out in the river from the Leeke place where the witness lived ran north for miles, and the main river was on the east side of the island. The witness and his dad picked mushrooms on that island when he was a kid. When the river cut within thirty-three steps of their house, it stopped cutting but in later years it cut it in.

Gay Eyler, born on December 29, 1882, and Silva Eyler, born in 1890, from Bartlett, Iowa, testified by deposition that in 1909 they moved up on the Haffke place near the Missouri River which is west of what is known

as the Dilley place. This location of the Haffke place was identified as being across the river from Queen Hill and they traveled to it down the same road leading west from the Carl Phelps or Dilley place which Babbitt takes into his land today. The Phelps or Dilley farm is the one on the east side of the road from Bartlett to Pacific Junction which has the beautiful paintings on the barn doors. A photograph was offered showing Mrs. Eyler standing on the levee right close to where the buildings were located on the Haffke place where the witnesses lived (Plaintiff's Exhibit Mrs. Eyler 1). When the Eylers moved to the Haffke place in March, 1909, the Missouri River was some distance west of the house. They had to leave in July of 1909 because it was too dangerous to live there any longer since the river was cutting so much. Mrs. Eyler was able to recall that the year was 1909 because their first baby was going on two years old and had a serious illness that year. In describing the cutting, Mrs. Eyler testified:

> "Well, it seemed like the river was coming with such force against our bank that it just started cutting there. Now, that is all, and it got to the spot where we were really afraid to stay there any longer because we could hear the pieces going in during the night." (Vol. V, p. 584)

She testified that this was not flood time but was just normal cutting and she saw trees go into the river and a very substantial corn crib float off in the river. Mr. Eyler also identified the Haffke place and testified they had to move off before they had plowed the corn the third time. This was in June or the first of July. He was then asked:

"Q. Why didn't you plow it the third time?

A. Because the river got to cutting toward the house, and everything. It got so close to the house. One night there was a regular storm, a heavy rain, so I lit my lantern to go out there and see how close it was getting. Chunks of dirt were going in there ten or fifteen feet across. So I lit my lantern, and I got out there pretty close, and the wind blew the lantern out, so I kind of crawled over toward the bank and feeling all of the time with my hands, and it was getting too close. I think within three or four feet of it, when a big chunk went in, and I got out of there.

Q. Was there any noise when that went in?

A. Yes. It jarred the bed, and it jarred the house. We could hear big chunks going in. It would jar the house and it would jar the bed, you know. I thought it was getting too close for us." (Vol. V, p. 594).

Mr. Eyler was asked when the river was doing the cutting, how he would describe it and answered:

"Well, it wasn't too high. It was almost bank full. It was awful swift. The main channel was right against the bank, it seemed like." (Vol. V, p. 596)

He also testified that the house and the ground where the house had been located was gone when he returned about a year later.

The Eylers identified where their buildings were when they lived on the Haffke place and Mr. Brown located that place as being east of the Nottleman Island traverse (Ex. P-2278). This point is located by the Eyler re-bar, in the north-central portion of Iowa Section 20,

slightly west of the letter "H" in the word "DITCH" on the 1946-47 tri-color map and Appendix A.

Bruce Connor of Glenwood, Iowa, was born in 1886, and testified by deposition that the first farm he ever farmed was when he was nineteen years old and he moved onto the Haffke place. He was born a half mile east and a half mile north of the Egypt School where he went through the eighth grade. The Egypt School was just a mile north of the Mills County Line and is identified on the maps as being just a little bit north and east of King Hill. He went to school with Patty Powles and worked for Floyd Fulton's father and Floyd Fulton had worked for Bruce Connor. The Haffke place was two miles north of Egypt School and three quarters mile west of the main road. He only lived there one year and the river was doing some cutting then. It was also cutting where George and Catherine Fulton lived. Later he moved to the Buckingham place which was on the main road to Bartlett two miles north of Egypt School. This was also identified as the Duval place. People named Dilley and Briley and Thede Powles also lived there at various times. He rented the farm which presently has the pictures painted on the garage from Mrs. Dilley. The witness identified the road which is the present road going into Nottleman Island from the east as the same road which was taken into the Haffke place. The witness in the presence of Mr. and Mrs. Eyler, pointed out where that road turned south and Mr. Brown located it on a map (Ex. P-2278). It is just east of the Nottleman Island traverse and directly north of the Haffke place. The witness lived at the Dilley place in 1913 and, in the eight

years he lived there, the Missouri River kept cutting in and cutting part of the Duval place on the north. While he lived there, he mentioned several other places which cut into the river including an eighty acres north of George Fulton, the McKinley place, the Waltenberry place, the Harris place, the Azbell place, and the Long place. These cut in about 1914 or 1915 and some before that. All of these farms were on the east side of the river in the Nottleman Island area. The witness specifically remembers the year 1913 because that was the year of the big cyclone. Exhibit Conner 1 is a picture of the Egypt School site showing the witness.

The witness also started to work for Woods Brothers Construction Company in 1921 and worked for them three years. They put in twenty-one retards and then he worked for Woods Brothers doing repair work for a couple of years. He knew Seth Dean, the surveyor from Glenwood, and the witness once worked for him. In 1921, he hauled trees for Woods Brothers by horse and mule to make retards. He testified they were making the retards on the east side of the Missouri River where it was cutting. The river was deep there, which was also true when he lived on the Haffke place and when he lived on the Dilley place. The Azbell place which cut into the river was half a mile west of Egypt School and three-quarters of a mile north. The Tuggenhagen place was south of the Haffke place. They had a grave yard down there and it went into the river in 1906 or 1907 and he went up to Glenwood to report it. The Leeke place was a mile south of the Tuggenhagen place.

Mr. Whitney Gillilland, age 65, a present member of the Civil Aeronautics Board and a former district judge in southwestern Iowa, testified by deposition concerning his personal knowledge that many years ago the main channel of the Missouri ran east of Nottleman's Island. He stated he saw it run there prior to 1920 and his recollection was this was the open main channel of the river. His earliest recollection was about 1917, and he said every one he ever knew of in that part of the country regarded Nottleman's Island as part of the State of Nebraska until the Act of the Legislature. He used to go fishing and camp out along the river, when he was young, about four or five miles north of King Hill but they would run along the bank of the river some miles in either direction.

John "Patte" Powles, who was 80 at the time of his deposition taken on November 14, 1967, was born in Mills County, Iowa, where he has lived all his life. His father's name was George Powles and, in 1892 when he was about 5 years old, the family moved to the first farm north of the Mills County Line just south of the Fulton-Leeke place. This farm joined the Missouri River and is the farm he grew up on. It is across from King Hill. In the early days the house was about a half mile from the river and was there up to about 1922 and then the river began to cut and it got to about a quarter of a mile from the river to his house. He testified that back around 1900 some people named Haffke and Tuggenhagen lived on farms to the north. The Haffke place cut into the river and the Tuggenhagen farm cut into the river about the same time as the Haffke place did. He knew Floyd

Fulton and worked for Floyd Fulton's father and saw some of that Fulton farm cut into the river. One of his brothers, Theodore "Swede" Powles, lived near the river from 1915 to 1920 about two miles north from the old Powles place and a little east. Just south of that farm is the road that goes west from the highway to the river which is the same road which Mr. Babbitt takes to go to his island. The farm just north of that road was the Theodore Powles place, and some of that farm on the west side might have cut into the river at one time. There were several houses over in there that the people owned besides his brother and the witness thought they moved the houses away. He testified there was a swift current along the Iowa bank cutting. It was deep enough to take chunks of land off. He also remembered Woods Brothers Construction Company doing work along the river commencing in 1921 both to the north and south of their place. They were cutting cottonwoods and putting them in the river and making dike levees to keep the river from cutting. There were islands in the river west from the Theodore Powles place and the river ran around on the east side of them.

On cross-examination the witness testified that the island west of Theodore's place was called Gochenour Island and that was the only island west of Theodore's that he recalls. He was not on this island until Babbitt rented the farm. George Troop also had some acres down there and Troop wanted to sell it to the witness so he went over and looked at it, but didn't buy it and Lee Sargent bought it for $10,000 and the stock. The road where his brother Theodore lived which is now used

to go out to the island comes into the island from the east and must come in about in the middle of the island. Theodore lived two hundred feet west of that road from the black top that goes to Bartlett. In the old days there were houses and small farms of forty to fifty acres west of Theodore.

On redirect, the witness testified that when Woods Brothers was doing their work in 1921, Gochenour Island was west of the river. He remembered it being over there for a long, long time before 1921 back to when he was a small boy. That island was always on the west side of the river that he could remember up until the time when Woods Brothers did their work. The farm that he mentioned west of Theodore Powles' place cut into the river.

Genevieve and Luther Johnson of Glenwood, Iowa, testified that they lived near Egypt School in Mills County, Iowa, from 1926, when they were married, to 1945. Mrs. Johnson, age 62, pointed out the Lizzie Leeka place west of the Egypt school house and Twin Lakes. She showed where she lived on the "J. H. Schroeder" place on a print of the Seth Dean 1922 map (Ex. P-721) which, when they lived there, was owned by a James J. Hogan. A Mr. Tooley lived directly to the west of them and, when they first moved there, the Missouri River was about one-half mile west of them and then it started cutting and it cut in north of them. They thought it was going to come down through Twin Lakes and take them. It started cutting soon after they got there and big trees and houses fell into the river. An area adjacent to the river north of her house and a little bit west marked "T. C. Harris, 100% 20.7a" (Ex. P-721)

was cut into the river along in 1926 or 1927. Immediately to the east of that, an area which appeared on the map as "C. M. Fulton 100%" was cut into the river, and the corner of the Sheldon place immediately to the north and east of what appears to be the center of Section 29 and designated as "Sheldon 70%" was cut in. The Powles had lived immediately south of them. Some land south of their house cut into the river.

From the fall of 1936 until the fall of 1939, some of the workers stayed on a quarter boat and Mrs. Johnson cooked three meals a day for them at her house. The boat was docked in the river right straight west of the witness's place because that is where they went. They had a quarter boat and other boats right along in there where the deep water was and the witness indicated an area located at the center section line of Iowa Section 29, where the water was deepest because they had boats and sandbarges there. This was along the east bank of the Missouri River on the Iowa side of Nottleman's Island. She watched the river cut and saw great big trees fall right into the water. At that time the river up against the east bank was real deep and real swift. They drove up this road north of them as far as they could and walked over and could see those big old trees fall right down into the water and the water was very swift and very deep over against the east bank. Across the river there was an island north and west of them, but the river didn't cut that way, it all cut their way. It was not comfortable living that close to the river in those days because it was just too much of a scare. After Patton Tully completed the river work they didn't have

any more problems. Mr. Bake Miller, a superintendent of Patton Tully told the Johnsons that they were fixing to shoot the channel back towards King Hill and zig-zag it and it wouldn't cut that way and it did not.

Luther Johnson, age 69, and a resident of Glenwood, Iowa, testified that most of his life had been spent farming on the Missouri River bottom. He lived just west of the Egypt School in Mills County. He also testified as to the cutting and the trees going into the river and mentioned that some of the Ed Sheldon place cut into the river and all of the T. C. Harris place which was north of them went into the river. He circled the T. C. Harris place (Ex. P-721) and the "100%" notation where the Harris place was and where buildings went into the river. He testified this must have been between 1926 and 1930. The river also cut south of the witness's farm and cut some of the George Powles' place away. The witness testified that at one time, the river was both directly north and directly south of his place. His farm was originally 160 or 170 acres and all but about 90 acres cut into the river. This cutting generally took place through the summer and cut at normal stage the same as it would if it were high stage. His father, Benjamin Johnson, at one time owned the area north and a little bit west of his farm and the river cut it all in except two or three acres. The witness also mentioned Woods Brothers had done a lot of rip-rapping and taxes were so high his father just let them have it, because he couldn't raise enough on the two or three acres left to pay the taxes. The work by Woods Brothers was done before the witness moved down to that area. Patton

Tully, contractors, moved in there in 1936. In the summer the witness dragged piling with a tractor for Patton Tully. The effect of the Patton Tully work was to shoot the water back away from the farm ground back towards the river. Then the river stopped cutting and land went to filling in.

All of these witnesses were very familiar with the area, most of them having lived right there while the events were taking place, and their testimony was consistent with the documentary evidence.

A page from the Mills County platbook of 1891 of Lyons Township shows the "River Line as shown by Govern. Survey of 1851" and north of the center line of Section 30, this line appears to be west of where the river is shown in the Nottleman Island area. At the very bottom of the map opposite Rock Bluff, the line is easterly of the river bank (Ex. P-2291).

Another atlas of Mills County of 1910 shows the left bank of the river considerably to the east and Section 19 is now all gone including the C. M. Fulton 30 acres on the previous atlas (Ex. P-2619). On the 1891 map, the E½ of the E½ of Iowa Section 18 is still shown as land, but on the 1910 map the river is clear over east into Section 17 and Section 18 has all washed away. At the bottom of Section 20, the C. M. Fulton 80 acres is cut in half and in 1910 appears as just 40 acres. The two C. M. Fulton 40 acre tracts which were directly east and west of each other show the west one having disappeared and the east forty remains. On the 1891 map, there is land in Iowa Section 30 directly west of Section

29 but on the 1910 map, about all of that land previously shown in Section 30 as approximately 220 acres has been cut into the river. The 1910 map also shows the original Government Survey of 1851 as a line to the west. When the overlay of the Windenburg traverse (Ex. P-1691) is placed upon the overlay of the 1910 atlas (Ex. P-737) almost all of Nottleman Island except some of the very eastern part is shown to be west of the left bank.

The 1913 atlas of Mills County (Ex. P-1764) shows almost the same river bank as the 1910 atlas, but the names of the landowners are changed. It is not contended that these atlases have the preciseness of surveys, but they are helpful in identifying some of the areas testified to by the witnesses. They also can be compared with the Seth Dean survey of January 23, 1895 (Ex. P-1668 and P-1668-A) to show the land cut into the river.

Albert Mason Watts, one of the present owners of a portion of Nottleman Island, age 68, was born in Lyons Township in Mills County about a quarter of a mile from the old Duval place. His father was James Nicholas Watts and he identified a deed from J. C. Buckingham and wife to James N. Watts filed August 4, 1894, in the office of the Mills County, Iowa, Recorder (Ex. P-1694). His parents were grantors in a warranty deed from James N. Watts and wife to Leonard Oviatt filed March 4, 1905 (Ex. P-1692). These two deeds describe the farm where the witness was born, which was on forty acres which now lie just to the east of present day Nottleman Island. When the witness was quite young, the family moved away from that place on account of the river

cutting in there and the witness's father was afraid it was going to cut the farm in. Subsequently, part of the west side was cut in.

The witness testified he had lived along the river in Lyons Township most of his life and spent nearly all of his time on the river when he was a boy. He used to live to hunt and fish and it was always up and down the Missouri River. He testified that, in the period from 1915 to 1920, the river came down from Plattsmouth and made a big wide curve to the east and on the west side of the river there was a big sandbar. They called it an island because when the river was high the water ran on all sides of it. When the river was down to normal or anything below normal at all, it was almost dry on the west side and the main river was on the east side. The island that was there in the earlier period is a part of Nottleman Island. Between 1915 and 1920 the biggest half of the river was east of that island. The witness testified it did a lot of cutting in there.

When Woods Brothers did their work, it was trying to cut on the east side, and when the government came down there in 1933 and was going to put in revetment for the piling, all the steamboats had to come on the east side of the island because the water on the west side was so shallow they couldn't get through. After the Corps got the stream transferred to the west side into that chute over on the west side, it cut over there and then the east side of the old river filled up.

The witness was born in 1901 and started hunting when he got his first shotgun when he was fourteen. He

would go out to the island by boat and he had a blind there. He testified that on the west side of Nottleman Island where the river is presently located, there was a chute in the period from 1915 to 1933. He also identified the west side of the T. H. Douglas farm in the northwest corner of Iowa Section 8, which cut in and the corner of the C. C. Randall place which appears as in the N½ of Iowa Section 17 and the S½ of Section 8 and some of the land listed as Hunters, Peters and Bock which cut in (Ex. P-1694). He testified that the C. M. Fulton 40 was cut in quite a bit where George Fulton lived. He believed that cutting around the Hunters, Peters, Bock, Southwick area occurred in 1916 or 1917 or at least somewhere between 1916 and 1920. Mr. Watts also testified that Carl Phelps had painted the hen house and buildings on his farm and this was also known as the Detsauer place and was also called the Dilley or Diller place.

When Woods Brothers Construction Company started their work in 1921 and 1922, the witness worked with them two or three months. He drove mules and would drag logs right up to the river. In some places the river was cutting in there. In 1933 or 1934 Forney Brothers contractors who worked for the government, drove piling and plugged the channel that went between the island and the Iowa bank with revetments and shoved the water down through the west chute toward King Hill and Queen Hill and made a new channel there for the main river. The witness testified that part of the present island is the same island that was there back in 1915 and it did not wash away when they put the chan-

nel around it and shot the water over on the west side.

The witness saw steamboats come up the river quite often and when they first started doing the river work there, the steamboats came up the river from the south and had to come up on the east side of the island because there wasn't enough water on the west side for them to get through, and after the water was put on the west side enough to cut the channel out, they came up the west side. The witness testified that between 1915 and 1920 he went across the river over to the island many times and he went around to the west side, and the amount of water on the west side varied depending on what time of the year you were over there. If you were there when the river was down and anything less than normal, you could get over there quite easily because the water was about gone or just chute water or shallow water which you could wade easily. The witness was down there hunting one day and saw a man drive onto the island with a horse and buggy from the west bank some time in the 1920's. However, if the water was a little bit deep, you couldn't get there. He said before the Corps of Engineers did their work, when the river was high, the water on the west side of Nottleman's Island would spread out because it was so flat over there. It would spread out until it would be about as wide as on the east side, but it was shallow. The main channel was on the east side which was the deepest.

The witness located a stake along the road from the Detsauer place into Nottleman Island indicating the farthest east the river had cut, and Mr. Willis Brown identified that stake on the map. It was located a mile

and a half or two miles east of the present bank of the Missouri River (Ex. P-2278). The witness stated they put the main river clear on the west side of the island and took it clear out of the country from where it used to be.

Witnesses called by the plaintiff who lived on the Nebraska side of the river in the Nottleman Island area confirmed the testimony of the witnesses living on the Iowa side as to the location of the river with reference to Nottleman Island. James J. Lipert, age 74, presently residing in Council Bluffs, Iowa, by deposition taken November 15, 1967, testified that he owned land in Rock Bluff Precinct in Nebraska and for fifty years lived in Plattsmouth Precinct which is the precinct just north of Rock Bluff Precinct. He moved there in 1904 and left in 1953. Part of his farm was in Section 5 in Rock Bluff Precinct and either 32 or 36 in Plattsmouth Precinct and this farm was not over two miles north of Queen Hill. His father, Frank, farmed the land until he died and then the witness farmed the place. The 80 acres which he now owns was east of his father's place one-half mile and practically to the foot hills. This was where he could look at the Missouri River. It was approximately 40 rods north of the precinct line between Rock Bluff and Plattsmouth Precincts and there was a high hill without any timber or anything to obstruct the view either to the southeast or east. (Mr. Willis Brown identified that precinct line as being along the line between Nebraska Section 4-11-14 just north of Queen Hill and Section 33-12-14 (Ex. P-2626).) The hills butted out so that you couldn't see very well to the north, but

you could look northeast and could see Keg Creek in Iowa which was slightly to the northeast. You could see as far south as King Hill and you could see Queen Hill. He used to go there quite often as a boy.

Between 1910 and 1920, the witness testified the main channel of the Missouri River was straight east, and he can remember because the chutes west of the river were nothing but chutes. At flood time there would be a lot of water in them and then when the river was down in July and August, the chutes would be dry. There were about two or three chutes that would run down there. In the early 20's you could see the land cut away on the east side. He testified that he would see a big house and that would go in and maybe you would go back there in a couple of weeks and the farm would be gone, buildings and all. He saw Woods Brothers Construction Company do some work on the east bank of the river and after that he testified he didn't see much cutting any more. Most of the cutting took place from a mile south of the mouth of Keg Creek and from there south for a mile or two stretch that he could see.

One time between 1925 and 1930, the witness went down to Queen Hill with his wife and children when they were small, and Taylor Cuthrell and his wife and their children were with them. He testified if you looked east standing at the foot of Queen Hill at that time, there was nothing but a sandbar with a bunch of willows on it. They waded across a little chute about knee deep which was right against the west bank and they waded out "Maybe a couple of hundred feet." Mr. Cuthrell was with the witness when they identified the place where they waded

out and the witness placed a stake which Mr. Brown later located by survey (Ex. P-2278). Exhibit Lipert 1 is a picture showing the witness and Mr. Cuthrell. The photograph is facing east and right behind them is the main channel of the Missouri River and across from that is present day Nottleman Island. This was a quarter of a mile or a half a mile north of Queen Hill. At the time they waded out, they crossed the slough and on the other side were willows and sandbars. They didn't go out into the willows very far. At about the same time as this, the witness was on the lookout point which he had described, and at that time, the main part of the river was right straight east against the Iowa bank a distance of about two miles or maybe a little further. The island back in those days did not have a name unless you called it Gochenour Island. The witness testified it could have been the south end of Gochenour Island. The place where the picture was taken was on a fence line between the property of Warga and Fitchorn.

Mr. Harrison L. "Cap" Gayer, born in 1891 and presently residing in Papillion, Nebraska, testified by deposition taken November 14, 1967. He lived on the Rock Bluff road about a mile and a quarter straight west from Queen Hill. Queen Hill quarry is right north and east of Rock Bluff. He moved to that farm in 1919 and in that year drove down to Queen Hill. He testified that, as you stood at Queen Hill and looked east in those days, you saw willows as far as you could see from the bank. There was no quarry there then. He did not see any running water and he knew where the Missouri River was east of Queen Hill, but never did go over to

the river. He said you could stand on Queen Hill and see the river north and east, but you could not see it looking straight east. Looking north and east you could see the river at a distance of about a half a mile or less than a mile and there it went in an easterly direction. On re-direct examination, the witness testified that a little later, he walked out into the willows in 1922 or 1923 and went clear to the water's edge which could have been a quarter of a mile or such from Queen Hill, and there was a chute there which he knew was not the main channel because there was no current. The chute could have been a hundred yards wide. He fished in that chute with Walt Sands and it was his first and last experience in trammel net fishing which is the reason he remembered it. He testified he rowed a boat in that chute and there was no current.

Albert Warga, age 74, also testified by deposition taken on November 14, 1967. He was the son of John Varga and at the time of the deposition lived west of Queen Hill in the northeast quarter of Nebraska Section 8-11-14, where he has lived since 1933. Before that he lived on the home place which was his father's place just across the road to the northeast and toward the river and about a half mile north of Queen Hill. He has been a farmer all his life. In 1913 in the vicinity of Queen Hill, the Missouri River was mostly over by Iowa and was about a mile from Queen Hill. He is able to recall this because 1913 was the year of the tornado and he was out duck hunting on that Easter Sunday in 1913. At that time, between Queen Hill and the river, there was a lot of land built in which he called accretion land. He tes-

tified it was willows, grass and stuff like that and there was no water between Queen Hill and the Missouri River and it was all dry through there.

Captain Otto Neuhauser, presently living in Kansas City, Missouri, testified he was born in 1892 and had been associated with the Missouri River ever since 1910, when he started as a deck hand and fireman on tow boats from Kansas City down to the mouth of the river. He received his pilot's license in 1913 and came up the Missouri River with a river boat in 1915. He testified that in those days you had to take a written examination for a license and give them miles on both sides of the river, the bridges and curves and rock points and cities bordering the river. Captain Neuhauser was a pilot on the Missouri River from 1913 until he retired from the government in 1957 from the Omaha District, but he has maintained his pilot's license and was planning to go back on the river in charge of an excursion boat at Kansas City in June, 1969.

In the early days, there were no navigation charts or maps so they had to pick their own water. It took a great deal of experience and a lot of people were on the river all their life and they would never be able to do it. You read the water. They had no navigation charts and, when asked when they first got their navigation charts on the Missouri River, Captain Neuhauser said he thought they started buoying up here in 1947 or 1948. (The Court Reporter's transcript states *1937 or 1938* (Vol. V, p. 670), but Nebraska counsel's notes show he said 1947 or 1948 and Mr. Murray at Vol. XIII,

p. 1840, said in a discussion with the court concerning navigation charts: "I was told by, I think, Capt. Neuhauser about the first chart he recalls was 1946." The Court then stated: "Somebody on the stand said that. We don't have this business of the boat track, the thalweg.")

In 1913, Captain Neuhauser just had his license up to Kansas City and then in 1915 he got on a boat by the name of *Myrtle H. E.* and they brought two barges up the river to Omaha. He made this trip so that he could get an extension on his license. The boat was a steamboat about 90 feet long and 25 feet wide which burned coal and wood and had a paddle wheel. Captain Neuhauser said he was familiar with the Rock Bluff area in 1915. When they got just north of King Hill there was an island located east of Rock Bluff and they followed the right bank at the lower end where there was a little water, and they couldn't get through so they backed down and went around the left or Iowa side (Ex. P-2624). This was in the spring of the year, around May. The water was at a low stage and they had not yet had the June rise. He testified there were three little chutes on the Nebraska side and they tried all of them and there wasn't enough water for them so they had to back down the river and go up the east side. The witness examined the 1922 Seth Dean map and stated that the area looked about the same as it did in 1915. He drew a line in red pen showing where they came up from the south and went as they proceeded north past Rock Bluff and marked that line with a capital A at the bottom and a capital B at the top. This line goes around the east or left bank

side of Nottleman Island. The witness also used a black pen and marked how far up they got along the right bank before they had to turn back and marked the north end of the line with a C which is just below "Rock Point Bluff" on the map (Queen Hill). The south end of the line was marked with a D. This is on the Nebraska or right bank side of Nottleman Island and the witness testified that water in that vicinity between the C and D is where the bars and three little chutes were (Ex. P-2624). He testified that the red line marked on Ex. P-2624 represents the best water and the navigable channel at the time they first came up the river in 1915. In 1915 when they came up the river and started up that chute on the right bank, the water was quite wide and scattered all over in there and was very shallow. The witness testified that, back around 1915, there was no commercial traffic. There were only snag boats and tow boats towing for contractors and bringing fleets up. In the years 1915, 1916, and 1917 and thereabouts, about four or five boats made the trip up the river per year outside of the snag boats.

Captain Neuhauser also worked for Woods Brothers Construction Company from Plattsmouth downstream and in 1921 Woods Brothers Construction Company wintered right below the Plattsmouth Bridge. He was a master of power and also boat foreman and was on a boat by the name of *Castalia* when they started the retards. After the winter was over they started putting retards in with the first one located at the mouth of Keg Creek (Ex. P-2624). They worked on a couple more retards below there and then they pulled him off that job and took

him to Missouri Valley, Iowa, and a boat named *Lindsay* came in and finished the rest of them. He described how the retards were driven and that they wanted them sunk 85 feet at least. He devised a kind of machine to drive these retards. Captain Neuhauser testified that the main channel of the Missouri River was on the left bank in the Nottleman Island area in 1921. It was cutting in 1921 and that was the reason they wanted to put the retards in, to stop the cutting. Before he left, he testified that the retards were working.

In 1931 Captain Neuhauser also had a boat by the name of *Arthur S.* owned by Wigham Bridge and Pipe Company, which was used at Plattsmouth by a sand company, and he came up and got the boat and tow and left Plattsmouth on January 2 and landed at St. Joseph on the 13th of February, 1931. They came past Rock Bluff and he came down the same way he had gone up the river in 1915. There was still an island right out from Rock Bluff and the main or navigable channel in 1931 was on the left bank of the Missouri River. The last time he went through the left bank side around Nottleman Island was in 1935 on the government boats. The contractors were working there then. In 1939 they pulled the first retard they had placed at Keg Creek with a snag boat, the steamboat *Daniel Boone.* They pulled these retards because the other river work had caused these old retards to be ripped up by the current and they were afraid they would ruin the boats' wheels. After the government Corps of Engineers completed their work, Captain Neuhauser testified the main channel of the river was thrown over to the right bank or Queen

Hill Quarry on the Rock Bluff side. Captain Neuhauser stated that it was the government work which placed the channel over there. He also testified the government at first had trouble at the top of Nottleman's Island holding the water and holding the dikes. After they got Queen Hill Quarry open and could get all the rock they wanted, they filled it to the top of the piling with rock on those dikes and that stopped the water.

Captain Neuhauser also testified about the difficulty of reading water and he stated he did not think you could tell where the main channel in the river was by looking at an aerial photograph or picture. He said he thought it would be better judging it out of a pilot house and it was hard enough doing that. When asked if the wider water was where the main channel was, Captain Neuhauser testified that the narrow places were always the best water and were usually the deepest and swiftest. When the river widens out it starts losing its flow and starts forming sand bars.

He also testified about government snag boats in 1915. The *Mandan* went from Sioux City to Fort Peck, Montana, the *McPherson* from Kansas City to Sioux City, and the *Missouri* snag boat went from Kansas City to the mouth. In 1915 he testified there wasn't commercial navigation "up here" but at Kansas City there was and the Missouri River Navigation Company had barge line freight into Kansas City from St. Louis. There were no barge lines going from Omaha down or up from St. Louis to Omaha. In answer to a question by the Court, Captain Neuhauser said he knew the channel was shifted to the right bank of the river on the west side of the

island when he pulled the retards in 1939 and that was the first time he knew that former channel was shut clear off. Once they shut the former channel off, he then called it a chute.

The U. S. Army Corps of Engineers Work In The Nottleman Island Area

The testimony of other witnesses familiar with the Missouri River substantiates the fact that, immediately prior to the time the Corps of Engineers commenced their construction work, the navigable channel of the Missouri River went around the left bank or Iowa side of Nottleman Island. Mr. Joe A. Tesnohlidek, "Pep Tess", age 53, testified that he had been a hunter and fisherman since he was about ten years old and in the year 1933 he hunted and spent all of October, November and part of December in the area around King Hill, Nebraska. The southern part of present day Nottleman Island extends downstream almost to King Hill. Mr. Tesnohlidek was 18 in 1933 and hunted on the west side of Goose Island which is immediately below King Hill. He kept a hunting camp for his father and they had two boats, a 14 foot river boat and a 16 foot river boat powered by a 9½ horsepower Johnson motor. They rowed most of the time in those days.

The witness identified on the 1947 tri-color map (Ex. P-2625) his hunting camp along the Nebraska side below King Hill. There was enough water there so the stern wheelers used to come up past his camp and there was a limestone ridge with one spot deep enough for the boats to get through. On two occasions he instructed

boats how to get up the river. He testified that they could not go on the Nebraska or west side of Nottleman's Island and that it was "like the Platte River" on the west side and you were lucky to find a channel to row through. He had rowed a boat up in there looking for ducks and he said the water was wide and shallow. The second boat was a paddle wheeler and he in fact saw it go north on the east side of Nottleman's Island.

Alvin B. Gregory, age 57, residing in Sidney, Iowa, testified that he is construction supervisor for the Corps of Engineers in the Nebraska City area resident office. He had been an employee of the Corps of Engineers for 32 years and went to work for the Corps in the fall of 1934. From 1929 to 1934 he was employed by A. W. Forney Construction Company which did river work and he worked on a boat on the river from 1929 to 1933. In September of 1933, when the government first started to work on the river, Forney Construction Company had the first contract at Plattsmouth that ran south of Plattsmouth. Forney Construction Company was headquartered in Kansas City so it was necessary to move their equipment up the river to Plattsmouth to start work and this was done in September of 1933. The work actually began about the middle of September and the witness was steersman on the boat that brought the equipment up. In September, 1933, he was a boat operator, but when they brought the fleet up the river he was steersman. This was a steamboat about 110 feet long and 25 or 26 feet wide with a draft of 3 feet. It came up the river with a tow of eight pieces which were barges, pile drivers, and a mat boat. In referring to the 1947 tri-color

map (Ex. P-1039), Mr. Gregory remembered coming up the river in that vicinity in the fall of 1933 and he remembered the town of Rock Bluff where there was just one store which was about a half mile from the river. In that location he testified there was an island in 1933 and there was water on both sides of the island. As they approached Nottleman's Island from the south going north, they tried to come up the west side or along the right bank of the river. They got almost up to where they were even with the Rock Bluff store and couldn't get through and had to back out and go up on the other side because there wasn't enough water on the west side. It was wide on the west side, but not deep enough for the boat and tow. He remembered that when they couldn't go any farther on the west side, he walked out to the store at Rock Bluff and called the office in Kansas City to tell them they were going up the other side, and that is how he remembers that they were just about straight out from where the store was at Rock Bluff.

In the fall of 1933, they started the dikes right below Plattsmouth Bridge at the head of Tobacco Island which was above Nottleman Island and they also put in revetment on the right bank just below Tobacco Island and across from the north end of Nottleman Island. The next work they did was in the spring of 1934 when they went to work right below the mouth of Watkin's Ditch on the revetment and those dikes at the north end of Nottleman's Island. They drove the dikes out pretty close to the ends and the river would go around them and back down the east side. The river would go through the dikes and tear them out and they would have to re-

place them. The river was going back down around the left side of Nottleman's Island. They continued to have that difficulty for two or three years, and "Then they went in and put a rock dike about half way down around the island, put a high rock dike across that chute down there so it would keep the water from sucking down in through the dikes and tearing out the dikes." Eventually, the stream was diverted to the west side. He testified that before the channel on the east side of Nottleman's Island was finally closed, the boats used the left bank side. The boats still continued to go up the left bank side until they couldn't get through any more because of the structures. Those dikes prevented them from getting through.

The witness testified the object of the work in the channel was to make that bend come around so they could lay the water in the bend so it wouldn't spread out and to keep it in the bend. It was the Engineer's intention at the start to shut off the channel on the east side of the island when they started the river work. The contract was actually let for that work to close off the head end of that island when they came up and went to work, and this was in the contract with Forney's. When the water force was changed from the east side of Nottleman's Island to the west side, the island stayed there all that time. The island had been there as long as the witness had been around. The witness received his boat pilot license in 1931 or 1932. He was a boat pilot when he went to work for the Corps and up until about five years ago. He also knew of dredging having been done in the

channel west of the island but after they forced the river channel down in there.

Jack Chadwick, age 57, is resident engineer for the Corps of Engineers at Nebraska City and had been with the Corps 27 years. He has been continuously at work on the Missouri River since 1930, excluding three years military service. In 1933, he went to Plattsmouth, Nebraska, to work for Forney Construction Company on floating pile drivers as a winchman and deck hand. In the late spring of 1934 he started work on river structure projects in the vicinity of Nottleman's Island. In 1934, he lived about three-quarters of a mile below the mouth of Keg Creek (Watkin's Ditch) in a farm home which he located on the tri-color map (Ex. P-1039) about a quarter of a mile from structure 630.2. Structure 630.2, which is at the very north end of Nottleman's Island, was started in the spring of 1934. Working up and down the river in that vicinity, he was familiar with the course the boats used to go around Tobacco Island and around Nottleman's Island. He testified that in 1934, the boats went down the left bank or east bank on the east side of Nottleman's Island. On the west side of Nottleman's Island in 1934 it was flat, shallow, and spread out. In 1934, Nottleman's Island had some pretty high ground and was pretty well tree covered. He guessed the trees were a foot or bigger in diameter. In the spring of 1935 the river came down on the west side of Tobacco Island and cut right through again and went on down the old channel because that was the deeper water and it hadn't held the water out of there yet. The dikes were washed out and there was 25 to

30 feet of water going down through there. He was on the pile driver that drove the dike back and filled the gaps. He didn't know the exact year the channel was successfully transferred from the east side to the west side of Nottleman's Island, but guessed it was about 1936 or 1937. He wasn't there when they put on the last end of the trail dike 629.9-A. Nottleman's Island stayed there all the time during the river work and did not disappear. There was considerable difficulty in getting the water to go from the east side to the west side of Nottleman's Island. The witness knew of a rock dam on the west side of Tobacco Island and of a rock dam below King Hill, but he didn't work on the construction on either of those. He also knew that, later on, there was a rock dam half way down the east side of Nottleman's Island, but he didn't know when they did it, and subsequently they have filled it clear full of stones.

On cross-examination, Mr. Murray showed Mr. Chadwick a reconnaissance map, with the right-hand channel sounded, dated November 2, 1934. However, the witness testified that the structures were already in at the upper end of Nottleman's Island as shown on that map. Although he was not on the reconnaissances at that time, he testified that they either had a pole or cast a lead line and they just kind of sketched the soundings as they drove along in the boat. He also testified that one of the purposes of the reconnaissance maps is to find out how deep the water was where the Corps wants it to be. "They wanted to check and see if they are getting any results."

The Corps of Engineer work in the Nottleman Island area was also described by Mr. Ray O. Herold, age 77, of Plattsmouth, Nebraska. He started to work for the Corps of Engineers in July, 1938, and worked practically every year for some time in the Nottleman Island area. In 1938, he worked on a rock barge maintaining the levees and places where they tried to hold the dike-line from breaking through. He also worked on Tobacco Island above Nottleman's Island and, at the head of Tobacco Island where the river splits, in the area of dike 632.6, the water broke through up there.

In 1938, he worked in the area of dike 630.0 which is at the north end of Nottleman's Island and they had trouble holding those dikes. They had to dump rock on the east side and he testified that, at that time, there was more water running through the east side than the west side of Nottleman Island. You couldn't get your barge down in the east side because it had all been shut off with the pilings, but when the dikes were broken through, the channel went back through the Iowa side. They also had trouble after 1938 keeping the dikes in there at the top part of Nottleman Island. Three of those dikes at the top end of Nottleman Island gave them trouble all the time, and they had trouble down below at the top end of Goose Island.

Mr. George L. McGraw, of Plattsmouth, age 57, is employed by the Corps of Engineers in the Omaha maintenance base and started working for the Corps in 1929. He worked with Captain Neuhauser in the Nottleman Island area in 1936, 1938 or 1939, one of those three years.

They pulled retards just below the entrance of Keg Creek or Watkin's Ditch. The witness also testified how they drove clumps of dikes with some of them 15 feet on center, some 18 and some 20, depending upon the depth of the water. These were to hold back the water and cause the sediment to form below and build up dirt below the dike. They also laid mattresses of wood or willow and sunk them with rock and drove piling through them. When they pulled the piling with Captain Neuhauser, there was fast water running around the east side of Nottleman's Island and it seemed to be about equal going on each side at that time. The piling which they pulled was not put in by the Corps but he testified they were put in back in the 20's.

The Corps of Engineer Project & Index Maps from the Omaha, Nebraska District of the United States Engineer Office from 1934 through 1939, show the progression of the dike construction. These maps are each dated September 30 and the 1934 maps (Ex. P-410) show parts of dike 630.2, 630.0, and 629.9 at the north end of Nottleman's Island as completed. Trail dike 629.9-A is shown as a dashed line for the most part which would indicate it was only partially completed. This map shows the high part of Nottleman's Island as a substantial island across from Rock Bluff. The 1935 Project and Index Maps (Ex. P-411) show the top dikes in and 629.9-A as completed. However, that map together with the ones for 1936 (Ex. P-1699) and 1937 (Ex. P-412) still show a considerable amount of water going around the east side of Nottleman's Island, although the structures are in and the river is apparently in the de-

signed channel. The 1937 map (Ex. P-412) calls the island "NODDLEMAN ISLAND" and it is so identified on the 1938 (Ex. P-413), 1939 (Ex. P-414), 1940 (Ex. P-415) and 1941 (Ex. P-416) Project and Index Maps.

Study of Trees On Nottleman's Island

The study of certain trees presently on Nottleman Island also supports the premise that the island built up on the Nebraska side of the main channel of the Missouri River, as contended by the Plaintiff, and thereafter did not wash away when the main channel was transferred to the west. Mr. Harry Weekly, age 69, of Lincoln, Nebraska, testified as Plaintiff's expert on the study of tree rings on tree samples taken from both Nottleman's Island and the Schemmel Island area. Mr. Weekly holds a baccalaureate degree in Agronomy received in 1922 and a Master's Degree in Soil Physics granted in 1925, both from the University of Nebraska. He was formerly employed by the U. S. Department of Agriculture, Agricultural Research Administration, as a soil scientist. He worked 23 years on the Experiment Station at North Platte, Nebraska, and 11 years on the Belle Fourche or Newell Field Station in South Dakota and has been at the Lincoln Scientific College of Agriculture since January of 1957 as an Associate Professor. In North Platte, he had charge of the climatic records.

He became interested in the study of tree rings and aging of trees in about 1927, 1928 or 1929. He was deeply interested in climatic conditions and read some articles published by Dr. A. E. Douglas of Arizona in which Douglas discussed the tree as a recorder of climatic con-

ditions, and Weekly became interested in the study of tree rings as recorders of climatic conditions. Mr. Weekly is a dendrochronologist, which is a word Dr. Douglas coined from the Greek word *dendros* meaning trees and *chronos* meaning time. The witness read everything he could on the subject and wrote to the National Library and got everything they had and wrote to other people who had published on the matter such as Ellsworth Huntington of Yale; very large correspondence with Dr. A. E. Douglas, William Schulman, and a number of other people from Arizona. These men were considered experts in the field and Douglas can be considered to be the father of the science, starting his work in 1904.

The witness had been constantly concerned with the study of tree rings since approximately 1929 and in those first days around 1930 there was a Tree Ring Association which published a bulletin that came out once a month which published all of Douglas' work, and the witness published in it a time or two and published seven or eight additional papers. He had been constantly concerned with the study of tree rings since approximately 1929 and had worked with a number of other institutions, particularly in the field of archeology and climatology. Mr. Weekly worked for the Smithsonian Institution "off and on" starting in 1945 and he still works for them once in a while. The nature of this work has been dating of archeological sites in the upper Missouri and through the Dakotas where they have been salvaging archeological material ahead of the inundation from the upstream dams. He testified that the study of tree rings is more than simply just counting them because by charting trees

and different ages and overlapping them, you can build a chronology back as far as you can get material that overlaps grown under more or less similar conditions. The witness has a dated chronology for western Nebraska that goes back to the year 1210. The archeologists save all the charcoal wood they can find in their excavations and then they chart it, match up where possible the charts, and they can tell, for instance, in an earth-lodge house, from the pieces that come out of it, when it was built and when the trees were cut and when it was put together. They can compare rings in a wooden house with trees that were standing and compare the dates.

The witness has worked for the Nebraska Historical Society from about 1957, 1958 and 1959, dating archeological specimens from archeological sites. He has also worked for the Department of Anthropology of the University, dated a lot of material for a doctoral thesis, and the Army Engineers made use of a lot of the data which he had accumulated and they worked it through a computer and made a climatic study of it. They were interested in wet and dry years and the wet year usually makes a wide ring and the poor years produce narrow rings. In western Nebraska the witness counted over 3,000 specimens and matched them on one project, and then the Smithsonian brought him material from Wyoming and North Dakota and South Dakota and he never kept track of the number of pieces, but from one site they brought him over 1100 pieces of wood and fragments of charcoal, so he testified he had studied a "pretty extensive bunch of stuff".

The witness had eight articles published which dealt with the counting of tree rings in the Journal of Forestry, Tree Ring Bulletin, The Journal of Soil and Water Conservation, and the 1962 Annual Report of the American Association of Agricultural Engineers, and then he had articles published in quite a few newspapers but he wasn't sure of the number. When he first became interested in the study of dendrochronology, he was the first one in this area, as far as he was able to find out, involved in that kind of study. He said it is very tedious, time consuming work, and a little hard on the eyes and many people have given up the study as a bad job. He testified how he likes to have the full cross section of the tree because the tree doesn't grow exactly at the same rate all the way around. The tree may be eccentric one way or another or something may have happened such as lightning striking it and injuring it so that no growth takes place for a time. Usually if he has a full section, he likes to count a number of radii such as three or four. He discussed how a tree growing under a stressful or dry condition may start out a ring and make a false ring and then the moisture might increase and you might get a couple of rings in a tree in that type of condition and that is particularly true of the soft wood evergreens. As a rule, it is not too difficult to identify these false rings. Lightning or other climatic conditions may affect the rings but "if you know something concerning the growth of the tree and its cell structure and things, you can usually tell with a degree of certainty what has taken place."

On May 13, 1965, the witness took tree samples and

plugs from trees on Nottleman's Island. Tree No. 259 was a plug taken from a tree which reached the center and gave a complete series of rings for that place on the tree. The witness took this plug home with him and put in about ten hours studying the tree rings and he counted 65 rings. It was his opinion that the tree started to grow in the year 1900. Mr. Willis Brown, who was present with the witness when the tree samples were taken, located tree number 259 on the overlay of the 1926 Corps map (Ex. P-726) and tree No. 259 can be seen to be to the west or Nebraska side of the 1890 Channel line. When it is considered that Seth Dean found no islands in the Missouri River which were considered a part of Mills County in his survey of 1895 and the river from the testimony and maps continued to cut to the east, this tree commenced to grow in Nebraska and the land upon which it was growing never thereafter washed away. A photograph of tree No. 259 is in evidence (Ex. P-431).

The witness also testified that tree No. 1234 commenced to grow about 1919. Ex. P-430 was a picture of tree No. 1234 and the witness testified they cut two sides off it to get rid of some of the excess weight. The witness testified that tree No. 1106 commenced to grow about 1913 with the possibility of a year or two discrepancy. This was a plug taken from a cottonwood about three feet off the ground and Ex. P-429 is a picture of that tree with the plug removed.

On cross-examination, the witness testified that the tree ring laboratory at the University of Arizona is the only department which he knew of where this type of

work of dendrochronology is taught. He also testified that considerable lumbering had gone on at Nottleman Island and the stumps are still there in lots of places. There were very few of those stumps under a foot in diameter and some were perhaps two feet or there might be some larger, but he didn't look for them particularly. He looked at some of them and even sawed a section off one or two on the Schemmel land, but the rings were in such condition it would be hard to be at all certain about them, but they were at least 30 to 35 years old. He was certain that some of them were older, ". . . but I wouldn't stick my neck out and guess on the number of actual rings because a stump, the tree is dead and it has been there and it has rotted and they are so full of cavities." He said you couldn't scientifically tell its age with any degree of certainty. In response to another question from the Court, he indicated experience may let him make a pretty good estimate of the age of the stumps but it would have to be based on some rings you can't count because you are not sure what they are. He tried charting them but with no particular luck. He got indications ". . . but I didn't get any accurate measurements. I wouldn't attempt to state."

Aerial Photographs of Nottleman Island

The earliest aerial photographs available show Nottleman Island as having existed from at least 1926. The 1926 Corps of Engineer aerial photographs show considerable vegetation on the high center part of the island with a great deal of bar land all around that high portion (Ex. P-433 through P-438). The 1928 Corps of Engineer Maps refer to aerial photographs and there was reference

at the trial by counsel for Iowa to the fact that they had been unable to find such photographs and counsel for Nebraska agreed that they could not be found.

The 1930 Corps of Engineer aerial photographs again show the high portion of the island and they show clearing on that high portion (Ex. P-439 and P-441). Exhibit P-440 is an enlargement of a portion of the Corps aerial photograph dated September 17, 1930 and the witness, Willis Brown, testified there were three areas on that photograph which had been cleared near the center of the island. This clearing did not appear on the 1926 aerial photographs so the clearing took place sometime between 1926 and 1930. The 1930 photographs also show the island referred to as Tobacco Island to the north of Nottleman Island, and there is quite a bit of clearing and vegetation on Tobacco Island with channels of the Missouri River on both sides (Ex. P-2621).

The 1936 aerial photographs taken by the Corps of Engineers (Ex. P-1736 through P-1740), the 1937 Corps photographs (Ex. P-1731 through P-1735) and the 1938 Agricultural aerial photographs obtained from The National Archives (Ex. P-444, P-445 and P-446) all show the island as having remained in existence during the Corps of Engineer work and they show some sand bars in the designed channel on the west side.

Mr. Brown also identified two sets of buildings on the 1938 aerial photographs (Ex. P-446) and marked these buildings on the island area. One set appears to the north of the division line fence and the other set appears south of the division line of the island. Mr. Brown testified that

the Corps revetment follows along the bank, the dikes push out against the river, and the trail dikes extend down along the river, and he marked the dike lines in red on the 1938 aerial photographs (Ex. P-444, P-445 and P-446). In spite of the structures on the north end of Nottleman Island, there is still considerable water flowing around the east side of the island in 1938 and there are still some bars in the river on the west side (Ex. P-448).

In the 1939 Corps aerial photograph (Ex. P-1729), there still is water around the east side but it has become heavily choked with sand bars. However, there still appear to be sandbars on the west side. The cleared areas and the line fence are still visible.

On the aerial photograph from The National Archives dated 8/13/41 (Ex. P-448), Mr. Brown circled tree number 1106 which is almost directly east of Queen Hill in an area of trees and is south of the dividing line fence. Mr. Weekly testified that tree number 1106 commenced to grow in about the year 1913. Mr. Brown also circled tree number 259 which is to the north of the dividing line fence on Nottleman Island, and Mr. Weekly testified it commenced to grow in the year 1900. A great deal of the high bar land on Nottleman Island is shown as having been cleared at this time. There still is water going around both sides of the island but the dikes are in at the north end of Nottleman Island on the east side, and the main channel is clearly around the right bank side in 1941. This is also visible on Exhibit P-447 which is another Agricultural aerial photograph dated 8/13/41. This shows the lower one-half of Nottleman Island and Mr. Brown

has marked the dike lines by King Hill in red. A large area of the island is shown as cleared. Exhibit P-1728, the Corps of Engineer aerial photograph dated 11/12/41 of Nottleman Island, shows some cleared area immediately above the line fence and shows the large island with a considerable amount of vegetation and cleared land upon it. At this time, the designed channel is quite prominent.

An aerial photograph of the area was taken by the Corps of Engineers on April 14, 1952 during the 1952 flood (Ex. P-1741). This photograph shows a lot of water around the entire area, but there is still quite a bit of Nottleman Island which is above water. The water is spread out over the lowlands toward the east and a great deal of Tobacco Island to the north is covered by water, but the high portion and area of cleared ground on Nottleman Island still is prominent.

The Agricultural photograph of 8/17/59 of Nottleman Island shows a great deal of the land cleared and the building site in the middle of the island. It does not show any water running in the former channel on the east side, although there are low areas which appear to have some standing water in them (Ex. P-450). Another agricultural photo dated 8/17/59 shows the south half of the island with a great deal of cleared and cultivated land (Ex. P-449).

All of these aerial photographs show the island as having been in existence prior to the work by the Corps of Engineers in closing off the channel on the east side of the island and they showed cleared areas continuously from 1930.

Ownership and Possession of The Land On Nottleman's Island

Mrs. Ruth Dooley, age 52, testified that her maiden name was Shipley, and she first stayed on Nottleman Island in 1929 when she lived there the whole summer with her uncle, Harvey Shipley, and her grandparents, John Shipley and Nellie Shipley. When she first went over on Nottleman's Island they were living on the north half of the island and had a two-room house and barn. There was a fence running east and west which fenced the island in two. She was thirteen at the time and she went over in the spring as soon as school was out and stayed all during her summer vacation. The water between the Nebraska shore and the island was so you could have waded across to the island. She went from Queen Hill on the Nebraska side east over to the island. Her uncle, Ernest Shipley, and Aunt Charlotte lived on the south end of the island that year. She then testified that she was on the island off and on several times before she was married in 1934.

Right after they were married, she and her husband went down to the island and stayed that winter of 1934 with Harvey Shipley. Then they moved off in March of 1935 and moved back on in 1936 in the spring. They lived with her Uncle Harvey on the north half of Nottleman Island in 1936 and, during that period, Ernest Shipley continued to live on the island with his family. During 1936 they farmed the island, and her husband raised corn and alfalfa on the north half. Ernest Shipley lived on the east and north half of the island in 1936. However, in 1929, Ernest lived on the south half.

When they lived on the island in 1936, Ernest and Charlotte Shipley had two children whose names were Georgie and Erma Jean. Those two children went to school at Rock Bluff, Nebraska in 1936 and their mother took them by boat. At that time, there was a lot more water on the west half of Nottleman Island than there was back in 1929 when she first went on the island. It was still such that Mrs. Shipley could row a boat across. In 1936 Cleo "Toad" Baker and his wife, Thelma, lived on the island with their child, Donnie Paul. They lived on the south half and Mr. Baker was farming for Nottleman.

The Dooleys moved off the island the last part of 1937, and Ernie Shipley moved off the island after the Dooleys did but she didn't know just exactly when. Harvey Shipley still lived on the island up into the 1940's sometime. Mrs. Shipley identified the names of George and Erma Jean Shipley, her cousins, whose names appear in the census report to the County Superintendent, Cass County, Nebraska, dated June 4, 1937, showing them as included in the school census for that year (Ex. P-528). George Shipley was also included within the school census for 1936 (Ex. P-527) and George Shipley was shown as enrolled in the Teachers List of All Pupils Enrolled on the Third Day of School, Compulsory Educational Report of Public, Private, Denominational and Parochial Schools for District No. 5 dated 9-5-35. The school was right there at Rock Bluff.

They had two wells on the island where they got their water. There were three houses on the island. Ernest Shipley built one of the houses and Harvey built one, but

she did not know who built the other. Ernest Shipley's house on the east side of the north half of the island burned down at one time. It was not rebuilt. John Nottleman owned the south half, but he did not live on the island. There was farming on the south half and the north half. One child was born on the island to Ernest and Charlotte Shipley in the fall. That birth occurred in Ernest Shipley's house on the east side of the north half. A birth certificate from the State of Nebraska, Department of Health, shows the birth of Elaine Joyce Shipley on December 3, 1936, and the witness recalled that name and the birth and the witness lived on the island when that girl was born (Ex. P-526).

During the time the witness lived on the island, she stated that she considered herself a citizen of Nebraska and the other people on the island considered they were residents of Nebraska. That was common knowledge in the Rock Bluff area that these people were considered Nebraska citizens, and the witness said that was the reason they had to take their children to Rock Bluff school.

Upon cross-examination, the witness stated that her uncle went over to Iowa to see about sending his children over there and was told there was no school over there and they would have to take their children to the Rock Bluff school. The witness said the school officials wouldn't let them go to school over in Iowa. She didn't know if there was a school house or not.

She also testified that she saw an automobile over on the island. It was a coupe that had the back end cut off and a box built on so they could haul fencing material

in it. She didn't recall the year, but they had it over there when she went over and stayed when she was a kid. She reiterated that in 1929 you could wade across from the Nebraska shore and the water wasn't very wide then. It would have been a fourth of a mile. The witness also had been over on the east side of the island and fished in there. At that time she said there were no chutes down through the island but the main river ran down the east side of it. The east side had the most water. They ran boats up it. The current was on the east side and that is where the flow was. There was no current in the chute on the west side at all. When the water was high, then the water went through there. The Shipleys did not have to pay any extra fees or tuition to enable their children to go to the Rock Bluff school.

Edwin M. Dooley, age 62, was a foreman in heating and air conditioning at SAC Headquarters at Offutt Air Force Base, is the husband of Ruth Dooley and testified they were married in 1934. In that year, he worked on the river for a contractor on a pile driver and drove piling in the vicinity of Nottleman's Island. He did some work at the north end of Nottleman's Island in 1934 driving piling. He worked for A. W. Forney and testified that, before the work, the tow boats went up the east side or the Iowa side. When he was first in the Nottleman Island vicinity the main part of the water was runnig on the east side because the tow boats towing material would go up the east side. He stayed on the island the winter of 1934-35 with his wife's uncle, Harvey Shipley, who was living on the island and farming part of it. He estimated that Harvey was farming 50 or 60 acres in corn or alfalfa

and he had a horse or two and some cattle and maybe a few hogs and farm implements. There was a dividing line fence separating the north and south half in 1934, and he estimated the fence was 300 yards south of where the house was. There was a grove around the house and a garden. Ernest Shipley lived and farmed on the island, also.

They moved to Plattsmouth in the spring of 1935 and moved back to the island in the spring of 1936, again living with Harvey and farming for him that summer. Cleo Baker and Thelma Baker and Ernest Shipley and the Baker child, Donnie Paul, also lived on the island in 1936. While living on the island, he remembers there was a child born to the Ernest Shipleys. It was fall because he was hunting ducks and Ernest asked him to go get the doctor. He got Dr. Tyson from Murray, but when they got back to the island, Mrs. Shipley already had had the baby and everything was fine. Thelma Baker attended her. In 1936 he filed a personal property tax schedule in the State of Nebraska (Ex. P-540). Other Nebraska personal property tax schedules were offered for Ernest Shipley, Harvey Shipley, and Cleo Baker while they lived on the island (Ex. P-539, P-540, P-541, P-542, P-543, P-544, P-545, P-546).

In 1936, the witness farmed approximately 50 acres to corn and alfalfa. John Nottleman had several head of cattle on the south end during the time Toad Baker was living on the island, and the witness saw some officials come over and test the John Nottleman cattle for T. B. in July or August of 1936. He thought they were Nebraska officials, but, on cross-examination, indicated he was not

sure and they might have been working for the federal government.

In 1942, he again farmed approximately 50 acres on the island on the north half and at that time they lived at Rock Bluff. He rented it on shares with Harvey Shipley, using Harvey's equipment. In 1942, Harvey Shipley had a John Deere tractor, a two-row lister, plow and disc on the island and he had some cows and a horse there.

During the 1930's when he lived on the island, the witness considered himself to be in the State of Nebraska and a Nebraska citizen, which was the belief generally held by the inhabitants of Nottleman's Island and was fairly common knowledge in the whole Rock Bluff and Plattsmouth vicinity.

In 1942, the witness testified, the main channel had come to the Nebraska side. It moved to the Nebraska side in 1934 and 1935 when they drove piling at the head end of Nottleman Island to throw it to the Nebraska side. The witness further testified that the whole Ernest Shipley family lived on Nottleman's Island from 1934 to 1936. A certificate of death from the State of Nebraska Department of Health showing the death of Elenor C. Shipley from whooping cough on December 15, 1935, was offered (Ex. P-525). The father's name was shown as Ernest Shipley and the maiden name of the mother was Charlotte Ross Smith. On cross-examination, the witness testified he helped Harvey Shipley move off the island in 1943 when the island flooded and he helped Harvey get his cattle and things off. The dikes he worked on in 1934 came out from

the island toward the Nebraska side. He testified the main river was in that east chute then. They drove dikes right across the upper end of the island to shut off the Iowa side in late 1934 or in 1935.

The area presently considered as Nottleman's Island was specifically surveyed of record in a survey by R. D. Fitch, Jr., County Surveyor of Cass County, Nebraska, of August 18-25, 1933. This survey is found in the County Surveyor's office (Ex. P-2345) and shows the Island with the designation of John Nottleman on the South half with 162.1 acres of what is called high bar, and approximately 218 acres of low bar. On the North half of the Island the ownership is shown as in Harvey Shipley with 162.1 acres of high bar and approximately 414 acres of low bar. The Shipley home is shown on the north half and there is a building site location shown on the south half. Also on the south or Nottleman half there is an area labeled "Potato Patch". Willows are shown on the Island and the Missouri River is shown as being on both sides. This Fitch Map is also recorded in Plat Book 2, Page 19 in the Office of the Register of Deeds of Cass County, Nebraska, with some slight changes. Certain lot numbers are designated and some of the acreages are changed slightly and on the northwest corner an area is now shown under the designation Wm. Watts, et al with reference to "W. D. (Warranty Deed) Book 73, Page 66 44.0+." Then there is a block showing specific references to the Island by lot number, section, township, range and acreage and there is also a notation of a "line dividing High Bar into two equal parts".

On December 23, 1939, a quit claim deed was filed in

the office of the Register of Deeds of Cass County, Nebraska from Herbert Church and wife to Harvey Shipley, single, covering the north half of the tract known as Nottleman's Island which was surveyed by R. D. Fitch, Jr. during the month of August, 1933. The deed also contains the statement:

> ". . . this deed is to supplement a conveyance of the same real estate made by Herbert Church, single, to Harvey Shipley in November, 1928 before Perry Graves, Justice of Peace of Cass County, and witnessed by Walter Furlong, which conveyance was in writing and p r o p e r l y signed, witnessed and acknowledged but never filed for record." (Exhibit P-458).

On April 10, 1937 a quit claim deed was filed with the Register of Deeds of Cass County conveying the northeast portion of the Island to William Watts and Mason Watts (Ex. P-460). On December 4, 1939 a Warranty Deed was filed with the Register of Deeds of Cass County, Nebraska from Harvey Shipley to Katherine Julia O'Brien conveying a 400 acre tract in the northwest portion of Nottleman's Island (Exhibit P-459).

On April 4, 1940, an action to quiet title to the north half of Nottleman's Island was filed in the District Court of Cass County, Nebraska, captioned *Harvey Shipley, William Watts, Mason Watts, and Katherine Julia O'Brien, plaintiffs v. Frank G. Hull et al.* This action included as defendants all persons having or claiming any interest in the real estate described. Also included as a defendant was Walter Gochenour who appeared as a riparian owner and as owner of a portion of Tobacco Island as it appeared on some of the earlier maps. The

Petition alleged that plaintiffs were the owners of the north half of Nottleman Island which had been surveyed by R. D. Fitch, Jr. in August of 1933 and:

> "That in November, 1928, Herbert Church and his grantors had been in actual, uninterrupted, continuous, notorious, peaceable, adverse and exclusive possession for more than ten years. That in November of 1928, Herbert Church, single, sold said tract of land to Harvey Shipley, single. That Harvey Shipley and his subsequent grantees had been in actual, uninterrupted, continuous, notorious, peaceable, adverse, and exclusive possession of said tract of land and every part of it since November, 1928 to the present time and for more than ten years next preceding the bringing of this action." (Ex. P-462)

The Petition then referred to the deed from Harvey Shipley to William and Mason Watts in April of 1937 and from Harvey Shipley to Katherine Julia O'Brien on the 4th of December, 1939 and alleged that the remaining land was still owned by Harvey Shipley. It alleged that the defendants, including Walter Gochenour, claimed some interest,

> "by reason of direct ownership or by reason of the ownership of the land in Nebraska on the West side of the Missouri river; but the land described in Paragraph One of this Petition has been in the actual, uninterrupted, continuous, notorious, peaceable, adverse and exclusive possession of Harvey Shipley and his immediate Grantees, Katherine Julia O'Brien and William Watts and Mason Watts for more than ten years next preceding the bringing of this action."

The plaintiffs prayed that title to the real estate be quieted in them in fee simple. Publication is shown in the *Elmwood Leader-Echo,* a legal newspaper in Nebraska,

commencing with the issue dated July 11, 1940 and ending with the issue dated August 1, 1940. A decree was entered on August 1, 1940 quieting title against certain of the defendants and finding that in November, 1928, Herbert Church and his grantors had been in actual possession for at least two years; that in November of 1928 Herbert Church sold said tract of land to Harvey Shipley and that Harvey Shipley and his subsequent grantees have been in actual possession since November, 1928, to the time of the action and for more than ten years preceding the bringing of the action (Ex. P-462 and Ex. "J" attached to Complaint).

Walter Gochenour appeared and contested the case and the court file showed a separate answer by him in which he alleged that he was riparian owner and,

> "That that portion of the lands described in plaintiff's petition which lies east of said lots were accretions attached to said lands, and were so attached to said lands as accretions until the government engineers changed the channel in the Missouri river so that the channel cut off a large portion of said accretion; but nevertheless the accretions were the property of this defendant, and this defendant has claimed the title to said property and said accretions for more than ten years last past. That this defendant is the owner of the reparian (sic) portion of said lands by right of purchase for more than ten years last passed."

He further alleged that he was owner in fee simple of other lots and that the accretions set out in plaintiff's petition lying east of these lots ". . . were attached to said lots 11 and 12 until Federal Government Army Engineers changed the channel of the Missouri River and cut off a portion of said accretion; . . ."

This answer was filed August 26, 1940, and the plaintiffs, in their Reply filed May, 1941:

> "admit that before the United States Government changed the Missouri river the land set out in the Petition was separated from the lands described in the Answer of Walter Gochenour and the lands of other defendants by a shallow and small channel of the Missouri River, and that the main channel of the Missouri River was on the East side of the land set out in plaintiff's Petition. . ."

and denied the other allegations. On June 19, 1941, the Cass County District Court entered a Decree quieting title in the plaintiffs against those other defendants not included in the first decree (Ex. P-462 and Ex. "K" attached to Complaint). The Court found that the plaintiffs had been in actual, uninterrupted, continuous, notorious, peaceable, adverse and exclusive possession of the land for more than ten years and all right, title and interest of the defendants should be barred. The index plat shows this area as being the north half of Nottleman's Island and the lots are identified by Nebraska descriptions so the area that Walter Gochenour owned on the mainland can be identified as a part of Tobacco or Gochenour Island. The Cass County real property tax records show Walter Gochenour as owning land extending across the old Tobacco Island area during the 1930's and James S. Gochenour as owner in 1940 to 1943 (Ex. P-548-1, P-550-3, P-552-2, P-554-2, P-556-4, P-558-4).

The south half of Nottleman's Island was included within the property in the Estate of John H. Nottleman, deceased, in the County Court of Cass County, Nebraska (Ex. P-464). The County Court records show that John

Nottleman died on March 31, 1940 and the following real estate is described in the inventory as being property of the estate:

> "South end of the Island located in sections 9, 10, 15 and 16 in Twp. 11, N. Rge. 14, east of the 6th P. M. in Cass County, Nebraska, as surveyed in August, 1933, by R. D. Fitch, Jr., and filed in the Office of the Register of Deeds of Cass County, Nebraska, on January 3, 1935, and recorded in Plat Book 2, page 19, together with the accretions thereto and known as the south half of Nottleman's Island."

Also included in the personal property was considerable farm machinery and one ferry boat. There is an application by the administrator to sell the old machinery and two old tractors on the Island to D. M. Babbitt for the price of $20.00 and there is in the Administrator's Report the entries, "D. M. Babbitt, rent of Island," showing $50.00, and, "Jones & Babbitt, Sale of Island and personal property thereon" in the amount of $1300.00. One of the appraisers of the estate was W. Rex Young, who was called as a witness for the defendant but had no recollection of having served as an appraiser.

The administrator then filed a Petition in the District Court of Cass County, Nebraska, for a license to sell the real estate, alleging that the deceased died "seized and possessed" of the land on Nottleman's Island and praying for authority to sell it (Ex. P-463). The District Court entered an Order to Show Cause ordering that all persons interested in the Estate of John Nottleman appear to show cause, if any, why license should not be granted to sell the real estate and there was publication for three consecutive weeks in the Plattsmouth

Journal commencing with November 25, 1940, and ending with the issue of December 12, 1940. There is also a Notice of Sale published for three consecutive weeks beginning with January 13, 1941, and ending January 30, 1941, and there is a report of sale indicating the land was sold to J. L. Jones and D. M. Babbitt for the sum of $1300.00, they being the highest bidders. The sale was confirmed and the executor was ordered to deliver a deed to the purchaser. An administrator's deed from J. H. Seiver to J. L. Jones and D. M. Babbitt was filed February 13, 1941, in the Office of the Register of Deeds of Cass County, Nebraska, conveying the south half of Nottleman's Island (Ex. P-469). Then on February 13, 1941, D. M. Babbitt and wife filed a mortgage to J. L. Jones with the Register of Deeds of Cass County (Ex. P-465). This described the premises as situated in Cass County and the index map shows the area to be the south half of Nottleman's Island.

CONSEQUENTLY, AT THE TIME OF THE IOWA-NEBRASKA BOUNDARY COMPACT, TITLE TO NOTTLEMAN'S ISLAND WAS IN HARVEY SHIPLEY, D. M. BABBITT AND J. L. JONES, WILLIAM AND MASON WATTS AND KATHERINE JULIA O'BRIEN AND EACH OF THESE TITLES WAS GOOD IN NEBRASKA. IN ADDITION, THERE WAS A MORTGAGE ON THE BABBITT LAND TO J. L. JONES AND THIS MORTGAGE WAS GOOD IN NEBRASKA.

On January 3, 1945, a County Treasurer's Tax Deed from Ruth Patton, County Treasurer of Cass County, Nebraska, was filed of record with the Register of Deeds

of Cass County conveying the O'Brien property to Margaret T. O'Brien (Ex. P-468). This deed states that at a public sale of real estate for the non-payment of taxes made in Cass County on the 21st day of November, 1942, Lot 1, Section 3; Lot 18, Section 4; Lot 13, Section 9 and Lot 1, Section 10, all in Twp. 11, Range 14, on Nottleman's Island, were sold to Margaret T. O'Brien for the delinquent taxes of the years 1940 and 1941 and ". . . the same not having been redeemed from such sale and it appearing that the holder of the certificate of purchase of said real estate has complied with the laws of the State of Nebraska, necessary to entitle Margaret T. O'Brien to a deed of said real estate; . . ." it was conveyed to her by the County Treasurer ". . . in consideration of the premises and by virtue of the statutes of the State of Nebraska in such cases made and provided . . ." This is the northwestern part of Nottleman's Island and Plaintiff contends comes within the provisions of Section 4 of the Compact which authorized taxes for the current year to be levied and collected and provided that the County Treasurers of the counties affected should act as agents in carrying out the provision of the section. The deed was issued within the five year period mentioned in section 4 of the Compact for enforcing such liens or rights.

Following the Compact, these same owners continued in the peaceful use and enjoyment of their land without interference from the Iowa Conservation Commission or the State of Iowa. Harvey Shipley conveyed a piece of land in the middle of the Island to George T. Troop and Mary Troop in 1945 (Ex. P-467). This land was

then conveyed by the Troops to Lee A. Sargent in December of 1953 (Ex. P-1083).

A Warranty Deed from Katherine Julia O'Brien to Margaret T. O Brien dated February 25, 1947, was filed with the County Recorder of Mills County, Iowa, on March 24, 1947, conveying the northwest part of the Island (Ex. P-1669).

The Babbitt mortgage to J. L. Jones was satisfied in 1949 when a quit claim deed from J. L. and Pearl Jones to D. M. Babbitt was filed with the Mills County Recorder on April 1, 1949, conveying the south half of Nottleman's Island (Ex. P-466). Then in 1956 a Conveyance and Agreement was filed between R. C. and Laura C. Good and Darwin Merrit (sic) Babbitt and Frances Babbitt which constituted a boundary line agreement between the Babbitts and the Goods who owned the land on the Iowa mainland. The Goods also quit-claimed to the Babbitts any interest or right which they might have had in land on what was known as Nottleman's Island or accretions thereto (Ex. P-1073).

Although the State of Iowa claimed in its Answers to Interrogatories in the case of *Iowa v. Babbit* that the State was in possession of the land, the documentary evidence as well as the testimony clearly shows that the individual title claimants at all times occupied exclusive control over the land and this occupancy was open and notorious. Mr. D. M. "Sandy" Babbitt, who is 67 years old and was a long-time resident of Plattsmouth, Nebraska, testified that he was the same party who was defendant in the case in Mills County which Iowa filed

in 1963. His land is the south one-half of the original Nottleman's Island. He first leased the land from the administrator of the John Nottleman estate in 1940. The Nottleman Estate proceedings were in the County Court of Cass County, Nebraska. In 1940 or 1941 he learned that the land was to be sold by reading a newspaper publication in the Plattsmouth Journal and he bid and was successful at a price of $1,300.00 in 1941. His partner in the purchase of the land was J. L. Jones and they obtained a deed from the administrator of the John Nottleman Estate (Ex. P-469). Jones furnished the money and Babbitt did the work. In 1940 and 1941, there was lots of water on both sides of Nottleman's Island. They reached the island by barge. In 1940 the land consisted of cottonwoods, willows, grape vines and bullrushes and out in the center was an area that had been cleared of about 60 acres. It had grown up to willows again having not been farmed for two or three years. They started clearing in 1941 and the witness testified it was "tough going". Later, they got better equipment and between 1941 and 1960 cleared about 480 acres. Most of it was done by Babbitt and his boys Naasson and Wynne.

When Babbitt acquired the south half of the island, Harvey Shipley lived on and farmed about sixty acres on the north part. The witness testified that Harvey Shipley sold out to George Troop and Mary Troop, and north of that the O'Briens and Bill and Mason Watts owned some land on the island. Babbitt started putting two-strand barb-wire fence around the south half and ran forty or fifty head of livestock. Then he and George

Troop went together on cattle and leased the O'Brien end of the island and fenced it and had 225 to 230 cattle there at one time in about 1946 or 1947. Babbitt built facilities, good lots and fences, loading chutes and sowed alfalfa and made hog pastures and raised quite a few hogs on the island starting in about 1950.

In 1956 he had 270 head of hogs on the land and in December of 1956, Mr. Babbitt held a public auction on his land and this sale was widely advertised in the *Omaha Sunday World Herald* of December 2, 1956 (Ex. P-1849), the *Plattsmouth, Nebraska, Semi-Weekly Journal* of Monday, December 3, 1956 (Ex. P-2237), and in *The Glenwood Opinion-Tribune* of Glenwood, Iowa, on Thursday, November 29, 1956 (Ex. P-2236). These advertisements list a considerable amount of livestock and equipment to be sold, such as 45 Minnesota Holstein Heifers, 3 Brown Swiss Heifers, 2 Guernsey Heifers, 2-year old Angus Bull, 275 cross-bred pigs, International M Tractor, fertilizer attachment, plows, rake, harrow, feed wagon, corn picker, etc. The ads explain how to get to "Babbitt Island".

In 1940-1941 Babbitt started paying real estate taxes to Cass County, Nebraska (Ex. P-556-1, P-556-2, P-556-3, P-558-1, P-558-2, and P-558-5). Babbitt testified that he paid the taxes and still owns the land and has it fenced, is in possession and has a lock on the gate. After the 1943 Boundary Compact, he testified that other owners contacted him and said they had been advised that the proper method to put the property on the Iowa tax rolls was to bring a suit against the county and have their Nebraska titles placed upon record in the State of Iowa

so he joined them and paid his share of the cost, and that case was entitled *Watts v. Strand* (Gillilland Deposition 1).

Before he could have his property removed from the tax rolls of Cass County, Nebraska, he testified he was told by the County Treasurer in the year 1946 or 1947 that he would have to show that he was paying taxes in Iowa. He finally had the land taken off the tax rolls in Nebraska in 1952. He further testified to taxes paid in the State of Iowa (Ex. P-614, Ex. P-607, P-613). He also paid drainage taxes in Iowa because he had 14.5 acres in the drainage district and the tax pays for maintenance and construction of the drainage district (Ex. P-608). His 1962, 1963, and 1964 Mills County, Iowa, real estate taxes were paid after they became delinquent and Babbitt had received a notice of redemption. He had to redeem his taxes in Mills County within 90 days or Iowa would issue a tax deed to his land. The notice of redemption is Ex. P-484 and his property is shown as advertised for sale by the Mills County Treasurer in the Glenwood newspaper dated November 28, 1963, under the heading "Delinquent Real Estate Tax List for Mills County, Iowa" (Ex. P-483).

At one time, Babbitt became dissatisfied with the amount of taxes he was paying and tried to have them reduced by going before the Board of Review in Iowa. This law suit was captioned *Babbitt v. L. E. Edwards, et al.*, in the District Court of Iowa for Mills County and the decree was filed November 30, 1961 (Ex. P-471). The allegation was made in the petition that the plain-

tiff was the owner of real estate in Mills County and the answer filed by the Mills County Attorney admitted that allegation.

Mr. Babbitt testified concerning the clearing of land on the island and how it was slow, hard, tedious work. On the western part, he had a saw mill in the 1940's and the larger trees were cut and 220,000 board feet of lumber were sawed out of there. The larger timber was on the west of the island.

In 1954 a photographer from the *Omaha World Herald* took photographs of trees and clearing on the Island and one photograph showed Wynn (Bill) Babbitt measuring across a tree and some of the other photographs showed the land being cleared (Ex. P-488 through P-496). These photographs appeared in the *Omaha Sunday World-Herald* of February 7, 1954, in a newspaper article with six pictures. It also showed Bill Babbitt measuring the trunk of a tree which measured 6 inches across. The article talks about a new frontier along the Missouri River bottom and stated that:

> "Mr. Babbitt owns 600 acres of the 'Island' . . . Last year he produced 75-bushels of corn on areas that had been cleared by more laborious methods."

The article also said:

> "Dozens of river bottom landowners, anxious to get rich bottom soil into production now that the flood threat is fading, have driven down to see the new clearing device in action. . . ."

The *Omaha Sunday World Herald* also carried an article on October 2, 1955, showing D. M. "Sandy" Babbitt holding soy beans in both hands and the article stated:

> "Mr. Babbitt has 50 acres of them on his Missouri River Island farm southeast of Plattsmouth." (Ex. P-1857)

This bean crop was on the south half of Nottleman's Island and he had about fifty acres in beans out of approximately 320 total acres under cultivation at that time. He was still clearing his land at that time. He kept no records of the cost to clear the land on Nottleman's Island, but stated:

> "I put every dollar I ever made in this farm to make a good farm of it. I made some money in the implement business, handling Holstein heifers, and every dollar went in there. I have no idea what the amount was." (Vol. I, p. 76)

This is what he had after what it took for living expenses.

Mr. Babbitt testified that in 1940 there was a property line fence between him and his neighbor to the north which was an agreed-upon fence line. This was kept in repair with each farmer maintaining one-half and since then Babbitt has built a new fence. Babbitt also put an Inland Steel bin on the island and mortgaged it to the Commodity Credit Corporation (Ex. P-486). He mortgaged the real estate upon which the bin was placed which was filed on November 21, 1959, with the Mills County Recorder. This mortgage was in the principal amount of $6,564 and covers his land on Nottleman's Island. He also obtained a storage loan and so, in his dealings with the United States Department of Agriculture, Agricultural Stabilization and Conservation Service and with the Commodity Credit Corporation, these governmental agencies raised no question as to his title.

Babbitts also had a cabin on their land and they have the usual farming equipment there presently, such as corn pickers, wagons, and tractors, and there is also a steel shed presently on the land. Photographs are in evidence showing these items (Ex. P-1850 and P-616 through P-621). He presently is leasing the farm to his son and he started leasing it in 1956 on crop share rent. During some years he has been flooded out and lost all of his crops, and the first thirty acres of corn he planted over there went down the river in 1941 or 1942. When Babbitt first came on the land there was about 60 acres that had been cleared and had been farmed in potatoes and alfalfa. He testified there was an old alfalfa stack out there about 25 x 60 feet long, but John Nottleman had passed away and for two or three years it had not been farmed.

Mr. Babbitt also had the property surveyed and the survey filed of record in Mills County, Iowa, in 1959 (Ex. P-1077), and he later filed an affidavit of possession pursuant to advice of his attorney in 1963 (Ex. P-1072).

The first notice which Mr. Babbitt received that Iowa might be claiming his land was when a friend called him from Council Bluffs and told him about an article in the *Council Bluffs Nonpareil* of February 19, 1961, entitled "MISSOURI RIVER COULD BECOME A 'PLAY-GROUND' ". A map was attached to this article showing thirty areas along the Missouri River which the State of Iowa claimed, including Nottleman's Island and Otoe Bend Island. The article mentioned that there were,

"twenty-five tailor made areas for recreational facilities which could be put to use advantageously with little cost and work. Between Missouri Valley and Sioux City, there still are many oxbows that will be cut off when the newly designed channel work is done. These are the areas that have a great present value and high potential for use as public recreation areas, the Commission pointed out. The Commission report added that the development would be expedited to a large degree if the State Boundary line is set as the center of the new channel. A lack of a definite division line between Iowa and Nebraska has caused considerable problems. Several of the oxbows being considered for development are east of the new channel and are made up of Iowa and Nebraska lands.

The twenty-five areas contain an estimated 15,567 acres of water, land, marsh and sand dunes. There are 11,807 acres in twenty-one areas on the Iowa side and 3,760 acres in the other four in Nebraska." (Ex. P-2608).

The very fact that Iowa announced they were claiming title made it impossible for Babbitt to borrow money on his land in order to finance his agricultural operations. By letter of October 20, 1961, the South Omaha Production Credit Association stated to Babbitt:

"I have discussed your recent request for additional credit with our executive committee and must advise that it has not been granted.

Although your present loan is of a reasonable size in comparison to your financial position, we cannot see our way clear to actually base the loan on the 640 acres of real estate. The State of Iowa apparently claims an interest in this land and in our opinion this clouds the title. If our attorneys were satisfied that you held an absolutely clear title we would have no problems meeting your needs. As it now

stands, we cannot do more than offer a loan which is based entirely upon chattel property." (Ex. P-475)

Mr. Babbitt spoke with John M. Creger, Assistant Attorney General of Iowa concerning their plans with regard to his land and received a letter dated November 22, 1961, which stated:

"Although it is impossible to give an absolutely definite answer to your questions at this time for a number of reasons, I think you may definitely assume for the present at least, that the State of Iowa, through the State Conservation Commission, does in fact claim title to so much of the above property as is physically located within the State of Iowa and intends to commence action to enforce its claim."

Babbitt also attempted to obtain a loan from Metropolitan Life Insurance Company and received a letter from the law firm of White, White & McMartin dated October 26, 1962, in which they explained that the Metropolitan Life Insurance Company had been unwilling to make a loan secured by Babbitt's Nottleman Island real estate. The letter quoted from Part I of the Missouri River Planning Report and mentioned that the State of Iowa through its State Conservation Commission was claiming title to the Island and said:

"It is my opinion that the Metropolitan Life Insurance Co. can not safely make you a loan upon this tract until the claim of the State of Iowa is disposed of in your favor."

Wynne M. "Bill" Babbitt, 39, is the son of D. M. Babbitt and testified he first went over on the island in about 1940 when he was about eleven years old. He tes-

tified he had been engaged in clearing the land since 1940 and described the work done in clearing the island. He identified photographs taken in 1954 by the Farm Editor of the *Omaha World Herald* (Ex. P-488, P-490 through P-496). He testified he was presently farming the land and had a crop there last year and was going to plant a crop in 1969. They had about 620 acres of crop land and last year they were in the soil program with 212 acres of corn and 170 acres of beans. He also testified about the equipment which had been used for clearing the island down through the years and some of its costs and that he was involved in clearing over 400 acres of land from 1944 through 1957. From this experience and his experience as a commercial land clearer, he testified the average cost of clearing the 400 acres was at least $100 an acre and this would not include the burning and reburning and discing afterwards. Aside from his own labor and machinery, they hired probably twenty or twenty-five people at one time or another cutting stumps, willows, and operating machinery. A photograph of the cabin which they moved on the island in the early 1950's was offered as Ex. P-1850. Bill Babbitt testified that, from 1941 when his father purchased the land until the present time, his father had full control over the property. If people trespassed they were informed about it and left. The land was posted with "No Trespassing" signs by Babbitt and by the Deputy Sheriff or Sheriff. The State of Iowa Conservation Commission or any agency of the State of Iowa never posted any signs around Nottleman Island designating it as Iowa State land.

George Troop of Murray, Nebraska, testified that he first became familiar with the Nottleman Island area in about 1944 when Mr. Babbitt owned land there, and in 1945 Mr. Troop bought land on the island from Mr. Harvey Shipley (Ex. P-467). They called it approximately 370 acres. At that time, some areas were used for pasture and approximately 70 acres were cleared and the rest was just timber and rushes. Troop brought in equipment and farmed there. During the time Troop had the property, he removed some stumps and a tree here and there from the cleared area. In 1953 he sold to Lee Sargent (Ex. P-1083). The Sargents paid $13,000 for the crop and land.

Mrs. Alva Mather, age 61, testified that she and her husband lived on the island in 1946 or 1947, but she was not sure exactly which year. At that time they called it Troop and Babbitt Island. They lived on the island in a trailer house and there was water running all around the island. There were a few old buildings on Babbitt's land and people had lived there. When they moved over on the island, there was some land cleared and Mr. Mather cleared some more. They farmed and then the flood water came and they lost most of it. They got their wheat off and saved 400 or 500 bushel of corn. At that time, the Mathers had two pet pigs on the island and Babbitt had cattle there. Several photographs were introduced into evidence which had been taken on the island by the Mathers when they lived there. These pictures showed corn cribs, tractors with which they were farming the land, a shed and corn crib, the government barge moving equipment down to the island, the trailer

house, her garden with a fence surrounding it to keep the cattle from coming in, the pigs, a grain elevator, two full corn cribs, a wagon and shed, and Babbitt and Troop with rabbits they had shot on the island (Ex. P-1763A through P-1763N).

Raymond P. "Red" Jones, born in 1893, testified that he had been a saw mill operator since 1921 and he bought logs from Sandy Babbitt during part of 1947 and 1948. This was done on what he always called Babbitt Island out from King Hill or Queen Hill. He was looking for logs somewhere around two feet. He was there approximately a year with a crew of four or five men. One of the men stayed on the Powles place and the rest stayed on the island which had some shacks on it. He paid Babbitt $1,100 for 220,000 board feet at $5.00 a thousand. He didn't take any trees that weren't about 18 inches in diameter and some of the trees were two feet in diameter. He also logged on the Sargent land about a year and took about 150,000 feet off the Sargent land and he was on the Bill Watts' land about 75 days and logged 46,000 board feet there. He logged less than 20,000 feet off the O'Brien land. While he was on the island, there was wheat and corn on the Babbitt and Sargent land and Bill Watts just had corn. There were some shacks on the island and he testified Sandy Babbitt had one right south of where the mill was set and that was pretty close to Troops and then Troop had a kind of three-room house which was the best building on the island. That was the one that the Sargents got. There was no farming on the O'Brien land, but O'Brien had put some wheat up there to have a place to hunt geese.

He testified that when he logged like that they cut down the trees and dragged them to the mill and left a stump. There were two fences on the island with one fence between Sandy Babbitt and the Sargents and a fence between the Sargents and Watts and O'Brien. Jones said he left some pretty big trees when he left and there were also some pretty good size willows, but they weren't nearly as big as the cottonwoods.

Merrill Sargent, age 42, from Pacific Junction, Iowa, testified that he was farming land on Nottleman's Island. He identified the Detsauer Farm as being at the intersection with the large "hand painting" on the garage door showing a roadway leading up through the timber and trees. Queen Hill and the elevator at Rock Bluff were across from Nottleman's Island. He testified his father acquired the land back in about 1953 from George Troop and he identified the deed (Ex. P-1083). The Sargents farm around 355 acres on Nottleman's Island and there is some land that hasn't been cleared yet. Babbitt is directly south of Sargents and O'Brien is to the northwest and Watts farm on the northeast. The Sargent land is in the center section of the island. There are fences or dividing lines between their property. The south fence is completely across the island and the north fence is around the O'Brien farm and the Watts portion isn't fenced.

In 1953 when Sargent's father acquired the land, he got the corn crop and the witness picked the corn crop in October of 1953. This was approximately 80 acres in irregular patterns and patches and the rest of the land was uncleared. Following 1953, he acquired an old bull-

dozer and started clearing the land and then he acquired a tree cutter and a Rome disc to follow up with and spent about three years clearing. He got crops from 1953 to 1956 while he was clearing. In the three-year period, he cleared about 300 acres, finishing in about 1957. They've had crops on the island every year since 1953 barring 1967 when everything was lost in a summer flood. In 1953, there were a couple of small, kind of run down, sheds on the land.

In 1957, the witness's father died and his estate was probated in Glenwood, Mills County, Iowa. The land was left to the witness and his brother who were co-executors of the estate. The estate included this land and a copy of the order approving the final report and discharging the executors with the receipt from the Iowa State Tax Commission for payment of inheritance taxes is in evidence (Ex. P-1696). An inheritance tax was paid to the State of Iowa and they had to acquire additional money so they executed a mortgage to the Travelers Insurance Company and borrowed $110,000 on the Nottleman Island land as well as other land (Ex. P-2610). They did everything that was required by the insurance company to bring their title "up to every legal aspect we had." Pursuant to advice of their attorney they also filed an Affidavit of Possession under the Iowa Marketable Title Act, Section 614.17 of the 1954 Code of Iowa on June 12, 1957, in the County Recorder's Office of Mills County, Iowa (Ex. P-2611).

Since the time the property was acquired from his father's estate, the witness and his brother have oc-

cupied the property and farmed it and have not leased it to anybody. They built a couple of steel grain bins between 1961 and 1962. During that time they had no contact with any members of the Iowa State Conservation Commission or officials of the State of Iowa concerning claims by the State of Iowa. The witness and his brother are defendants in the lawsuit in the District Court of Mills County, Iowa, entitled *State of Iowa v. Babbit, et al.* He first found out about the lawsuit by reading about it in the papers and sometime later a sheriff brought in a legal document. Nobody from the State of Iowa ever came around to ask what his claim was or went out on the island or marked it with signs. In his opinion, the land would bring $600 or $700 an acre for most of the 350 acres. Possibly 40 acres which hasn't been cleared would be worth $200 or $300 per acre.

Mrs. Margaret T. O'Brien testified that she is presently 60 years old and resides in Omaha. She was married to an attorney, Charles E. O'Brien, in 1935, and Mr. O'Brien had practiced law from 1934 until his death in 1960. She identified the deed from Harvey Shipley to Katherine Julia O'Brien which was filed in Cass County, Nebraska, on December 4, 1939 (Ex. P-459). This is the same Katherine Julia O'Brien who is the sister-in-law of the witness. She also identified a certified copy of a tax deed that conveyed the land from the County Treasurer of Cass County, Nebraska, to her (Ex. P-468). She testified her husband represented her and she wouldn't know the exact transaction but would assume that it was bought for her at a tax sale in Cass County, Nebraska. The exhibit is a county treasurer's tax deed

filed January 3, 1946, at 10:10 A. M. with Lucille Horn Gaines, Register of Deeds and is dated the 3rd day of January, 1945, and signed by Ruth Patton, County Treasurer of Cass County, Nebraska. The O'Briens claimed land on Nottleman's Island from shortly after the deed in 1939 from Harvey Shipley to her sister-in-law. This witness got title from the time of the tax deed.

She testified she was first on the land in 1939 and that her husband went there many times. At first it was what you would call primitive land, mostly used for hunting or recreation. Then as soon as some land was cleared, it became farm land. There were no buildings on the land when they first got it but they brought in a small building that would do for overnight if people were hunting, and set it up on a temporary foundation. This was probably about 1940 and her husband hunted there a good deal. She testified that 200 or so acres have been cleared at a cost of at least $10,000, according to her records. She thought the clearing was done by a corporation out of Des Moines, Iowa, which had heavy equipment. Some of it was done by a man named Don Blodgett who was from the area. The building that Mr. O'Brien brought on the land was taken by the flood of 1952. The river cut in and cut the corner of the land the building was on. The land is presently farmed and leased to Clay DeLashmett who lives at Pacific Junction. It had been leased since about 1950 or 1952. The income varied and two years ago there was a flood and there was no income, but the previous year it produced a good crop. The gross was something over $8,000 which was her share under the crop sharing arrangement.

Mrs. O'Brien was shown Exhibit P-1617 which is a copy of entries in the records of the Mills County, Iowa, Recorder's Office which has a notation on line 6 of a deed from Katherine Julia O'Brien to Margaret O'Brien with a notation "Returned 3-25-46". She believed this was the beginning of the effort to have this land placed on the tax rolls in Mills County, as they refused at first to accept the land. At that time the engineers had changed the channel and Plattsmouth was no longer in a position to accept the tax, and her husband made many trips back and forth arranging and bringing suit to get it put on the tax rolls in Mills County, Iowa. Mr. O'Brien sometimes had help from Mr. Gillilland and Mr. Drake on various things that came up. She also had filed an affidavit of possession in Iowa on the advice of her attorney, Mr. Smith, from Council Bluffs (Ex. P-1698).

Mrs. O'Brien first became aware that the State of Iowa might be claiming the land when she saw something about it in the paper. She didn't know it was the exact land at that time, and then shortly thereafter Mr. Babbitt stopped in and called her and came to visit about it. The first actual notice was the serving of the summons for suit. She is a defendant in that proceeding pending in Mills County, Iowa, entitled *State of Iowa v. Babbit, et al.* She never had any discussions or correspondence or contact with representatives of the Iowa Conservation Commission before they brought suit.

She testified that she has been paying her real estate taxes in Mills County, Iowa, and last year they amounted to $571.60 whereas back in 1960 they were only $350.00.

The income which she receives from the land is "pretty important" to her.

Albert Mason Watts, whose testimony has previously been referred to in connection with the formation of the island area, testified that he and his brother, William Watts, bought a part of this land on Nottleman's Island from Harvey Shipley and he thought Nottleman got the land from a man named Church. The deed was filed on April 10, 1937, with the Register of Deeds of Cass County, Nebraska (Ex. P-460). This is in the northeast part of Nottleman's Island. The land immediately to the west was owned by Charlie O'Brien and to the south the Sargent boys owned a strip and south of there Sandy Babbitt owned the rest. They bought only 100 acres to start with and at that time the land was all brush and timber. From 1937 to 1940 they had a dozer out there and cleaned the trees off and farmed it as best they could. They paid taxes on this land in Nebraska for eight or nine years and then he testified they sued the State of Iowa to get the land transferred and put on the Iowa tax books. They first had a quiet title action in Nebraska to clear their title and they had a regular court session over there in Plattsmouth. This was the quiet title case of *Shipley v. Hull, et al.* (Ex. P-462).

Charlie O'Brien came down there hunting and they got him to quiet title in Nebraska and make their title as good as he could for this piece of land. After that, they sued the State of Iowa to move their records over into Iowa to put the title in Iowa instead of Nebraska because they were then on the wrong side of the river.

They relied upon their attorney, Mr. O'Brien, in the case at Plattsmouth and then hired Mr. Whitney Gillilland as their attorney to help get it transferred over into the State of Iowa. This was the case of *Watts, et al. v. Strand, et al.* (Gillilland deposition, Exhibit 1). The case would have been in 1946 and the witness has been paying taxes in Iowa ever since.

Mr. Gillilland later told the witness that he had some kind of communication with the Attorney General of Iowa and the Attorney General had given him a letter of recognition that the Wattses were the legal, lawful owners of the land. They relied upon Mr. Gillilland's advice.

William Watts died about three or four years ago and the witness was the administrator of his estate. The pleadings from the estate of John William Watts were offered, including the Commission to Inheritance Tax Appraisers, a tax receipt from the State Tax Commission of Iowa with regard to the inheritance tax, and the Final Report and Order Approving Final Report (Ex. P-1750). Mason Watts and his brother had owned the land in joint tenancy and the brother's interest in the island was appraised by the Iowa State Inheritance Tax appraisers at $10,000 and an inheritance tax of $566.67 was paid to the State of Iowa on the entire estate.

The witness also testified that he was very active in the conservation field and at one time when they owned the land on the island, Bruce Stiles, head of the Conservation Department in Des Moines, was visiting them and the Wattses tried to get Stiles to take over the land.

They told him they would sell it to him for practically nothing or give it to him if Iowa would make a game preserve out of the island, and Stiles refused to take any part of it. Stiles didn't want anything to do with it.

There is a fence line between the Watts and O'Brien land. It was fenced as soon as they got it and they lost two or three fences in floods. The land has also been posted against trespassers. Of the 238 or 240 acres the witness owns on the island, only about 79 acres are cleared. They are farmed by his renter, Billy Barker, who has been renting it for two or three years. The Iowa State Conservation Commission has never placed any signs in that area or any fences to designate the boundaries of their claimed lands. The present crop is in corn and last year it yielded close to 100 bushels an acre. The year before that it was lost because of the flood. Last year the witness's share of the crop was a little better than $2,000.

The witness is also a defendant in the case in the District Court of Mills County, Iowa, brought by the State of Iowa to attempt to quiet title to the land on Nottleman's Island. No one from the Iowa State Conservation Commission talked to this witness before the suit was filed.

Exercise of Jurisdiction Over, and Taxation Of Nottleman Island By Nebraska

Nottleman Island was surveyed by the Cass County Surveyor as a separate island on August 18-25, 1933, and this survey was filed in the Office of Register of Deeds

of Cass County as well as in the Office of the County Surveyor (Ex. P-735 and P-2345). The tax records of Cass County for the years 1930, 1931, 1932 and 1933 appear on the same pages in the Assessment Records, Rock Bluffs Precinct, Cass County, Nebraska, and those pages show the "N½ of Nottleman Island in Mo. River" assessed to Harvey Shipley and the "S½ of Nottleman Island in Mo. River" assessed to John Nottleman. A notation is also made:

> "Surveyed by Robert D. Fitch and reported to Co. Assessor for Assessment for Sept. 7, 1933." (Ex. P-548-1)

These assessment records for the years 1930 through 1933 also show the land on the Nebraska bank and Tobacco Island as being assessed in Nebraska (Ex. P-548-2). The index maps show the designed channel of the Corps of Engineers, an Island just to the north on the Nebraska side which was a part of the original government survey of the south end of Tobacco Island, an island extended further south from this Tobacco Island which was a part of a Cass County Survey, the Nebraska bank line from Cass County Court House Records, and Nottleman Island as it appeared in the Fitch survey. Also shown is the outline of Nottleman Island from the tricolor map.

One of the certificates of the Deputy Assessor attached to the Cass County tax records states:

> "I, Alfred Gansemer, Precinct Assessor of Murray, do solemnly swear to the best of my knowledge and belief that the schedules and books of assessment heretofore returned by me contain a correct and full

> list of all real estate and personal property subject to taxation in Rock Bluffs so far as I have been able to ascertain the same; . . . " (Ex. P-549).

The assessment records for 1934-1935 show Harvey Shipley and John Nottleman as owners of the island (Ex. P-550-3, 550-2, and 550-1).

The tax records show part of the island was divided for 1937 and show Harvey Shipley, William and Mason Watts, and John Nottleman as owners of the island. The assessment records for 1938 and 1939 show a further division of ownership and show the ownership in Harvey Shipley, Katherine Julia O'Brien, William and Mason Watts, and John Nottleman (Ex. P-554-1, P-554-2 and P-554-3). In the 1940-1941 Assessment Records for Cass County the name "John Nottleman" has been crossed out and J. L. Jones and D. M. Babbitt has been inserted and the island is identified by specific lot numbers (Ex. P-556-5, P-556-4, 556-3, 556-2 and 556-1). In 1942 and 1943 the lots are referred to as being on "Nottleman Island" and are again shown assessed in Harvey Shipley, Katherine Julia O'Brien, William & Mason Watts and J. L. Jones & D. M. Babbitt.

The Cass County Records show a letter dated August 20, 1952, to the Cass County Assessor from Richard C. Peck, Cass County Attorney, which was found in Book 15, 1952-53 Real Estate Assessment Records in the Cass County Assessor's Office. The letter states that there was pending in the Cass County District Court a tax foreclosure action upon various tracts located on Nottleman's Island and then stated:

"An independent investigation reveals that under the Nebraska-Iowa Compact of 1943, this Island became a part of the State of Iowa and is presently taxed in that State."

At the bottom of this letter is a notation:

"The Board of County Commissioners of Cass County, Nebraska hereby approves the removal of Nottleman's Island from the tax list by the County Assessor of Cass County, Nebraska for and after the year 1943."

and this notation is signed by the Board of County Commissioners (Ex. P-474).

In addition to taxing the island as a part of Nebraska, the State of Nebraska and its subdivisions exercised personal jurisdiction over the individuals residing upon Nottleman Island and they considered themselves as citizens of Nebraska.

The personal property on Nottleman's Island was listed in Nebraska personal property returns filed by those residing on the island. The 1936 Nebraska personal property tax return of Ernest L. Shipley shows him as living on the "N 2 of Nottleman Island" and lists property such as a hayrack, stacker, sweep & loader, pulverizer, disk, field roller, harrow, plow, go-dig, walking and riding cultivator and one wagon. It also lists one pony and plug (Ex. P-539). There were in the records schedules for 1936 for E. M. Dooley living on the "N 2 of Nottleman Island Mo. River" (Ex. P-540); 1936 personal schedule for Cleo Baker living on "S 2 Nottleman Island Mo. River" (Ex. P-541); 1936 personal schedule for H. C. Shipley showing, in addition to cer-

tain equipment, one bull, four stock cattle, one three-year old and over horse, and two hogs (Ex. P-546); 1937 schedule for Harvey Shipley describing the land as "Shipley Island Mo. River" (Ex. P-545); 1939 schedule for Harvey Shipley (Ex. P-544); a 1941 personal schedule for Harvey Shipley (Ex. P-543); and a 1942 personal schedule for Harvey Shipley showing him as living on "Nottleman Island" (Ex. P-542).

Harvey Shipley, Ernest L. Shipley, and Cleo and Thelma Baker registered their motor vehicles and trailers in Nebraska during various years when they lived on the island running from 1935 through 1940 (Ex. P-512 through P-517 and P-521 through P-524).

The school records of Cass County show George and Erma Jean Shipley, children of E. L. Shipley, attending schools in Nebraska during the time that the Ernest Shipley family lived on the island (Ex. P-535, P-536, P-537 and P-538).

The records for the term commencing 9/6/37 and ending 5/20/38 show Erma Jean and George Shipley as having "Moved". George Shipley attended school 113 days that year and Erma Jean attended 114 days (Ex. P-538).

The school records also show that Donald Paul Baker, son of C. G. Baker, attended school in Nebraska while Cleo Baker lived on the island in 1937 (Ex. P-535) and 1938 (Ex. P-538).

On the TEACHER'S LIST OF ALL PUPILS ENROLLED ON THE THIRD DAY OF SCHOOL, the Ne-

braska school laws are quoted indicating these reports were filed pursuant to statutory requirement (Ex. P-534).

In addition, a child was born on the island to Charlotte and Ernest Shipley and the birth certificate was filed with the State of Nebraska, Department of Health, Division of Vital Statistics, showing this birth on December 3, 1936 (Ex. P-526). Mr. Dooley testified as to this birth. There was also a Certificate of Death filed with the Division of Vital Statistics of the Nebraska Department of Health showing the death of Elenor C. Shipley on December 15, 1935, of whooping cough. The father was shown as Ernest Shipley. Elenor, according to the death certificate, was shown as having been born on November 3, 1935. Each of these dates was while Mr. and Mrs. Ernest Shipley lived on Nottleman Island.

Previous mention has been made of the quiet title action to the property in Nebraska of *Shipley v. Hull* (Ex. "J" and "K" attached to Complaint, Exhibit P-2615, Exhibit P-462) and inclusion of the property in the John Nottleman Estate probated in the County Court in Nebraska and sold through District Court proceedings (Ex. P-463 and P-464). Mention has also been made of the tax sale by the County Treasurer of Cass County to Katherine Julia O'Brien in Nebraska for delinquent taxes for the years 1940 and 1941 (Ex. P-468).

Conduct of the State of Iowa With Reference to Nottleman's Island

The testimony of Whitney Gillilland and Margaret O'Brien showed that in early 1946, the O'Briens attempt-

ed to file with the Mills County, Iowa, Recorder's Office a deed conveying land on Nottleman's Island from Katherine Julia O'Brien to Margaret T. O'Brien, but the Mills County Recorder refused to accept it. This was substantiated by the General Index Deeds, Lands, Mills County Recorder's Office which has an entry which shows the deed dated January 2, 1946, and the offered date of filing of March 22, 1946, and the records have the notation "Not Recorded" and "Returned 3/25/46 O'Brien, Katherine Julia" (Ex. P-1670).

Mr. Lewis S. Robinson, Glenwood, Iowa, age 55, testified that in 1937 he became a clerk in the office of the Mills County Auditor and he later became deputy auditor and prior to World War II County Auditor of Mills County, Iowa. He was Auditor in March of 1946. He testified that the Recorder did not have any place to record the O'Brien deed and she returned it to the Auditor's Office because she had no record books in which she had this area designated. The description in the deed carried section, range, and township designations which were not Iowa descriptions, but were Nebraska descriptions. The witness then contacted Mr. W. R. Byington, County Attorney, and he recalls this incident so well because they made quite a detailed study as to how this should be handled. First they went to the Clerk's office in Cass County, Nebraska, and found that this same piece of land was being carried on their real estate tax rolls. They then visited the Area Corps of Engineers Office in Omaha to see how the land was described and from there they went to other Iowa river county officials and found that they had the same problems and they had

found no solution for them. Then Mr. Byington wrote a request to the Attorney General of the State of Iowa requesting an opinion. The witness and Mr. Byington delivered the request in person to a deputy in the State Attorneys' Office in Des Moines. They discussed the situation with Mr. Strauss, a deputy Attorney General, and left the question with him. The witness never heard of any answer to that request. There was a great deal of confusion concerning treatment of these lands.

In an effort to resolve this problem, the witness wrote the General Land Office by letter dated April 25, 1946, and this letter states in part as follows:

> "In 1943 the Legislatures of the two States of Iowa and Nebraska passed an act establishing the center of the channel of the Missouri River as the boundary line between the two states. This was done because the river had changed its course in previous years putting lands of each state on either side of the river adjoining lands of the other state. The acts of the two State Legislatures was approved by Congress July 12, 1943. Public Law 134, Chapter 220, H. R. 2794 of the 78th Congress.
>
> Due to this boundary change, Mills County, Iowa, has acquired a certain area of land of approximately 1500 acres. This piece of land, formerly of Cass County, Nebraska, known as 'Nottleman's Island' carries the Township and Range designations of Nebraska. Now that this area is part of Iowa we are faced with the problem of setting it up for assessment and taxation. And also with the setting up of plats and transfer of title records. During the war years, and up to now nothing has been done in re-establishing the area as Iowa land. However, re-ently a deed was filed in this county on part of it,

and property owners have also requested that they be assessed and taxed in Iowa.

Nebraska township and section lines will not join with Iowa lines when projected. We should like to know if any survey is on file from which we might obtain Iowa designations for this area. Or, their not being, how the identity of this land could be re-established in order that it might be tied in with the land it now adjoins. It is believed that the area affected, if properly identified, would lie in parts of Sections 18-19-20 and 30 of Township No. 71 North and 43 West of the 5th Meridian.

Counties other than ours have similar difficulties but none we have contacted has arrived at any satisfactory solution. However, in the filing of the deed on this land, it becomes imperative that we know how such land is to be correctly described now that it has become a part of Iowa. We hope that your office may provide the answer, or at least the means to it. . . ." (Ex. P-2398)

The reply from the Acting Assistant Commissioner of Department of the Interior General Land Office, dated June 25, 1946, stated:

". . . Your letter calls attention to the fact that by the act of July 12, 1943 (57 Stat. 494), Congress gave approval and consent to the pact entered into by the States of Iowa and Nebraska establishing the center of the channel of the Missouri River as the boundary between the States. As a result of the pact, it appears that about 1500 acres of land formerly in Cass County, Nebraska, are now located in Mills County, Iowa.

This area was originally surveyed in Nebraska and is shown upon the official plats of survey presumably as Tps. 11 and 12 N., R. 14 E., 6th P. M.

Since the pact transferred the jurisdiction from Nebraska to Iowa but did not affect the ownership of the lands, it would appear that the land descriptions used in disposing of these lands would be appropriate for the purposes of assessment and taxation." (Ex. P-2398)

Mr. Robinson also testified that at the time of the letters to the General Land Office he had no descriptions on his records showing land in that Nottleman Island area. They were still waiting for an opinion from the Attorney General at the time he left the County Auditor's Office in July of 1946.

Mr. Whitney Gillilland, age 65, testified by deposition taken in Washington, D. C. on January 23, 1969. His personal knowledge concerning the Nottleman Island area has been previously referred to. Mr. Gillilland has been a member of the Civil Aeronautics Board since 1959. From 1954 to 1959 he was Chairman of the Foreign Claims Settlement Commission of the United States and before that was Chairman of the War Claims Commission and immediately prior thereto was Assistant to the Secretary of Agriculture. Before 1953 he was in the general practice of law at Glenwood, Iowa, for a period of about 24 years with an interruption or two. In about 1938, he served for a period of time on the District Bench in southwestern Iowa, which is a court of general jurisdiction in Iowa. He left the bench to return to the practice of law and testified that sometime in 1946 some of the owners of land on Nottleman Island came to his office because they wanted the official records of Mills County, Iowa, to show their title and ownership. They had sought to record their title papers with the Mills

County officials and were refused the right to have them recorded. They wanted to see if Mr. Gillilland could devise some way they could accomplish this result. Mr. Gillilland discussed the subject with Woodford Byington, County Attorney of Mills County. He told Byington he thought these people had a right to have their instruments recorded and at the same time could understand the perplexity of the county officials because the tract book in the County Recorder's Office didn't show any sections of land that were far enough west to include the land involved. There was the additional problem that section lines under Nebraska descriptions didn't coincide with the section lines on the Iowa side of the river and this involved the need to make a reconciliation. Gillilland suggested a law suit and told Byington he didn't think this would be the only time the problem would occur and that Byington would do well to take the matter up with the Attorney General and report what he had in mind.

The witness made a personal examination of the tract books in the County Auditor's office and determined there were no descriptions for the area. He prepared a Petition in Equity which was filed in the District Court of Mills County, Iowa, with the caption *William Watts, Mason Watts, Harvey Shipley, Margaret T. O'Brien, J. L. Jones, D. M. Babbitt, George T. Troop, and Mary Troop, plaintiffs v. Donald Strand, County Auditor of Mills County, Iowa; Hattie Brown, County Recorder of Mills County, Iowa; and Mills County, Iowa, defendants.* This Petition was filed on November 23, 1946, after Lewis Scott Robinson had left the County Auditor's office. The

Petition alleged that the Watts' title was derived through the case of *Shipley v. Hull* in the District Court of Cass County, Nebraska, that the Troops' title came through a deed from Harvey Shipley recorded in Cass County, that Margaret O'Brien's title came from a County Treasurer's tax deed dated January 3, 1945, from Cass County, Nebraska, and signed by Ruth Patton, County Treasurer, and that J. L. Jones and D. M. Babbitt's title came from an administrator's deed dated February 1, 1941, from Don H. Seiver and recorded in the Cass County Register of Deeds Office. Copies of the various instruments referred to were attached and the allegation is further made that, prior to the adoption of the boundary compact, the tracts of real estate described were located in Cass County, Nebraska, and that by said statutes the tracts of real estate, " . . . were transferred to, became a part of and now constitute a part of Mills County, Iowa." It was further alleged that uncertainty had arisen as to the manner and method of entry and indexing of said tracts of real estate upon the books of the defendant County Auditor and upon the tax books and records of Mills County, Iowa, and that the plaintiffs were entitled to have the tracts shown on the books and public records of Mills County in order that their ownership therein may be fully protected (Gillilland Deposition, Exhibit 1). Authenticated copies of the deeds and decrees were tendered for recording and the plaintiffs prayed that the County Auditor of Mills County be directed to enter the tracts of real estate upon the transfer and plat books and other public records in his office. They also prayed that the instruments be recorded in the office of the County Recorder and asked for general equitable

relief. An Answer was filed on behalf of the defendants on November 25, 1946, and signed by Woodford R. Byington, Attorney for Defendants and County Attorney for Mills County, Iowa. The Answer stated in part:

"3. For further answer to plaintiff's petition, these defendants show the Court that by Chapter 306 of the 50th General Assembly of Iowa, which provisions were later enacted by the State of Nebraska and approved by the Congress of the United States, the boundary line between the states of Iowa and Nebraska was changed and by said change Mills County, Iowa, acquired land which is situated West of sections 17, 20, and 29 in Township 71 North, Range 43 West, in Mills County, Iowa, and which land at the time of the boundary survey on March 29, 1940, was situated East of Sections 4, 9, and 16 in Township 11 North, Range 14 East, in Cass County, Nebraska.

"4. These defendants admit that the plaintiffs, or at least some of them, have submitted deeds to be recorded in Mills County, Iowa, and that these defendants have failed and neglected to record such deeds for the reason that they did not know what legal descriptions could be given to this additional land useing (sic) Mills County designations and did not know the procedure in setting up of the plats and transfer records in their respective offices due to the fact that said land does not bear Mills County designations.

"5. These defendants further state to the Court that they have been advised by their attorney, Woodford R. Byington, County Attorney of Mills County, Iowa, that on May 6th, 1946, he wrote to the Attorney General of the State of Iowa, for an opinion as to the proper procedure in correctly describing this additional land for taxation purposes and in

setting up the necessary plats and transfer records and so far has not received any opinion."

The decree of the District Court was filed on January 6, 1947, but stated that the matter came on for hearing on December 31, 1946, and the court found that the allegations and statements of the Petition were true and the plaintiffs were entitled to the relief prayed for. The court further found that William and Mason Watts, George T. Troop and Mary Troop, Margaret T. O'Brien, and J. L. Jones and D. M. Babbitt were the owners of the land and the clerk of the Court was ordered to file a copy of the plat attached to the Petition in the Plat Book and Index Book and any other book referred to in Chapter 558 of the Code of Iowa. It was further ordered that the plaintiffs were entitled to the recording of the instruments referred to in their Petition (Gillilland Deposition, Ex. 1).

Both the testimony and the statement by Mr. Byington in his Answer show that the Iowa Attorney General's Office had actual knowledge of the proceedings. However, the State of Iowa in Answers to Interrogatories in the case of *Iowa v. Babbit*, Answer 22, said:

". . . Plaintiff was not a party to said action, had no notice or knowledge thereof and therefor is not bound by any decision rendered therein. . . ." (Ex. F attached to Complaint and Ex. P-2615).

Mr. Gillilland testified that the plaintiffs were actually physically in possession of the land in 1946 and that it was open and notorious. He testified that neither the plaintiffs nor he, as their attorney, had any idea

that the State of Iowa had any claim to Nottleman's Island in 1946.

The witness then testified that in 1950 a State Conservation employee living in Glenwood came to see him and told the witness that the State Conservation Commission had before it an application to purchase this land. The employee had been over at the Court House seeing what he could find out about the records and the county officers had referred him to Mr. Gillilland. A few days later, Mr. Gillilland was in Des Moines and talked to the Iowa Attorney General, Robert Larson, who is presently a member of the Iowa Supreme Court, about it. Mr. Gillilland told the Attorney General that somewhere in the Attorney General's files he could find the records of the case because Mr. Byington, County Attorney, had sent the pleadings and advised the Attorney General about the matter. Mr. Larson then suggested that the witness should write a letter to the Conservation Commission setting forth the situation. Then, on March 20, 1950, Mr. Gillilland sent a letter to the Iowa State Conservation Commission with copies to the Honorable Robert Larson, Attorney General of Iowa, Des Moines, Iowa, and copies to Mr. William Watts of Pacific Junction and the County Auditor, Glenwood, Iowa. This letter included the following language:

> "Many years ago the main channel of the Missouri River ran east of this island. As a matter of fact, I do not know whether there was any channel on the west side. At that time and for many years the Courts of Nebraska exercised jurisdiction over the island. There was litigation over the ownership of the island and titles were established in the Courts

of Nebraska. Various portions of the island passed under the laws of inheritance and others were conveyed under Nebraska description from time to time. Taxes were paid to Cass County, Nebraska.

"You will recall that a very few years ago, the legislatures of the two states enacted statutes determining the boundary as the center of the then main channel of the river. The statutes were approved by act of Congress. At that time, the channel of the river had shifted to the west of the island and the island became a part of the State of Iowa. The owners of the property on the island encountered difficulty in having the description entered upon the books in Mills County, because they did not coincide with the Iowa descriptions. They employed an engineer to reconcile the descriptions. A friendly action was brought involving the County Auditor and County Recorder of Mills County, Iowa, and a direction made by the Court to enter the reconciled descriptions upon the records here. In my humble opinion the titles having been recognized under the laws of Nebraska previous to the acquisition of this island by the State of Iowa, we would be bound thereby and the then owners or their grantees would have good title to the land included in the island.

"I don't think this is a case of occupying claimants. I think it is a case of straight-out ownership." (Gillilland Deposition, Exhibit 2)

In Mr. Gillilland's enclosure letter to the Attorney General of Iowa of March 20, 1950, he also stated:

". . . The claims of the owners and their grantors go back for many, many years and I think having been recognized by the courts of Nebraska, they are good. I thought perhaps you should be advised as to the situation because, we presume, that you are advisors to the Conservation Commission and we know you are to the State Executive Council. There-

fore we are sending you this letter copy." (Gillilland Deposition, Exhibit 3)

Reference has previously been made to Mr. Gillilland's testimony that he had personal knowledge of the existence of this island going back to about 1917.

Mr. Ray W. Beckman, age 64 of Watkins, Iowa, testified by deposition that he was with the Iowa State Conservation Commission continuously from July 1, 1937 until his resignation in 1958 or 1959. He started out as a Conservation Officer in the Lands and Water Division and after about a year and one-half was transferred as a Conservation Officer in the Fish and Game Division. In about 1944 or 1945 he became Conservation Officer Supervisor until 1948 when he was appointed Chief of the Fish and Game Division, serving in that capacity until his resignation. As Chief of the Fish and Game Division, he was responsible for carrying out or seeing that the functions of the Division were carried out which included all functions dealing with fish and game and law enforcement and all the lands that were under the supervision of the Fish and Game Department. During the year 1950, his immediate supervisor was the director, Bruce Stiles. Mr. Beckman remembered being handed a letter by Mr. Stiles which dealt with this matter and which Mr. Beckman answered. He remembered writing a letter dated April 19, 1950, addressed to Mr. Whitney Gillilland and a letter dated April 19, 1950, to William H. Mead of Percival, Iowa. The letter to Mr. Mead stated:

"Reference is made to your request to purchase an island from the State of Iowa located in the Missouri River in Mills County, Iowa.

"Please be advised that the island you referred to is not State property. The information we have is that this island belongs to four parties as follows:

Wm. Watts N. Babbitt

Margaret O'Brien Jones & Babbitt"

(Ex. P-478 and Gillilland Deposition Exhibit 5)

The letter was signed "Ray W. Beckman, Chief Division of Fish and Game." The enclosure letter to Mr. Gillilland was offered as Exhibit P-477 and Gillilland Deposition, Exhibit 4. There was also an acknowledgment letter from the law firm of Gillilland and Thomas to Mr. Beckman dated April 21, 1950, expressing their appreciation for the information contained (Gillilland Deposition Exhibit 6) and the testimony was that the Wattses were informed of this by Mr. Gillilland (Gillilland Deposition Exhibit 7) and relied upon this information.

The Babbitt land was the subject of another law suit when the case of *Darwin Merritt Babbitt, plaintiff v. L. E. Edwards, R. W. Mansfield, and Warren Honeyman, as members of the County Board of Review of Mills County, Iowa, and Harry Markel, County Assessor, Mills County, Iowa, defendants* was filed in the District Court of Iowa in and for Mills County on June 8, 1961. The Petition alleged the Plaintiff was the owner of real estate in Mills County which had been assessed for taxation, but that the assessment was unjust and excessive and that the taxes should be lowered. This was Babbitt's land on Nottleman Island. The defendants admitted the allegations of ownership by the plaintiff in an Answer filed by the Mills County Attorney on June 15, 1961. The court

entered a judgment and decree on November 30, 1961, in which it found:

> "That the assessment of the real estate of the plaintiff, as contained in plaintiff's Petition, was not illegal, excessive, unfair, unjust, or inequitable and is not contrary to law."

The Petition was therefore dismissed. It was in this case that Mr. Jauron testified concerning the formation of the island and this testimony will be referred to elsewhere. Mrs. Dooley testified that the Shipleys inquired of the Iowa School District when they lived on Nottleman's Island but were informed they could not send their children to school in Iowa. The children did go to school in Nebraska without having to pay tuition, and were enrolled as Nebraska residents.

Mr. Whitney Gillilland testified that, at the time he filed the case of *Watts v. Strand* in 1946, he made a search of the records in the Mills County Court House and found no indication that this land was then of record as being in Iowa. This was confirmed by the Auditor, Mr. Robinson. Following *Watts v. Strand*, the land was placed on the Iowa tax rolls and real property taxes have been levied by Mills County, Iowa, and have been paid by the owners on the property up until the present time. This is true notwithstanding the fact that the State of Iowa claims that it "owns" the land. This is established not only by the testimony, but also by the certified statement by the Mills County Treasurer showing taxes on the property from the original tax list for the years commencing with 1946 through 1966 (Ex. P-2623 and P-2218).

The specific areas are also shown on the Mills County Tax Plats prepared by the Nebraska State Surveyor (Ex. P-1673. The total taxes for that period on Nottleman Island were in excess of $27,000 through 1966, and the evidence shows that the taxes on the property have been increased in recent years.

Defendant, in its Answers to Interrogatories in the case of *State of Iowa v. Babbit,* Answer 18 objected to the question of collection of taxes on the land on the grounds it was irrelevant and immaterial to any issue in the case " . . . because any taxes which any of the defendants may have paid to plaintiff on the land involved in this case were infinitesimal. . . " Iowa also objected on grounds that this was an improper attempt to shift the burden of proof to Iowa and that Iowa should not be subjected to the burden of researching, investigating and proving the facts concerning said issue until some burden is cast upon the State by reason of pleading and proof.

In addition, the Treasurer of Mills County at various times sold some of the properties for taxes and they later had to be redeemed by the owners. The Troop land was sold for taxes on December 5, 1949 and redeemed by George Troop on December 31, 1949 (Ex. P-1664). The Babbitt land was sold for taxes on December 1, 1958 (Ex. P-600), December 7, 1960 (Ex. P-2613, Ex. P-484 & Ex. P-559), and December 30, 1965 (Ex. P-2614 and Ex. P-2492) and Babbitt was required to redeem the property and pay the taxes if he wanted to keep title. These actions by the County Treasurer were pursuant to the Code

of Iowa. Two of the published notices by the County Treasurer of the Delinquent Real Estate Tax List for Mills County, Iowa, which gave notice the treasurer would offer for sale lands in the county for delinquent taxes, cited Ch. 446.7 and 446.18 of the Code of Iowa (Ex. P-343 and P-510).

In the Assessment Rolls of the County Assessor sent out to Mr. Babbitt, the statement at the bottom indicates he may protest if not satisfied, " . . . such protest to be confined to the grounds specified in Section 441.37 Code of Iowa, 1962," and references are made to the 1962 Code of Iowa on the back of the statement (Ex. P-2612).

In addition, on a Real Estate Assessment Roll for 1968 addressed to Babbitt from the Assessor, the back cites various acts of the Iowa statutes from the 1966 Code of Iowa including:

> "Every inhabitant of this state shall list for the assessor all property subject to taxation in the state, of which he is the owner or has the control or management. Section 428.1." (Ex. P-1800)

Other tax statements were offered showing payment of taxes (Ex. P-602, 604, 613, 614, 607), which apparently is no longer an issue and is accepted by all parties in this case.

Mr. Babbitt was also assessed by the County Treasurer of Mills County for taxes for a drainage district (Ex. P-603, P-605, and P-608).

The Sargent land, which was purchased from George Troop, was included within the Inventory in the Estate of Lee A. Sargent, deceased. These probate proceedings

were in the District Court of Iowa in and for Mills County, Iowa and the Final Report and Discharge was filed in 1958. The executors stated in their final report that the Estate was found by the order of the court to be subject to an Iowa inheritance tax and the inheritance tax had been paid and there was on file a receipt from the Iowa State Tax Commission Inheritance Tax Division. The real property of the decedent was described in the inventory and included the description of the Sargent land on Nottleman Island (Ex. P-1696).

The Watts' land on Nottleman Island was included within the Estate of John William Watts, deceased, probate No. 558 in the District Court of the State of Iowa in and for Mills County (Ex. P-1750). Bill Watts is shown as having died on August 7, 1964, and the real property schedule includes the Nottleman Island land as owned in joint tenancy with Albert Mason Watts. Bill Watts' ½ share of the island land was appraised at $10,000.00. There is also a receipt showing payment by Albert M. Watts, Administrator of the Estate of John William Watts, of inheritance taxes on the estate to the Iowa State Tax Commission. The Final Report filed by Albert M. Watts, states that John William Watts was the owner of an interest in the Nottleman Island property which was described in the report by metes and bounds, and the Court in its ORDER APPROVING FINAL REPORT filed October 10, 1967, found:

> "... And the Court having fully examined the report as filed and having heard the evidence finds that the said report is true and correct and that the same should be approved."

Iowa's Traverse of Nottleman Island

In its Second Amendment to Plaintiff's Petition in the *Iowa v. Babbit* case, Iowa described the area which it was claiming by metes and bounds (Ex. "H" attached to Complaint, Ex. P-1691). This is also referred to as the Windenburg Survey (Ex. P-740). The description purportedly follows along "the center of the designed channel of the Missouri River, said point being on the boundary line between the State of Iowa and the State of Nebraska, as established by the State of Iowa and Nebraska and approved by the 78th Congress in 1943. . ." It also runs along the "present ordinary high water line on the left bank of the abandoned channel of the Missouri River."

Interrogatory No. 249 by plaintiff to the defendant was offered:

> "What is the physical feature, if any, which was followed by the State of Iowa in determining the easterly boundary of the tract as described in the second amendment to plaintiff's petition in the case of Iowa versus Babbitt?"

Answer by the the State of Iowa:

> "The left bank, ordinary high water mark of the former channel which separated the island from the east bank of the Missouri River." (Vol. III, p. 411).

The Windenburg survey was dated 1/3/64 and the certificate states that Windenburg made the survey in August and September, 1963, which was after the law suit was filed by the State of Iowa against the landowners. Windenburg showed the "Island Division Line" running across the middle of the island and he did not identify the left bank line of the present Missouri River.

The Nebraska State Surveyor, Mr. Willis Brown, has numbered various stations from one through eleven along the eastern line of the Windenburg Survey (Ex. P-428). He testified to ground level photographs which he took along this eastern traverse which show the Windenburg traverse going through water, low swamp, and brush, and they point out that the Windenburg traverse does not follow any high bank or ordinary high water mark and there is no high bank in the near vicinity of the traverse. In some cases it goes across flat land and in others runs right through standing water (Exhibits P-417 through P-420 and P-423 through P-427).

On cross-examination of Mr. Brown, counsel for Iowa brought out that the field work on his checking of the Windenburg survey was done in May in 1965 whereas the Windenburg Plat says it was made in August and September of 1963. Mr. Brown admitted that in those two years there could have been some difference in the terrain in that east channel between the date of his checking and the date of the Windenburg survey. However, although Iowa may argue that there may have been some difference in the physical features on the ground between 1964 and 1966, their witness, Professor Ruhe, seems to think that banks and scarps will remain for sixty to eighty years in the Schemmel area.

The Windenburg survey is not accurate on the west side of Nottleman Island either and cannot be substantiated by Iowa's own expert witness. Mr. Brown prepared a plat showing the State Line according to the Compact compared to Mr. Windenburg's line around the west side of Nottleman's Island, and Iowa's expert, Mr.

R. J. Lubsen, made his determination of the State Line for comparison (Ex. P-746). Professor Lubsen's drawing was dated November, 1965. Professor Lubsen's State Line coincided with that of Mr. Willis Brown for a considerable distance from the north end of the island going downstream until approximately the lower one-fourth of the island where his line departs from the Nebraska State Surveyor's line and goes further east. The maximum amount of departure is approximately 150 feet at the point close to the termination of trail dike 626.8-A which extends out into the channel on the Nebraska side. Mr. Brown testified that this feature requires a surveyor to make a judgment decision whether he should use the trail dike to determine the bank line or whether he should use the revetment line. He testified this would differ from surveyor to surveyor, as it did in this case. The Windenburg line, upon which Iowa's quiet title action in the case of *Iowa v. Babbit* is based, is about 50 feet to the west of Mr. Brown's line and, at the south end of the island is a maximum of approximately 230 feet west of Professor Lubsen's State Line. Mr. Brown testified that he felt his survey of the State Boundary was true, and he had not seen anything to change his opinion. He admitted that Professor Lubsen certainly had grounds for his position and, in his opinion, there is some justification for the Lubsen line and some justification for the Nebraska State Surveyor's line, but the Windenburg line is clearly in error to the extent of approximately 50 feet and on the south end it is even further off. Mr. Brown did testify that he did not know what maps the Corps may have given Mr. Windenburg to make

his determination. However, suffice it to say that both the Lubsen and Brown testimony show that Iowa is encroaching approximately 50 feet into Nebraska for the major portion of the traverse around the west side of Nottleman Island.

Mr. Lubsen also testified that he did not find out when the designed channel was actually designed. The surveys and testimony point out a distinct problem in ascertaining the State Line from the information contained in the Iowa-Nebraska Boundary Compact.

THE SCHEMMEL ISLAND AREA

On March 26, 1963, the State of Iowa filed a Petition in the District Court of Iowa in and for Fremont County captioned *"State of Iowa, Plaintiff v. Henry E. Schemmel, et al., Defendants"*. A copy of the Petition is attached to the Complaint and marked Exhibit "L" and also offered as Ex. P-2615. In its Petition in Equity, Iowa again alleged simply that it was the absolute and unqualified owner in fee simple of the real estate described and some of the defendants make claim to the real estate but that ". . . all said claims are wholly without right". No further grounds for Iowa's claim were stated. Iowa prayed that its title be quieted in the real estate. The Petition was signed by Michael Murray with the names Evan Hultman, Attorney General of Iowa, and William J. Yost, Assistant Attorney General of Iowa, also appearing on the Petition. The metes and bounds description in the Petition purportedly followed the "ordinary high water line on the east bank of the abandoned channel of the Missouri River" on the east side and the western boun-

dary was supposedly ". . . to the Iowa-Nebraska boundary as established by the States of Iowa and Nebraska and approved by the 78th Congress in 1943, thence along said boundary . . .".

The Schemmels and Mary Leah Persons, who is the daughter of Henry Schemmel, answered the Petition and alleged that plaintiff's claim was contrary to, and in violation of, the Iowa-Nebraska boundary pact of 1943 in that it failed to recognize and give effect to defendants' title and rights to the said land under Nebraska law. Other defenses were alleged and the defendants counterclaimed and asked that title be quieted in them (Ex. "M" & "N" attached to Complaint, Ex. P-2615). Iowa then filed a reply and denied that the land was in any manner affected by the Iowa-Nebraska boundary pact of 1943. It also denied that the land was ever located within the State of Nebraska and alleged that the Iowa-Nebraska boundary pact had no effect and did not change the ownership of said land or the sovereignty of the State of Iowa over it. Iowa further admitted that, for the purposes of that case, the defendants and their predecessors in interest were the riparian owners of land bordering on the main channel of the Missouri River on the west or Nebraska side, but alleged that ownership of said lands on the west or Nebraska side was irrelevant and immaterial because the land did not form as accretions to said Nebraska lands or as accretions to that part of the bed of the river which was in Nebraska. Iowa alleged that the land in controversy formed as an island upon and over that part of the bed of the Missouri River which lay within the State of Iowa at the time of such forma-

tion (Ex. "O" attached to Complaint, Ex. P-2615).

The trial of the case of *Iowa v. Schemmel* was commenced in Fremont County, Iowa, in 1964 and Mr. Michael Murray, Counsel for the State of Iowa, in his opening statement said that Iowa expected to prove the area came into existence as an identifiable piece of land traced to some date commencing in the 1930's and probably before 1936. He said when it came into existence it started as a sand bar not attached to either bank and that it was continuously thereafter not attached to either bank until about 1960 when the Corps of Engineers installed a "channel closure" closing the channel which ran down the east side. He then stated that, r e g a r d l e s s of the exact date of the commencement of formation of the land, the thalweg was west of it and:

> "We expect the Court will be satisfied that there was no avulsion to cause the state boundary line to be any place other than the thalweg in this particular area.
>
> "In the first instance, we are simply going to rely on a presumption concerning avulsions. Perhaps the Court is acquainted with the fact that one claiming an avulsion has the burden of proving; and therefore, we will have no proof except incidental proof that there was no avulsion in the first instance, being our intention to rely on the presumption in the first instance, at least." (Ex. P-1658)

Mr. Murray then stated that he intended to trace the area back into the 1920's, demonstrating that there was no identifiable piece of land which could be traced back to the 20's. The witness, Jauron, testified upon cross-examination in this case that Iowa called only two wit-

nesses in *Iowa v. Schemmel* before they rested, namely Mr. Windenburg, the surveyor who made the traverse around the Schemmel area, and Mr. Raymond Huber, formerly of the Corps of Engineers, who also testified in this case. Iowa then rested and left the entire burden of showing the history of the land upon the defendants. They did this apparently knowing that the Corps of Engineers had dug a canal in Nebraska during the time that they were moving the channel into its design. The State of Iowa also ignored all of the previous early history of movements of the river in this area and left the defendants with the difficult burden of attempting to prove an avulsion many years after the event.

For purposes of identification, the Schemmel area, Otoe Bend area, or the area enclosed by the Windenburg traverse was identified on the Nebraska tax rolls as a part of Sections 29, 30, 31 and 32 in T. 8 N., R. 15 E. and Section 5 in T. 7 N., R. 15 E. of the 6th P. M. Otoe County, Nebraska. This same area identified from the 5th P. M. would be a part of Sections 10, 14, 15, 22 and 23 in T. 67 N., R. 43 W. of the 5th P. M. Fremont County, Iowa. Measured along the road the Schemmels take into their property, which is along the section line common to Iowa Sections 10 and 15, 11 and 14, and 12 and 13, the area is approximately one-quarter mile west of the northwest corner of Section 14. South of that point, the area extends eastward into Section 14 approximately a quarter of a mile, which would be at least three quarters of a mile west of the section line common to Iowa Sections 13 and 14. This area is on the east or left side of the present Missouri River. It is five miles down-

stream from the Nebraska City bridge. The lower or southern end of the area is one-fourth of a mile north of Hamburg Landing which is four and one-half miles west of Hamburg, Iowa. The upper portion of the area is one and one-half miles west of the improvements on the Propp farm, the old agricultural or John Payne levee, and the improved road south of Payne. The Iowa Chute is one and four-tenths of a mile east of the area measured along the section line between Sections 10 and 15, 11 and 14, and 12 and 13.

The Givens farm buildings are four-tenths of a mile north of the Iowa Chute measured along the section line between Sections 11 and 12, T. 67 N., R. 43 W. and are one-fourth of a mile west and three-fourths of a mile north of the Propp buildings.

The area is three-fourths of a mile west of the Schwake Chute measured along the section line between Sections 10 and 15, and 11 and 14, T. 67 N., R. 43 W.

The lower tip of the area is two miles east and two-thirds of a mile north of the old town of Minersville, Nebraska. The central portion of the area is directly east and across the river from the Yearsley farm, which is on the Nebraska side.

For further purposes of reference, attached hereto and marked Appendix B is a reduced photographic reproduction of a portion of Ex. P-1036 which is the 1946-1947 Corps of Engineer tri-color map of the Schemmel Island area. The Windenburg traverse is not reproduced on this map but it extends downstream to include all of dike 600.1 and 600.1-A and to within one-quarter of a

mile from the Hamburg Landing Road which is along the section lines between Iowa Sections 23 and 26. The water areas are not depicted exactly as they appear today. The Iowa Chute and Propp and Givens buildings were marked by witnesses. Ex. P-1036 also had the Schwake Chute and Old Levee identified but those markings did not reproduce very clearly on Appendix B.

The historical evidence shows that at the time the states were admitted into the Union, the Missouri River in the Schemmel Island area was located at approximately where the present west one-third of the Schemmel land is found today. From the time Nebraska was admitted into the Union, the river commenced to work easterly and erode away land on the Iowa side. By 1895, the river flowed in a pronounced easterly developed bend and in 1900 at its most easterly point was about two miles east of the present location of the Missouri River, and the main channel of the Missouri River was then located where the Iowa Chute is found today. Between 1900 and 1905 a cut-off of the Missouri River occurred in the bend and the river thereafter flowed in a channel over a mile to the west. The river never again worked its way as far east as the Iowa Chute but there was at least one additional natural cut-off to the west within the bend; and in the 1930's, the United States Army Corps of Engineers placed the river in the designed channel, where it is presently located, by the construction of dikes and revetments and by the dredging of the Otoe Bend Canal in Nebraska. Each of these sudden movements did not wash away the intervening land as the river moved or was moved to the west. However, as in the Nottleman

Island area, regardless of how the Schemmel land formed, it was always considered to be a part of Nebraska until ceded to Iowa by the Compact.

Early History of the River in the Schemmel Island Area

The early maps of the Schemmel area were introduced along with the testimony of the Nebraska State Surveyor, Mr. Willis Brown, who prepared transparent mylar overlays of the various maps and the Windenburg traverse to the same scale so that comparisons could be made. The Iowa side of the Missouri River was first surveyed by the Surveyor General's office in 1846 and 1847 and an almost identical survey was executed by the Surveyor General in 1852. These surveys showed no islands surveyed as Iowa land in the Missouri River (Ex. P-202, P-203, and P-204). The Nebraska original government survey was made in 1856 and showed an island on the Nebraska side of the river surveyed as a part of Nebraska Sections 19 and 30, Township 8 North, Range XV East of the Sixth Principal Meridian (Ex. P-205 and P-206). The Hopkins and Haddock tie survey was dated December 31, 1858, and is a connection or tie survey for the Federal Government. This also shows one island in Nebraska with the river going around the east side of that island and some water on the west side. The island has section numbers which are common to the 6th Principal Meridian in Nebraska. If patents are obtained on land that is included within original government surveys, these patents show the section numbers of those original government surveys and would be filed in the state to which they relate. The tie survey gives the relationship

between the original Iowa and Nebraska surveys. The Iowa bank on the tie survey in some places is considerably different from the bank as it appeared on the original government survey. This tie survey also illustrates how the section lines, when extended, do not coincide between the two states.

The Nebraska State Surveyor prepared a mylar overlay of the original government survey of Iowa and original government survey of Nebraska, tied together by the measurements of the tie survey (Ex. P-208). The 1856 island was patented in Nebraska and later became referred to as Frazier's Island or Frazer's Island on the 1879 and 1890 maps and in reports of the Corps of Engineers. Certified copies of patents to some of the land on Frazier's Island were introduced with index plats (Ex. P-1614 through P-1617). The southeastern part of the original Frazier's Island overlaps the northwest part of the Windenburg traverse.

At the time of the original government surveys, the Missouri River was located in approximately the same location as the present west one-third of the Schemmel land today. From Mr. Brown's testimony, it also appeared that the river had moved to the east in the time between the 1856 original government survey and the 1858 government tie survey.

In the Annual Reports of the Corps of Engineers, there is a MAP OF THE MISSOURI RIVER IN THE VICINITY OF NEBRASKA CITY, NEB. from surveys made under the direction of Major Charles R. Suter, Corps of Engineers, U. S. A., in December, 1876, and

January, 1877. This map shows "Frazier's Island" as attached to the Nebraska shore and the river has a distinct bend to the east around that area with a considerable amount of accretion shown as attached to Nebraska (Ex. P-370). There is no indication of water to the west of the island on the map. This map also has a designation for Nebraska City and Eastport.

The Corps of Engineers surveyed the area from July 2 to August 7, 1879, and the words "Frazier's Island" are written on the accretion land on the Nebraska side of the river. The river has a distinct bend around the east side of "Frazier's Island" and the Corps of Engineers mile designation 604.4 is written nearly opposite the words "Payne's Ldg." which is right along the Iowa bank. Sidney Ldg. is shown at mile No. 602.2. This map shows an easterly developed bend with Frazier's Island part of the Nebraska bank or shore and at the lower part of the bend the river flows westerly towards Otoe City or Minersville, Nebraska. A little south of this area, McKissock's Island is shown and mention is made of the "Peru Cut-off 1865" and on the Nebraska side is Hog Thief Island. North of the area, Nebraska City Island is shown with a chute running around the west side and the words "EASTPORT BEND" on the east side and mile No. 610 is shown in the river around the east side of Eastport Bend (Ex. P-209). In the 1876-1877 Corps map (Ex. P-370), the river also went around the east or left side of Nebraska City Island.

The Nebraska State Surveyor made an overlay of the 1879 Corps map of the Otoe Bend area (Ex. P-210). In comparing this overlay with the original government

surveys (Ex. P-208) they show the river had moved east into Iowa Section 15 approximately one-half mile and in Iowa Section 10 it had moved east between a quarter and one-half mile. The area designated as Frazier's Island is joined to the mainland and includes almost all of the original island surveyed in Nebraska. When this overlay of the 1879 survey is placed on the 1946-1947 Corps of Engineers tri-color map (Ex. P-2683), the river is shown as running right through the greater central portion of what is later to be the Schemmel land.

The Reports of the Missouri River Commission from July 1, 1885, to June 30, 1887, which are a part of the Annual Report of the Chief of Engineers for 1887, have a very significant map which is entitled "Map of the Missouri River in the Vicinity of Nebraska City, Neb. made under the direction of the Missouri River Commission in December 1886." (Ex. P-371). This map shows the area south of Nebraska City and shows the river having cut away 1002 acres along the left or east bank in the vicinity of Schemmel Island from the years 1879 to 1886. The reference is made "Cut M to N, 1879-1886, 1002 acres" and the letters M and N have been circled and the line traced in red by Mr. Willis Brown. Attached to, and a part of, Exhibit P-371 is a copy of a portion of Exhibit P-371 upon which Mr. Brown has placed the traverse of Schemmel Island, and all of Schemmel Island except a very small part at the southern tip is to the west of this line drawn from M to N (Ex. P-2627). Mr. Brown has also placed on Exhibit P-2627 the 1895 Pierce right bank survey which will be referred to, and Schemmel Island is on the right bank. The 1879, 1882, and 1886 bank

lines are all shown on this map and it can be seen that the bend is moving towards the east and downstream.

Exhibit P-371 also shows Nebraska City Island just across from Nebraska City and shows water running around both sides of the island with the major portion to the west along the Nebraska City waterfront.

The Road Plat Book of Fremont County, Iowa (Ex. P-172), compiled by H. F. Gagnebin, County Surveyor, found in the Fremont County Auditor's Office shows the original bank line of the Missouri River in 1852 and shows the Meander of December, 1884. This line goes through Iowa Section 14 just west of the center line. Then to the east of that is shown "MESUREMENT 1888" and that curved line touches the line common to Iowa Sections 13 and 14. This map also shows the progressive easterly development of the river from the 1852 map to the Meander of December, 1884, to the "MESUREMENT 1888" but it still places the river to the west of the Iowa Chute.

The Missouri River Commission survey of 1890, published in 1893, also identifies "Frazers Isl." as part of the Nebraska shore and shows an easterly developed bend. Although this series of maps shows topography in considerable detail, *there is no marking on this map showing any topographic feature in the position of the Iowa Chute* (Ex. P-211). Mr. Brown testified that the left or east bank of the Missouri River is "just a mile west of the Payne School". The 1890 survey shows the river along the Nebraska bluff in the Eastport Bend area with "Nebraska City Isl." identified as now being on the east-

ern or left bank of the river and the word "(Abandoned)" under the words "U. S. Boatyard" in Eastport Bend. There is also the "Old Bed of Missouri River" shown on the east side of McKissock Island south of the Schemmel area. Cut-off areas are thus shown in what had been easterly developed bends both above and below the Schemmel bend. When the mylar overlay of the 1890 Missouri River Commission map (Ex. P-212) is placed over the 1879 Corps survey overlay (Ex. P-210) the left bank has moved eastward on the line between Iowa Sections 11 and 14 a distance of approximately 5,000 feet. Sidney Landing has also moved to the east as shown on the 1890 map. Right along the left bank of the 1890 map (Ex. P-211) is written the word "Foster".

When the Windenburg traverse of Schemmel Island (Ex. P-233) is placed upon the 1890 map (Ex. P-212), the major portion of the traverse of Schemmel Island is on an area indicated on the 1890 map as land on the Nebraska side of the river identified as Frazer Island, and there is a chute down through the western one-third of the traversed area.

The Plat of Washington Township in Fremont County, Iowa, taken from the "Plat Book of Fremont County, Iowa, Drawn from actual Surveys & County Records by the North West Publishing Co., 1891" shows the river line as shown by the 1851 government survey with the left bank of the river considerably to the east of that line and running diagonally from about the northwest corner of the section through the center to the southeast corner of Iowa Section 11 and extending into the western part of land identified as the John Foster 80 which is the west

half of the northwest quarter of Iowa Section 13. The river is still west of the location of the Iowa Chute. Payne School No. 9 is shown and circled in red as being at the southwest corner of Iowa Section 7, Township 42 North, Range 67 West and is right next to the railroad tracks between the railroad tracks and the section corner common to Sections 7, 12, 13 and 18 (Ex. P-372).

The Otoe County Plat Book in the Office of the County Clerk of Otoe County, Nebraska, has plats of a survey made in 1895 along the Missouri River (Ex. P-137). This is commonly known as the Pierce Survey and some of these plats show the "Missouri River in 1895". Pierce was the County Surveyor of Otoe County at that time. The Pierce Survey shows acreages and locates the land by lot numbers. Mr. Willis Brown testified that the plats showed the acreages divided to 100ths of an acre and that this survey was apparently quite accurate.

The Nebraska State Surveyor prepared a mylar overlay of the 1895 Pierce Survey where it ran through Nebraska Sections 28, 29, 30, 32, 33, 5 and 6 as shown in the Plat Book in the Otoe County Clerk's Office (Ex. P-213). This survey did not show the left bank but only showed the Nebraska bank or right bank of the Missouri River. When the 1895 Pierce Survey (Ex. P-213) is placed upon the 1890 Missouri River Commission Survey (Ex. P-212), the right bank of the Missouri River is now located in bar area which had been along the left bank of the 1890 survey. The right bank has moved considerably to the east and is now touching what was marked as "Sidney Ldg." on the 1890 map. When the overlay of the Schemmel land (Ex. P-231) is placed upon

the 1895 Pierce Survey (Ex. P-213), almost all of the Schemmel area appears on the right bank, except at the very southern tip of the traverse. The Windenburg traverse falls in Nebraska Sections 29, 30, 31, 32 and 5. The east side of the traverse is about 2,500 feet west of the right bank line of the Pierce Survey of 1895 measuring along the center line of Nebraska Sections 32 and 33. This same Pierce Survey line appears upon the Iowa survey of Mr. Windenburg (Ex. P-237).

An article from the *Nebraska City News* of April 16, 1897, captioned "The Water at Hamburg" further documents the location of the river in the late 1890's. This article includes the statement:

> "The Missouri river commenced to rise on Sunday night, April 11. About four miles northwest of Hamburg, near the railroad, is the Payne school house. *The river is three-quarters of a mile west of the road at this point.* The bottom lands in that vicinity have been heretofore protected by the so-called John Payne levee, though Mr. Payne has moved to the uplands of Nebraska. On Monday afternoon the levee broke and the water swept over the bottom and the railroad a mile wide . . ." (Ex. P-200). (Emphasis supplied.)

Mr. Brown testified that the 1890 Missouri River Commission map (Ex. P-211) showed that it was one mile from Payne School to the left bank of the Missouri River so the river must have moved a quarter of a mile to the east between 1890 and 1897. The index map to Ex. P-200 shows the location of the Payne School House four miles from Hamburg, and shows the Iowa Chute is located almost exactly three-quarters of a mile west of that school

house measuring along the road between Iowa Sections 12 and 13.

This Iowa Chute has been referred to by several witnesses and appears as a physical feature upon almost all of the later Corps of Engineer maps which extend that far east. The Iowa Chute is in the shape of an easterly bend and the testimony of Frank Duncan places the Missouri River in the location of the Iowa Chute in 1899. Mr. Duncan testified by deposition that he was born on November 27, 1892, about two and a half miles north of Payne Junction and he lived around Payne Junction in Fremont County, Iowa, for 34 years. His family lived on the Mose Givens place commencing in 1896. A sister of Mr. Duncan was born on the Mose Givens place in November of 1898. The Mose Givens place is on the west side of the road in Iowa Section 11 north of the Albert Propp place. Mr. Duncan testified that there is now a house at the same location, but it is not the same house. The witness identified the location of two houses in which he lived on the Givens' place upon a photograph (Plaintiff's Exhibit D-1). In 1896 and 1897 they lived in the south house and then they moved to a smaller house along the railroad tracks and were there for two years. Mr. Duncan testified that the Missouri River was in the old river bed which was right straight south along the road that went in front of his house. When the road got to the river it ran at an angle to the southeast. The road today isn't exactly where it was at that time, but it is very close to the same location. The witness saw the first boat which he ever saw in his life come up the Missouri River from the southeast headed on an angle to

the northwest until it came up "and then it took up pretty near west". This boat had a paddle wheel in the back and had a work barge ahead of it. Mr. Brown drove a stake where the witness testified he stood when he saw the boat and plaintiff's Exhibit D-2 is a picture of the witness and Mr. Brown, showing the stake. The boat that was seen by the witness came within 50 feet of where they were standing in the picture and was close to the bank. In the vicinity where the picture was taken, you can see the old river bed which is part of what is now called the Iowa Chute. The Givens' road runs north from the place where the picture was taken to the Givens' house. The brush in the picture marks the old river bed and the witness identified this brush with "A" and he also identified the stake with a "B".

The witness saw the steamboat coming up the river in 1899, and he was looking south. It came to his left up around the river and there is a bend right there and then it turned and went west and they watched it until it was pretty near out of sight. He repeated that the boat came within fifty feet of where he was standing and that is the spot shown in Plaintiff's Exhibit D-2.

Mr. Willis Brown also located a stake at the spot designated by Mr. Duncan on a copy of a portion of the 1946-1947 Corps of Engineers tri-color map with a red X and to the left of it printed in red is "Duncan re-bar". This X appears right where the road came south from the Givens' place and then angles off towards the southeast toward the Propp farm (Ex. P-2277). The photograph (Plaintiff's Exhibit D-2) which Mr. Duncan marked show-

ing where the boat went as it traveled upstream would be facing about northwest and shows the present Iowa Chute.

Mr. Cliff Cockerham, of Hamburg, Iowa, born 1892, testified by deposition that, when he was one year old, the family moved east of the Albert Propp farm about a quarter of a mile on the north side of the road. When he was about nine or ten years old, his family built a house up by Mose Givens and he moved there. From 1893 until 1912 when the witness was married, he lived within one-half mile of Albert Propp's place. Mr. Cockerham testified that at one time the Missouri River was located about 300 yards west of Propp's house and the old bed is there and they call it the Iowa Chute. In about 1900, he saw a boat in the Missouri River in the Iowa Chute 200 or 300 yards west of Propp's. This was in the spring and the boat was 30 or 40 feet long and had a paddle wheel on the back and was tied up to the east bank of the Missouri River west of Propp's. Quite a few people saw it there and it stayed overnight. At the time he saw the boat, he thought the Iowa Chute was mostly the Missouri River and the Missouri River today is west of where it was then. The witness testified the water stayed in the Iowa Chute several years and while the river was farther west there still was water running in the Iowa Chute. He testified that Frank Duncan lived in a house up by the railroad on Mose Givens' place just north of Propp's. John Foster had land just west of Propp's and most of it got cut into the Missouri River. Part of it was on "this side" east of the Iowa Chute and the rest of it out there got cut in. When the witness was

a small boy, there was a levee along the river where Propp's farm is today called the John Payne Levee and he recalls no levee west of there up through the 1920's. When the witness saw the boat in 1900, it was not during flood time.

Mr. Cal Taylor, of Hamburg, Iowa, born November 7, 1878, testified by deposition that he was born on McKissock's Island (Nebraska) just south of Hamburg, Iowa. He testified that he recalled when the Missouri River was west of where Albert Propp lives today. He testified it wasn't too far west of Albert Propp's house and he was there with Mr. Willis Brown and Mr. Brown drove a stake on what the witness identified as the east bank of the Missouri River. He said it was a good body of flowing water and they called it the Missouri River. He saw it there when he was "just a good sized boy" but he couldn't remember exactly how old he was when the Missouri River was there. In those days, the Missouri River was there during normal water. The witness knew Mr. Cliff Cockerham and testified Mr. Cockerham lived on the north side of the road and not too far east of Propp. On redirect examination, Mr. Taylor testified that at the time he was a fair sized boy and the river was right there west of Propp and the bank was where Mr. Brown drove the stake, that was the main channel of the river at that time. This "Taylor re-bar" also appears on Exhibit P-2277 and is located right along the Iowa Chute just west of the Propp farm. The stake is on the east bank of the Iowa Chute.

Measuring straight west along the north line of Iowa Sections 13, 14 and 15, which is the road the Schemmels

take into their property, it is today approximately 10,200 feet to the east bank of the designed channel of the Missouri River from the Iowa Chute.

All of the maps previously referred to with reference to the Schemmel area have shown the river moving progressively eastward with a large bend developing. Then in 1905 a survey was made by the United States Department of the Interior Geological Survey which, for the first time since the original government survey shows the river back to the west (Ex. P-214). This map purportedly shows a dashed line which is identified as the state boundary line but, as in the 1920 soil survey with reference to Nottleman Island, the map was just offered to show the location of the river and not the location of any boundary as the Geological Survey was not competent to make this legal determination. This map does not extend far enough east to show where the Iowa Chute would be. The mylar overlay of the 1905 U. S. Department of the Interior Geological Survey Map (Ex. P-215), when placed upon the 1890 Corps of Engineer Map (Ex. P-212), shows the river running through what was a part of Frazier's Island on the 1890 map. The 1905 channel appears to be in the approximate location of the 1890 slough on the Nebraska side through the Frazier's Island Bend. The 1905 left bank is approximately 6,200 feet west of the Iowa Chute when measured along the section line between Sections 11 and 14, as shown by placing the overlay of the Alluvial Plain map (Ex. P-231) under the overlay of the 1905 map (Ex. P-215). This means that the left bank of the Missouri River in 1905 was more than a mile to the west of the location of the

Iowa Chute along the east-west road which the Schemmels take into their property. When the 1905 survey (Ex. P-215) is compared with the mylar copy of the 1895 Pierce Survey (Ex. P-213), the 1905 right bank runs through the center of Nebraska Section 30 and the eastern portion of Sections 31 and 6 as shown on the 1895 Pierce Survey, and in 1905 the right bank of the river is approximately a mile and a quarter west of the 1895 right bank measured east and west through the center of Section 32. Consequently, by 1905, the Missouri River had moved about one and one-quarter miles west of where it had been located in 1900 in the Iowa Chute.

Geological Analysis of the 1900-1905 Avulsion and Physical Evidence of 1895 Tree

Dr. William N. Gilliland, age 49, of Newark, New Jersey, testified as plaintiff's geology expert. Dr. Gilliland began the study of geology in 1937 and received his Bachelors Degree from Ohio State University in 1941. Following World War II, he received a Ph. D. in Geology in 1948 from Ohio State University. He studied the normal courses in geology including such subjects as physical geology, historical geology, mineralogy, petrology, sedimentation, paleongeology, geomorphology, and structural geology. For a year after 1948 he worked with the U. S. Geological Survey mapping alluvial and precrustacean sediments in western Nevada which involved mapping several streams. Following his work with the Geological Survey, he went to the University of Nebraska and was there until 1965. For fourteen or fifteen years during the time he was at the University

of Nebraska, he was Chairman of the Geology Department. At the University of Nebraska, he taught physical geology, historical geology, engineering geology, structural geology, and he did a great deal of research and a considerable amount of consulting work. In 1965 he left the University of Nebraska and went to Rutgers University as Dean of the College of Arts and Sciences and Professor of Geology.

Dr. Gilliland testified that the study of characteristics and the behavior of meandering streams is fundamental in the training of all geologists and he had extensive training in the behavior of rivers as a student. Also, while teaching geology, he taught the nature and characteristics of streams as a basic elementary part of any geologist's training. He is a fellow in the Geological Society of America, a member of the American Association of Petroleum Geologists and a certified professional geologist with the American Institute of Professional Geologists. To obtain the latter certificate involves a critical examination of the person's training, experience and ethics and, of the 40,000 or 50,000 practicing geologists, there are less than 2,000 certified professional geologists.

Dr. Gilliland testified that the Missouri River is a meandering stream and all meandering streams have certain common behavior patterns and certain principles apply in this behavior. He prepared exhibits to show successive stages in the development and behavior of meandering streams from an experimental standpoint, a numerical standpoint, and an historical standpoint. Dr. Gilliland illustrated by his testimony and photographs

and slides the development of a meander pattern of alluvial streams (Ex. P-1590 through P-1602). Some of these photographs were taken by the Corps of Engineers of the U. S. Army in connection with their experiments. They showed how meanders develop and enlarge and move downstream (Ex. P-1599, P-1591 and P-1596). Areas of deposition appear on the inside of the curve which are residues called point bars and are frequently characterized by elongated depressions called chutes. There is erosion on the outside of the curve and deposition on the inside of the meander.

Illustrations from elementary geology texts also showed the same development as was shown by the Corps of Engineer experiments (Ex. P-1593, P-1594, P-1595, P-1597 & P-1598). There is a concentration of maximum velocity on the deep outer part of the bend as well as maximum turbulence on the outside of the bend (Ex. P-1593). On the inner part of the bend the water is shallower and there is low velocity and turbulence. Dr. Gilliland testified that it is a widely held concept in basic geology that erosion occurs on the outside of bends and deposition occurs on the inside of bends because the velocity and greater turbulence is concentrated on the outside of the bends (Ex. P-1595). Also, across the point bars there are frequently and commonly depressions called chutes. He illustrated how material is eroded from the outside of the bend and transported to the inside of the next bend downstream and deposited there. At the outside of that downstream bend, erosion is caused by the concentration of the greater velocity and greater turbulence of the water and that sand will be deposited on the

inside of the next bend downstream (Ex. P-1597).

The process of the enlargement of the meander downstream and shifting of the meander is known to continue until a portion of the meander is abandoned. This happens in one of two ways. As the uppermost curve erodes on the outside of the curve, a portion of the river may approach and literally cut through the narrow restricted portion of what is called the point bar, diverting the stream from around the long path to a shorter path directly across the point bar or neck. A neck cut-off is where the streams actually approach and finally merge. A chute cut-off is where the stream cuts across a point bar suddenly.

The witness explained by way of an oblique aerial photograph taken from a geology text book *Basic Concepts of Physical Geology* that, in the point bar, you can see many ridges and intervening depressions (Ex. P-1592). During the time of high water, perhaps in a flood stage, the river will in many cases take a shorter path than the meander path and cut directly across the point bar because, since the distance is less, you have a steeper gradient and because of the steeper gradient, water will flow faster and thus be able to erode more readily across the point bar (Ex. P-1592). The Exhibit has the following caption: "*Chute cutoff*. A chute cutoff has formed at the left, cutting back of the bar deposits laid down on the inside of the meander. The cutoff has shortened the stream considerably."

The witness also used illustrations from *Fluvial Processes in Geomorphology* to show a steep bank on the

outside or eroding portion of the curve and a gently sloping point bar on the inside of the curve (Ex. P-1599 and P-1600). He used another historical record of a portion of the Mississippi River from a geology text entitled *Geology, Principles and Processes* showing successive positions of the river from maps of various dates and a cut-off of the point bar occupying the inside of the meander. The area shown is called "Moss Island" and shows a "Cutoff of 1821" (Ex. P-1602). This illustrates that from an historical standpoint it is possible to recognize progressive or successive positions of a river and its history.

The witness testified that these principles apply to the Missouri River. He made a study of the Missouri River in the vicinity of Otoe Bend referred to as Otoe Bend Island or Schemmel's Island. In making this study he visited the area on a number of occasions, observed the topography of the area adjacent to the river, noted the configuration of the river, and compared the area with current maps and older maps using existing maps and ancient maps. He did not take any soil samples because he felt that soil samples were irrelevant in tracing the successive positions of the river. He studied maps dated 1852, 1856, 1858, 1879, 1884, 1890, 1895, 1905, 1923, 1940, 1946 and 1947. In order to understand the historical development of the river in that area, he requested the Nebraska State Surveyor to extract from the several maps certain data, principally the several bank lines of both the right bank and left bank, in order to see the direction in which the river was shifting.

A map was presented showing successive positions of the left bank of the river in the vicinity of Otoe Bend in the years 1852, 1879, 1884 and 1890 and the witness checked these locations against the original maps and found them to be accurate (Ex. P-2423). This exhibit indicated that the bend existing in this portion of the river in 1852 behaved as meanders typically do by shifting eastward and downstream. In 1879 the left bank of the river, or the Iowa bank, had shifted towards the east. In 1884 the position was farther east, and in 1890 the left bank had shifted some more, consistent with the illustrations indicating the outward migration of a meander.

The witness also identified a map showing successive positions of the right or Nebraska bank in the years 1852, 1879, 1890, and 1895 (Ex. P-2422). When the Windenburg traverse of Schemmel Island (Ex. P-233) is placed upon Exhibit P-2422, it is almost entirely within the point bar as it existed in 1895. Dr. Gilliland, from his studies of the characteristics of a meandering river and from the principles which he described, and from the studies of the Otoe Bend area and his investigation of the topography, was able to form an opinion based upon reasonable geological certainty as to the manner in which the river moved from 1856 to 1890 in the areas shown on Exhibits P-2422 and P-2423; and his opinion is ". . . that the Missouri River in this particular area moved in the same fashion that typical meandering streams move, basically by erosion on the outer portion of the meander causing a shifting of the meander towards the outside with simultaneous deposition on the inside of the bend on the point bar." (Vol. XI, p. 1554).

Dr. Gilliland then used a mylar overlay prepared by Mr. Willis Brown showing the various locations of the river from the 1852, 1895 and 1905 maps and the designed channel as it appears on the Alluvial Plain map (Ex. P-235 and P-235-A). The 1895 designation is of the right bank from the Pierce Survey and the left bank of 1895 was only a projected bank for purposes of the comparison. These exhibits show a large area between the right or Nebraska bank as shown by the 1895 Pierce Survey and the left bank of the Missouri River as shown by the 1905 Geological Survey. The river had moved considerably to the west. Dr. Gilliland also used a mylar Zip-a-Tone map prepared by Willis Brown showing the Missouri River in 1852, 1895, 1923 and 1940 from Corps maps and the 1895 right bank Pierce Survey (Ex. P-236 and P-236-A). The Missouri River in 1852 is shown to the west. The 1895 channel is considerably to the east in a pronounced bend. Then the 1923 map shows the river back to the west and then the 1940 designed channel is in some places back to about the location in the original government surveys.

In discussion of these exhibits, the testimony was as follows:

> "The Court: Let's look at the 1905. How did it get back to that area in 1905?
>
> "The Witness: In view of all past known observations, the only possible way that that could have come back from its 1895 position to the position in 1905 is through an avulsive change either by means of a neck cut-off or a chute cut-off. Its location across the point bar which is well established renders it like many other streams that have shifted in this fash-

ion. • • •

Q. (By Mr. Moore) I take it, Dr. Gilliland, that there is no information that was available to you showing the location of the river between 1895 and 1905, is that correct?

A. No.

Q. Based on the opinion you previously stated as to the movement of the river up to 1895 and the location you found the river to be in 1905, is that sufficient information upon which to form an opinion as to how the river moved from its 1895 location to the 1905 location?

A. It is sufficient to say that sometime between 1895 and 1905 the river started flowing across the point bar. I think the only conceivable way of that occurring is through an avulsive change, as is the case in all known situations of cut-offs.

Q. Do you know of any manner by which the river could have moved from its indicated 1895 location to its indicated 1905 location other than by an avulsive change?

A. Except by man-made artificial channelling, I know of no way in which that could have happened.

Q. Why not?

A. Because, as illustrated, it is widely known that where a distinct meander exists the erosion does occur on the outside of the curve. The 1905 position of the river is well within the curve and not on the outside of the curve. Recall too that the maximum velocity is concentrated on the outside portion of the curve. Where you have maximum velocity you have maximum erosion. Conversely, where you have low velocity on the inside of the curves you have deposition.

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> That is the reason for the occurrence of the point bars on the inside of the curve. The velocity is lower there. The sediments being transported are deposited." (Vol. XI, pp. 1555-1558)

Although Dr. Gilliland did not have the testimony of Mr. Duncan and Mr. Cockerham available to him specifically locating the navigable channel of the Missouri River in the Iowa chute in 1899 and 1900, that testimony certainly supports and is entirely consistent with his findings.

Dr. Gilliland then pointed out on the 1890 Missouri River Commission map a low depression occupied by a slightly sinuous stream which he interpreted as a "natural chute" to the lower right of the words "Frazers Isl." which is on the point bar occupying the inner part of the meander. He was asked by the Court:

> "The Court: Now, would that have a tendency —Would that develop into what we call an avulsion through there and cut the whole thing off or not?
>
> The Witness: It certainly could because with any rising of the water level it is going to tend to flow through there, and you might note this, the distance between here and here (indicating) is shorter this way than that way (indicating). The elevation is the same so we essentially then would have a steeper path along this route than around this much longer route (indicating). Because of the steeper path, the water would flow naturally and obviously more rapidly. More rapidly flowing water, as you or as anyone well knows, can transport more material and thus erode more readily than slower flowing water. That is the reason why many times chutes are enlarged and cause abandonment of the meanders.
>
> The Court: Of course, the testimony in this case

has been too that in the Engineer's canals, they are making them smaller than they expect the channel to be in a short while. In other words, the scouring of the river will deepen them and widen them. Will that be done naturally?

The Witness: I missed that, I'm sorry.

The Court: The Engineers say, as I understand this testimony, when they build a canal tending to transfer the channel from its present location into a canal and then into the river again, they build an 80-foot channel expecting it is going to widen and deepen and take the whole river. Does that happen naturally?

The Witness: If the canal provides a proper slot, it would be normal to have water flowing through there faster and with more erosive ability.

The Court: Getting the scouring effect, they call it.

The Witness: Yes.

The Court: You call it that too?

The Witness: Yes; that is a perfectly good word.

The Court: That happened naturally on Frazer's Island?

The Witness: Yes." (Vol. XI, pp. 1559-1560).

The witness also testified on cross-examination that he believed there was no kind of information in the way of scarps and soil tests that would really lead a geologist to say that the river had moved east or west in view particularly of the sequential positions of the river as shown on the maps. The whole area is a complex of soils and alluvial materials deposited by the river. The real

indication that the river consistently moved eastward is twofold (1) a succession of maps showing a succession of positions of the river and (2) this is confirmed by the experimental and other empirical data typifying this as a typical meander consistent with the movement of meanders in other areas. Study of the depressions that indicate abandoned channels or the movement of the river eastward would not necessarily have a solidifying effect on his opinion because in very soft alluvial material as underlies the entire area, you have easily eroded material. The rains have subdued and obscured many of what might be called marks. Furthermore, there has been extensive agriculture in the area. Plowing alone would obscure some things such as the size of the "marks" that are there. Perhaps even deliberate leveling might have obscured some of them so a study of these minute marks couldn't confirm his thesis which he would have been pleased to confirm in any way possible. In addition, a natural levee built on the outside of a curve of a river is going to be destroyed as the river moves in that direction by undercutting and shifting towards the outside of the bend. The cut bank, if it is eroded, no longer exists. As the river moved eastward, only elongated depressions or ridges as are left on point bars would have remained on the right bank, and typically it would have the gradual slope of a point bar. The witness reaffirmed his testimony as to the history of the river and that there was an avulsive change between 1895 and 1905. The avulsive change caused the river to flow in an area considerably west of the maximum eastward location of the river, leaving part of the land that had been built up on the point bar, or accreted to the point bar, exposed. In all subse-

quent maps, the river has not extended as far east as it did in the most easterly position prior to 1905. Schemmel Island is located in the area that was a point bar prior to the avulsive action.

Dr. Gilliland's conclusions are also substantiated by the study of tree number 230 which was a cottonwood tree. This tree was cut down and the rings were studied by the dendrochronologist, Mr. Harry Weakly. He testified that on May 1, 1965, they took a plug from tree number 230 which was located to the east of the Schemmel land. The plug was so unsatisfactory that the entire tree was cut down on December 17, 1965, and a slab was taken from the top of the stump comprising a complete cross section of the tree. The diameter of this tree measured 58 inches at the time of Mr. Weakly's testimony and he indicated that, since it is thoroughly dried now, it may have shrunk since cut. Mr. Weakly spent 40 hours working on that slab. It took him so much time because an area of the slab was injured by lightning which struck the tree and exploded the cells, and he had to cut thin sections with a razor blade and examine them under somewhat higher magnification. He counted along four radii of the tree to the outside and he used a power sander and in no place could he count a direct straight radius. He had to count until he came to a fault and then either go one way or the other to where he could count, until he could get back on the original radius. He counted 71 rings on the tree and determined that the growth started not later than 1895. At the time it was cut, this tree was standing by itself except for a little brush, and photographs of the tree, taken December 17,

1965, before and after it was cut down, are in evidence (Ex. P-381 & P-382). Mr. Brown testified that tree number 230 is approximately 2400 feet east of Schemmel Island.

Mr. Willis Brown prepared a mylar overlay locating the trees (Ex. P-234) and when this overlay is placed upon the 1895 Pierce right bank survey (Ex. P-213) and upon the 1905 Geological Survey (Ex. P-215), the 1895 tree is located on the point bar to the west of the 1895 right bank and is to the east of the 1905 left bank. Consequently, this is in the area to the west of where the river was in 1895, but to the east of the river as shown by the 1905 survey and the river had moved back to the west without destroying that tree. This is physical evidence of a sudden change or an avulsion. The river never thereafter washed away the area where the tree was located since that tree survived up until the time it was cut down in preparation for this trial. No reliable survey can be found following 1905 which placed the Missouri River east of that tree, although there may have been isolated instances of flooding which temporarily covered the valley.

The plaintiff contends that this movement of the river between 1900 and 1905 was sudden and met all the tests of an avulsion, leaving the boundary between Nebraska and Iowa in the abandoned main channel to the east of the Schemmel land. The boundary would appear to have been in the approximate location of the Iowa Chute and would have remained there up until the time of the Iowa-Nebraska Boundary Compact of 1943. However, plaintiff contends that determination of the exact

location is not necessary since the significant point is that there was a title "good in Nebraska" to the Schemmel land which Iowa agreed to recognize in the Iowa-Nebraska Boundary Compact of 1943.

That the Iowa Chute marked the abandoned main thread of the Missouri River, and that this was generally recognized by the old people in the vicinity, was indicated by the testimony of Iowa's witness, Mr. Otto Hinze, when questioned by the Court as follows:

> "The Court: What did the old residenters say what caused that, what built that chute? What did you understand when you were a kid about how it got there?
>
> The Witness: At one time the Missouri River was over that far.
>
> The Court: That is understood in that area?
>
> The Witness: That is understood in that area, yes, and then it started going back again and went back to its present place. * * *
>
> The Court: Going back to that chute a minute, what do the old people say was in that chute?
>
> The Witness: At one time they claim that was the Missouri River, years and years ago.
>
> The Court: It wasn't very wide?
>
> The Witness: It was from there west.
>
> The Court: There were two banks there?
>
> The Witness: Yes, but that bank was throwed up there again later.
>
> The Court: In other words, the left bank of the chute would be the left bank of the river, is that what you are saying?

The Witness: Yes, if you are facing south, that was the bank.

The Court: What about the inside bank, the west bank, when did that appear?

The Witness: Well, I think that eventually filled in there and the chute stayed open for a few years after the rest of it filled in. The river most generally fills next to the bank and leaves those blamed place like that.

The Court: Leaves the bar, does it?

The Witness: Leaves another ravine that way."

(Vol. XXI, pp. 3104-3106)

Hinze was born in 1900 and first became familiar with the Iowa Chute about 1915.

Iowa Records Indicating Eastward Movement of Missouri River and Abandoned Channel in the Iowa Chute

Investigation into other records in Fremont County substantiates the information concerning the easterly movement of the river up until just before 1905 and the fact that the Iowa chute marks the abandoned main channel of the Missouri River.

Book No. 1 in the Fremont County Court House in Sidney, Iowa, has a Delinquent Real Estate Tax List which shows areas as being "in river" (Ex. P-142). The years delinquent run from 1866 to 1874 and the index map prepared by Mr. Brown shows two areas in the river in the northeastern part of Section 15, above which is typed in red "called 18 acres". This area was the north half of the northeast quarter which would normally be 80

acres but appears as only 18 acres on the delinquent real estate tax list. There are also two areas at the top of the index map in Section 3 which are shown as in the river and there are several areas to the southwest which are also shown as in the river.

Exhibit P-143 from the Delinquent Real Estate Tax List shows a checkerboard pattern of areas in the east half of Section 10 and in Section 15 which are shown as being in the river. The dates on this page are from 1874 to 1880. Other pages from the Delinquent Real Estate Tax List Book No. 1 show the west half of the southwest quarter of Section 14 as being in the river and also, in Section 22, part of the northeast quarter, 55 acres are shown as in the river (Ex. P-144). These are dated 1883.

In the Journal of Board of Supervisors, Fremont County, Iowa, Book 7, which is on file in the County Auditor's Office, an entry appears under date of April 2, 1889, as follows: "... Resolved by the Board of Supervisors of Fremont County, Iowa, That the tax against the S2NE&N hf SE4 14-67-43 be reduced to $5.90 for the year 1888, part of the same having gone into the river" (Ex. P-176). The plat attached to Exhibit P-176 shows this area in green on the index map as being between the Iowa chute and the Schemmel land. This area is in the east half of Section 14 and is about 700 or 800 feet west of the Iowa chute.

Another entry from the same book contains the following dated November 15, 1889:

> "Resolved that the Treasur be authorized to recin'd the tax for year 1888 on the NE4 NE4 Sec 14 T67

R43 by reason the Same has been washed in the Mo River." (Ex. P-177)

This is a 40-acre tract in the northeast corner of Section 14 and is approximately 800 feet west of the Iowa chute measured along the north section line of Section 13 which is the road which the Schemmels take to their property.

Page 127 of the Tax List of Washington Township, Fremont County, Iowa, for the year 1885 (Ex. P-165), shows two areas as being in the river. One is the west half of the southwest quarter of Section 14 which is on the present location of the Schemmel land and the description is: "All in River" "W2 SW4" Section 14-67-43 and "All in River" is also shown as applicable to the west half of the northeast quarter of Section 22. Page 14 "Record of Sales of Real Estate, Fremont County, Sold for Delinquent Taxes", shows the north half of the northeast quarter of Section 14-67-43 as "in River" and shows this piece as being 40 acres. The records show that it was sold in 1894 for taxes. That 40 acre tract has been marked in red on the index map and the words "In River" written in that area by Mr. Brown and the Schemmel land has been identified in red (Ex. P-157). The tract is east of the Schemmel land and west of the Iowa Chute.

Page 16 of the Record of Sales of Real Estate, Fremont County, Sold for Delinquent Taxes, shows the east 77 acres of the west half of the northwest quarter of 13-67-43 as consisting of twenty acres, and the notation below this description is "57 *a* in River". This piece is shown as sold for taxes for the year 1899 with the date

of sale December 3, 1900 (Ex. P-159). Mr. Brown, on the index map, has shown the piece as being just south of the road going into the Schemmel land and part of this tract is on both sides of the Iowa Chute. Mr. Brown has drawn a black line along the Iowa Chute and written to the inside of it "Iowa Chute". This line goes right through the area marked in red in which he has typed "57 Acres in River". He has also outlined the Schemmel land to the west and written "Schemmel" within it (Ex. P-159). The 20 acres are the amount of land to the east of the Iowa Chute and the "57 Acres in River" correspond to the area west of the Iowa Chute. This would seem to negate Iowa's witness Ruhe's conclusion that the river was moving back to the west after 1890 since the area just west of the Iowa Chute is shown as being in the river in the years 1899 and 1900.

The Record of Sales of Real Estate, Fremont County, Sold for Delinquent Taxes, in the office of the Fremont County Treasurer also shows the east 77 acres of the west half of the northwest quarter of Section 13-67-43 as consisting of 20 acres and the description "57 Acres in River" is referred to (Ex. P-160). The index map again shows this as being on both sides of the Iowa chute with the 20 acres corresponding to the land to the east. The entry is shown twice on the page and the records show this piece of land was sold to J. J. Cook on December 3, 1900, for taxes for the year 1899 and also shows it sold on December 6, 1901, for the taxes for the year 1900. This, again, indicates the land in the river in 1899 and 1900 and also substantiates the fact the Missouri River was in the Iowa chute in 1900 and had not started to

retreat to the west by 1890 as theorized by defendant's witness, Ruhe.

There are also in the Office of the County Treasurer of Fremont County, Iowa, pages from the ancient Treasurer's Plat Book which have certain notations of land being "In River". These pages were not dated and show various areas as being in the river with some of these locations east of the present location of the Schemmel land. On one of the index maps prepared by Mr. Brown from these descriptions, the river is shown as going through the "Jon Foster 80" which is in the west half of the northwest quarter of Iowa Section 13. At one point this shows the river within 500 feet of the present location of the Iowa chute. These maps show movements of the river with the river first to the west of the center of Section 10 and then to the east through Sections 11 and 14 and finally the notation showing the river through the Jon Foster 80 in Section 13 and near the Iowa chute (Ex. P-166 through P-177 & P-2389). The witness Cliff Cockerham testified he knew John Foster, who owned land just west of where Propp's farm is today and which was on both sides of the Iowa Chute, and that the part west of the Iowa Chute was cut into the Missouri River and the Fosters moved out.

A resolution by the Board of Supervisors of Fremont County, Iowa, dated August 1, 1905, stated:

> ". . . the County Auditor be and is hereby instructed to redeem from tax sale for the years 1893 and 1894, the following described land, to-wit:
>
> The North half of the Northeast Quarter of Section 14-67-43,

for the reason of wrongful assessment, and in name of one not the owner of said land, *and for the further reason that at that time said land had mostly washed into the Missouri River and should not have been assessed for taxation.*" (Ex. P-174) (Emphasis supplied.)

The attached index plat shows the land described as being "mostly washed into the Missouri River" as extending to within one-quarter mile of the Iowa Chute along the farm road from Propps into Schemmels. This document also refutes Ruhe's findings.

Even after the river had moved back to the west from the Iowa Chute, the Iowa records in the earlier days acknowledged that it had been there. Ditch Record 3, Page 286 of the Fremont County Records, contains a resolution establishing the Knox Drainage District and fixing the boundary and approving damage claims. It is dated June 11, 1909, and recorded June 12, 1909. The description of the Knox Drainage District goes ". . . to the levee *on the east bank of the Missouri River,* thence northerly up said levee about one mile to the west line of section 12-67-43, thence north ½ mile to the C. B. & Q. Railroad. . . ." (Ex. P-196). (Emphasis supplied.) The index map shows this boundary to be at the location of the Payne levee along the Iowa Chute between the Propp and Givens farms. Mr. Brown has identified on the map "Levee on E. Bank Missouri River" and Schemmel Island is shown to the west. The resolution states that a report of the Commissioner was filed December 9, 1908, and subsequently amended and filed June 11, 1909. So at this time, the levee by the Iowa Chute was still

described as being on the east bank of the Missouri River. The witness, Willis L. Brown, testified that the description follows along the Iowa Chute and that the Iowa Chute looks like a natural ditch. It has banks on both sides and in wet weather it is full of water. However, it is not a drain coming from the hills. It starts out two or three miles below Nebraska City adjacent to the Missouri River and meanders around and at the Propp place is about as far east as it ever gets. It comes back to the Missouri River and is probably five or six miles in length. Mr. Brown also testified that this ditch is commonly known in the area as the Iowa Chute.

The Iowa State Highway Commission Official Map of Fremont County, Iowa, filed February 14, 1914, in the office of the Fremont County Auditor also shows the Missouri River covering the southwest half of Section 11 and it is just to the east of the section corner common to Sections 11, 12, 13 & 14, which is close to the location of the Iowa Chute. The right bank or Nebraska bank follows a configuration very similar to the Pierce Survey. Although the other records and testimony indicate that the river was not at this location in 1914, yet this map constitutes another recognition by Iowa officials that the river had been located there and that the east or left bank represented the limits of Fremont County, Iowa (Ex. P-1707).

There is also a plat in the office of the Auditor of Fremont County entitled Knox Drainage Ditch Outline of District and Location of Ditch, filed September 2, 1920, and signed by Ben B. Hurst, Engineer, in which the drainage ditch boundary runs along the east-west center line

of Section 13 as far west as the east line of Section 14 and then curves up to the east crossing the line common to Sections 12 and 13 and then northwesterly to the east line of Section 11 and then north. This again goes along the Iowa Chute and Mr. Brown has identified this on the Exhibit in red (Ex. P-1765).

In the Engineers' Report dated November 14, 1922, recorded in Ditch Record No. 5, Page 128, Fremont County, entitled KNOX-PLUM DRAINAGE DISTRICT, a description is contained of the boundaries of the proposed district which includes:

> ". . . thence west *to the high bank of the Missouri river, thence north along said high bank* to the point where it intersects the west line of section 12-67-43; thence north along said section line to the point where it intersects the east line of the C. B. & Q. Railroad right of way. . . ." (Ex. P-198) (Emphasis supplied.)

Mr. Brown's index maps outlined the area in red except where it ran along the Iowa Chute because the description just referred to "high bank of the Missouri river", but he testified that the Iowa Chute configuration corresponds to the description.

Ditch Record Book No. 5, Page 129, concerning the proceedings of the Missouri Valley Drainage District No. 1, Election District No. 3, signed by Ben B. Hurst, Engineer, on preliminary surveys on November 24, 1922, which is on file with the County Auditor, Fremont County, shows described boundaries of the proposed district as:

> ". . . thence west to the high bank of the Missouri river thence north along said high bank to the point

where it intersects the west line of section 12, township 67, range 43; . . ." (Ex. P-1767)

No index map is attached to this exhibit but this is the slanted or curved line between Propps and Givens which runs along the Iowa Chute.

A map of Missouri Valley Drainage District 1, Fremont County, Iowa, was filed on February 5, 1923, in the County Auditor's Office. This map was by Ben B. Hurst, Engineer for the District, and was dated November, 1922. The boundaries of the District are shown and run around the curved area in Sections 13 and 12 along the Iowa Chute (Ex. P-1766). Along that line is a designation "Boundary Line of District".

Page 626 of Ditch Record Book No. 5, concerning proceedings of the Missouri Valley Drainage District No. 1, Election District No. 3, from the Fremont County Auditor's Office, also has the description:

". . . thence in a southeasterly direction following the meander *of the abondoned (sic) Missouri River bank* through the West half of the SW¼ of Section 12 and the West half of the NW¼ of Section 13 to the Southwest corner of the Northwest quarter of said Section 13, Township 67, Range 43. . . ." (Exhibit P-1768). (Emphasis supplied.)

The resolution in which this description was contained was passed on May 4, 1931. Even at that time the County Officials recognized the Iowa Chute as being the abandoned Missouri River bank. The Map of Election District No. 3 by H. Greenwood, County Engineer, dated 1931, which is a record in the office of the Fremont County

Auditor, shows the limits of the District ran west along the center line of Section 13 to where it touches the east line of Section 14 and then north on a line curved to the east to the ¼ corner of Sections 11 and 12 and then it goes directly north (Ex. P-1769). George Propp is shown as having the land in Section 13 through which the curve appears and M. M. Payne is shown as having the land in Section 12. This map also recognizes the limits of the District as running along the abandoned river bank between Propp and Givens.

Exercise of Jurisdiction Over, and Taxation of Schemmel Land by Nebraska

In 1895, the Otoe County Commissioners ordered lands added to the tax rolls of Otoe County, Nebraska, and this included the accretions surveyed within the Pierce Survey of 1895. The Commissioners Record of June, 1895, in the Otoe County Clerk's Office shows changes made by the Board of Equalization and the order that these accretions be added to the Tax Lists of Otoe County for the year 1895 (Exhibit P-133). Mr. Willis Brown testified concerning tax records of Otoe County taken from the Otoe County Treasurer's Office commencing with the year 1895 (Exhibits P-1 through P-125). Most of the land surveyed by Pierce was on the tax rolls in 1895 and all of it was taxed by 1896. The acreages shown on the 1895 Pierce Survey appear on the tax rolls with Nebraska Section 32 shown as 695 and a fraction acres (695.78) instead of the usual 640 acres, and this additional acreage was shown in the Pierce Survey as part of Section 33. The original Frazier's Island is shown as divided up into

timber lots with many small tracts of between two and ten acres. It can generally be said that all of the area within the Pierce Survey, which includes the Schemmel land, appeared on the Nebraska tax rolls continuously from 1896 through the date of the Iowa-Nebraska Boundary Compact of 1943. There were some discrepencies which were explained by the testimony, as some areas may have been described in different sections. For instance, Mr. Brown testified that the 1907 tax rolls showed Section 29 to be 395.08 acres and that same acreage designation appeared as Section 19 in 1908 and for some time thereafter. This was apparently a clerical error within the Otoe County Treasurer's Office. The index maps illustrate the tremendous amount of research required for this study. Mr. Brown testified that they only researched the tax information on Nebraska Sections 32 and 29 and did not look it up for Section 5-7-15. The information isn't void in that area, it just hasn't been shown.

In 1905, a tax suit was filed in the District Court of Otoe County, Nebraska, captioned *"State of Nebraska, Plaintiff v. The Several Parcels and Land Hereinafter Described, and all Persons and Corporations Having or Claiming Title to or any Interest, Right or Claim in and to Such Parcels of Real Estate or any Part Thereof, Defendants"* (Exhibit P-138), which included descriptions of land in the Schemmel area. This suit found that certain taxes were a valid lien against the real estate and directed that the parcels be sold.

On December 14, 1908, a Treasurer's Deed from F. M. Cook, County Treasurer of Otoe County, Nebraska, was filed for record in the office of the Register of Deeds of

Otoe County conveying 695.78 acres described as accretions to Sec. 32-8-15 and other land, a good portion of where the Schemmel Island is today, to H. H. Hanks. This deed was also recorded in Iowa with the Fremont County Recorder's Office on March 17, 1961. The land included is within the Pierce Survey. It extends over into what would have been Nebraska Section 33 east of the Schemmel land. The deed states:

> "Whereas, At a public sale of real estate under a decree of the District Court, in the State tax suit for the year 1905, held in said County aforesaid, on the 8th and 13th days of November 1905, the following described Real Estate was sold . . ."

The real estate was not redeemed, and the Court confirmed the sale and ordered the execution of a deed of conveyance and the County Treasurer conveyed the real estate unto H. H. Hanks in fee simple, subject, however, to all unpaid taxes and assessments (Ex. P-141).

Henry Schemmel's title traces back to that first tax deed but Mr. Schemmel also testified that, when he and Dan Hill first took title to the property, it was under a tax sale certificate for part of it.

Portions of the area were also included within various Nebraska quiet title actions over the years. The quiet title action of *Yearsley v. Gipple,* filed in the District Court of Otoe County, Nebraska, on March 2, 1917, included land located where the western part of the Schemmel land is found (Ex. P-138). A decree was entered on November 25, 1925, quieting title to Nebraska land in Section 30 and part of Frazier Island and extending onto the northern part of Schemmel Island in the case of

Joy A. Larson, Plaintiff v. William Ivers, et al., Defendants, in the District Court of Otoe County, Nebraska (Ex. P-187). In addition, the quiet title decree in the case of *Yearsley v. Yearsley, et al.,* in the District Court of Otoe County, Nebraska, dated June 21, 1923, quieted title to the Yearsley land which is right across from what is presently the Schemmel land (Ex. P-2229). The Corps of Engineers moved the river over into some of this Yearsley land when it moved the river to the west to place it in the designed channel.

The Nebraska Courts were also exercising jurisdiction over the land immediately prior to the Compact as evidenced by two additional quiet title cases; the case of *Charles G. Zimmerer, Plaintiff v. Dan Hill, Mildred Hill, his wife; Henry Schemmel, Lucile Schemmel, his wife; George Ward; The County of Otoe, et al.,Defendants,* quieted title to a large portion of the Schemmel land. The decree was entered on May 28, 1941, in the District Court of Otoe County, Nebraska. The quiet title case of *Martha Higgins, Plaintiff v. Dan Hill, Mildred Hill, his wife; Henry Schemmel, Lucile Schemmel, his wife; George Ward, the County of Otoe, et al., Defendants,* in the District Court of Otoe County, Nebraska, also included land on Schemmel Island and this decree was entered on May 28, 1941 (Ex. P-189, 194 and 190). These cases will be discussed in connection with the Schemmel title.

Consequently, at the time of the Iowa-Nebraska Boundary Compact, not only was the land being taxed in Nebraska but also the Nebraska courts had exercised jurisdiction over it.

Movement of the Missouri River Following 1905, Construction Work by the Corps of Engineers and the Otoe Bend Canal

It is plaintiff's position that the documentary evidence, Dr. Gilliland's testimony, and the physical evidence of tree No. 230 taken with the testimony of Mr. Weakly, all established that an avulsion occurred between 1900 and 1905 which fixed the boundary in the abandoned channel of the Missouri River which would correspond with the Iowa Chute. The continued exercise of jurisdiction over the land by Nebraska further confirms this conclusion. However, there were other avulsions in this area in which the river moved by itself or was moved by man-made acts farther to the west and into Nebraska. AT THE TIME OF THESE LATER AVULSIONS, AND AT ALL TIMES FOLLOWING 1905, THE RIVER WAS ENTIRELY WITHIN NEBRASKA AND THE LAND ON BOTH SIDES OF THE RIVER WAS NEBRASKA LAND UNTIL THE IOWA-NEBRASKA BOUNDARY COMPACT OF 1943.

Mr. Elmer (Buck) Garrison, age 79, of Hamburg, Iowa, testified that he first moved on the Albert Propp place in 1905 and lived there until 1908. He then moved to about a mile east and a quarter mile north where he lived until 1913. From there he moved about two miles north of Albert Propp and lived there two years and then moved three-quarters of a mile east of the Propp place and lived there for the following twenty-seven years. When he first moved to the Propp place in 1905, the Iowa Chute was a running stream located about the same place as it is today. The water came out of the Missouri River

up north and went back into the Missouri River south of Propp's about three-quarters of a mile. In 1905, it was all the way from knee deep to over his head and it was about 50 yards across. Water was still flowing in the Iowa Chute until 1911 or 1912. Mr. Garrison testified that the John Payne Levee started on the Mose Givens land about 300 yards up the field and came just west of the Propp barn and went straight south and then back to the river. There were no levees further north in the next mile or two.

In 1905, the witness was fifteen years old, and he said the Missouri River was pretty well to the east side of what is now the Schwake farm. He crossed the Iowa Chute "lots of times" during 1905 to get to the river. Between the Iowa Chute and the river by the Schwake farm, there were small willows and cottonwoods and brush. The east bank of the river ran through Schwake's and the depression is there yet. The river moved west in about 1911 or 1912. It just jumped over to another low place going through over on the bar in the spring. It jumped during high water in a week or so. Lost Lake was on the east bank of the river, on the east side of the Schwake place. There was water in the Iowa Chute and in Lost Lake and the Schwake Channel was the Missouri River up until 1911 or 1912 when it left there. The current left the Iowa Chute at about the same time although water remained. The witness was questioned about this movement by the Court as follows:

> "The Court: You didn't, but when the river was there in front of the Propp place you have talked about, there wasn't any work done on it then to move it?

The Witness: No.

The Court: The Engineers didn't move it over?

The Witness: No, sir.

The Court: Build any dikes or anything?

The Witness: Nothing.

The Court: The river just moved itself?

The Witness: The river just moved back. Jumped back by going down a lower draw. It would get up and cut a new draw out.

The Court: What did it leave after it cut that draw? How much land did it leave?

The Witness: Sometimes it would leave a mile. The first time practically a mile wide between jumps.

The Court: Of dry land?

The Witness: Of dry land, yes.

The Court: How many times did it do that?

The Witness: I just seen it do it once.

The Court: That time it left a mile of land?

The Witness: It left a mile of land in there and maybe a little more.

The Court: How far north and south?

The Witness: I would say three miles.

The Court: Three miles north and south and a mile wide?

The Witness: Uh-huh.

The Court: All right."

(Vol. VIII, Pages 1062 and 1063.)

The witness saw steamboats in the Missouri River

when it was in the Schwake Channel. On cross-examination he stated that the Schwake Channel was about a mile west of Propps. Before the Corps of Engineers did their river work during the 1930's, the witness testified that the river was on the west side of Schwake's. It is a mile or so farther west of there now.

The maps available following 1905 up until the time when the Corps of Engineers started to move the river into the designed channel in the Otoe Bend area in 1934, show the river in about the same general location in the Schemmel area. The 1923 Corps of Engineers map (Ex. P-219 & P-220) shows four retards extending into the Missouri River on the left bank in the vicinity of Hamburg Landing. When the Windenburg traverse (Ex. P-233) is placed upon the 1923 map (Ex. P-220), one of these retards is within the lower tip of the traverse and another is just upstream above the lower tip of the traverse. The 1923 Corps map has the 1890 right and left banks shown.

The first Corps of Engineers aerial photographs discovered of the area were flown in 1926. These were originally found by Mr. Jauron in the vault in Kansas City at the Corps offices and were extremely difficult to locate. The Nebraska State Surveyor prepared an aerial mosaic from these photographs (Ex. P-1721) and identified the Iowa Chute along the Propp and Givens place. The photographs were taken during the winter and, because of the snow and ice, it is difficult, if not impossible, to identify certain features of the river. They do show bar or island area where Schemmel Island is located.

The Corps of Engineers also have 1926 maps (Ex. P-221, P-222 and P-223) which are revisions from these airplane photographs which show the 1890 thalweg or channel line as a dashed line with mile number 600 and 605 circled. This channel line can also be seen on the 1946-1947 tri-color map and Appendix B. Mr. Brown marked this line in red on the 1926 maps in the Schemmel area which shows the thalweg or 1890 channel line running to the east of present day Schemmel Island for the most part. Mr. Brown identified the Hamburg Landing Road which is about a quarter mile south of the southernmost point of the Windenburg traverse on Ex. P-221. When the overlay of the 1926 Corps map (Ex. P-223) is placed upon the 1923 Corps overlay (Ex. P-220), the Iowa Chute can be compared with the left bank of the 1890 survey which is shown on the 1923 Corps map. Mr. Brown, testifying for the Plaintiff in rebuttal, measured the distance from the 1890 left bank (Ex. P-212) to the Iowa Chute (Ex. P-2683) along the road from Propp's into Schemmel Island and testified that the Iowa Chute is 600 feet east of the 1890 left bank. A little bit to the north, on the section line between Iowa Sections 11 and 12, the Iowa Chute is approximately 1,100 feet northeast of the left bank as shown on the 1890 map. To the south, measured along the section line between Iowa Sections 14 and 23 and 13 and 14, the Iowa Chute is 1,600 feet east of the left bank of the 1890 Missouri River. This comparison shows the movement of the bend downstream and to the east following 1890. The retards around Hamburg Landing are also shown on the 1926 map. The Corps of Engineers also have maps of 1928 (Ex. P-224,

P-225 & P-226) and 1930 (Ex. P-227, P-228 & P-229). When the Windenburg traverse (Ex. P-233) is placed upon the 1930 overlay (Ex. P-229) and compared with the prints of the 1930 maps (Ex. P-227 & P-228), the extreme western portion of Schemmel Island above Dike 601.9 appears to be on Nebraska bar land immediately to the west side of the words "Otoe Bend" on the 1930 map.

The Corps of Engineers commenced to place the river in the designed channel in the Otoe Bend area in 1934. The construction work by the Corps of Engineers along the Missouri River between the States of Nebraska and Iowa was discussed by Major General Herbert B. Loper, one of the first District Engineers in the Omaha District. General Loper is 72 years old and presently resides in Bozman, Maryland. He retired as a Major General in the United States Army in 1953. For the next seven years, he had a Civil Service position as Assistant to the Secretary of Defense for Atomic Energy and Chairman of the Military Laison Committee to the Atomic Energy Commission under the Atomic Energy Act of 1946 and 1954. He resigned from that position in 1961 and was in private practice as a consultant until January 1, 1969, at which time he retired. In the military, he was in the Corps of Engineers. He graduated from Washburn College in Topeka, Kansas, in 1916 and from the United States Military Academy in 1919. He graduated from the Massachusetts Institute of Technology in 1921. In addition, he attended several military schools including the Engineer's School at Ft. Belvoir, Virginia, and the Command Staff School at Fort Leavenworth, Kansas. At West Point, he had a broad education but his

major course of study at MIT was strictly civil engineering.

The witness was assigned to the Corps of Engineer's District Office at Omaha, Nebraska, arriving in early January, 1934. He had been at the Engineer School as an instructor for about four years and was due for reassignment. It happened that the Omaha District Office had been created in the summer or fall of 1933 and the new District Engineer was Captain James M. Young, who knew the witness and who asked the Chief of Engineers if he would assign the witness to Omaha. General Loper arrived in Omaha on January 14, 1934, the date of his youngest son's birthday. His first duty was Assistant and Operations Officer to the District Engineer which continued until the 1st of August, 1935, when Captain Young was transferred and the witness became District Engineer. At the time, the primary function of the Omaha District Office was to install the regulating works on the Missouri River from Sioux City to Rulo. The general condition of the Missouri River at that time was its normal or wild and natural state except at a few localities where some regulating works had been installed as early as 1932. He described the general nature of the river as ". . . in its uncontrolled and natural state as a meandering river in an alluvial bed." (Vol. XIV, p. 1887).

In those days, by far the major part of the work was done by civilian employees. As Assistant to the District Engineer and Operations Officer, the witness' duties were to assume direct, overall supervision of the actual construction operations in the district and throughout the first year the witness spent perhaps an equal amount of

time in the field as in the office until he got to know the river quite well.

When he arrived in Omaha all the work was under contract. Sometime in late 1934 they obtained a government fleet, a government plant and personnel from the Kansas City District, and started on one job with hired labor. The district was divided into four areas with an Area Engineer in charge of each of these four areas, and a staff of accountants, inspectors, normal office staff and field staff, to both lay out the work and inspect it, supervise it day by day. At the time of the witness' arrival on the scene, the area offices were at Auburn, Nebraska City, Plattsmouth and Florence. They had an Area Engineer at each of these offices.

The project from Sioux City to Rulo was part of the overall project from Sioux City to Kansas City. The basic design of the channel was to be a 700 foot controlled width and to follow the method described in the report of the Chief of Engineers to the Congress back in 1927, and was to follow the same construction as had been done before on the Missouri River below Kansas City. The design work from Sioux City to Rulo had been done by the Kansas City District and was not complete. The trace of the 700 foot channel had been drafted from Omaha to Kansas City, and the planned structures which were intended to be built between 1932 and 1934 under the contracts in existence at the time of the arrival of the witness had been completed and designed and shown on the construction maps by the Kansas City District.

Above Omaha, in the vicinity of Sioux City and perhaps in Decatur Bend, the design work had been done because there were two jobs going on. The remainder of that part of the river from Sioux City to Omaha hadn't been done in final form because it was done in the Omaha District after the witness arrived. The general theory behind the design work was based upon actual construction operations which had been carried on in the lower Missouri River dating back as far as the 1880's and 1890's when, through both model work and experimentation, it was determined conclusively that permeable dikes built in certain ways along the river banks would cause deposit of the sediment carried by the river behind the dike and thus build a new bank for the river, and that the river could be held to sinuous curves by diking the convex banks and revetting the concave banks. This procedure will only work on a river that carries a heavy burden of sediment. The method was tried on the upper Mississippi River and had failed. This method will work with some success on any river that carries a heavy sediment load and has a sufficiently wide bottom that one can get in a type of curve that will hold. This method will probably not work above Yankton, South Dakota, because the distance between the bluffs up there is too narrow to get in the sinuous curves that are necessary for the river to hold its shape. The ideal curve, as determined by observation and experiment for a river of the capacity of the Missouri River, would be about 3 miles long and have a radius of perhaps 6,000 to 9,000 feet. In actual practice, they accepted well defined curves as they existed and tried to hold the river in these curves even

though they were not ideal. Many curves are too flat, too long, or too short. The river won't stay in a straight reach for any length of time simply because of the fact that the changes of velocity of the river will cause it to drop its bed and then it attempts to pass by that bed and in so doing creates a curve.

General Loper testified that, to start a system to create a bend, it is necessary to start from a point which has very little likelihood of being eroded away so that the river will not get behind the system, so they attempted to start at a bluff contact or very high bank contact and then proceed downstream from each of these. There were reasons why some systems were started with a little risk because 1933 was a depression year and the funds were allocated for this work based upon the expectation that it would create employment. They tried to spread it out a bit, so some of the jobs were put in locations which were not ideal to begin work in recognition of the fact that there were people to be employed in those areas. When they started this work, they did not give consideration to solid dikes or solid structures. This matter had been studied in great detail in connection with many surveys of the river, and it was recognized it would not be feasible to attempt to control the river by solid dikes as a general method of control, which did not preclude the use of solid dikes for certain specific purposes.

In driving the dike system, it is necessary to select where there is sufficient water. The dike system for a bend starts on the concave side and directs the current across the river to the opposite side, creating a concave bend there. Therefore, at the point of beginning you

must have deep water; otherwise your river will scour the bank out from under you. The take-off dikes at the beginning of a system are driven by floating pile drivers. However, as one moved downstream on that same system you run into sand bars between the high bank and the place where you are going to put the river, and across those sand bars you frequently use a skid rig, a pile driver which you drag along. If it is a low sand bar, you may wash or dredge or cut through that bar deep enough to float a driver through. This is just a matter of cost, which way is the most economical to build that dike which necessarily goes over one or more sandbars before it reaches the designed channel location.

It didn't always turn out that the deep water was on the outside of the dike system. The basic policy was to attempt to keep about 150 feet of navigable water from the end of the dike to the opposite bank and they tried to do that. Unfortunately, from time to time, the river didn't cooperate and would change direction from up above and fill in ahead of the dike and the main part of the water passed through the dike. There had been numerous occasions where it was impossible to navigate for a short time until you either washed a channel around the end of the dike or pulled a few piles and went through the dike. This was done a good many places.

In the early days, the use of dredges was not looked upon with favor by the division office. The first case of their use of dredges was here in the vicinity of Omaha, around the lower end of Florence Bend, ahead of the Narrows. This was approximately opposite the present air field. In the fall of 1936, they were experiencing diffi-

culty where the river had been diverted from the Nebraska bank by the lead-off dikes and was striking abruptly against the opposite bars and cutting back towards the Nebraska bank to the root of the dikes that had been built down below. It threatened to take out the root of the dike and it actually did bridge it and started eroding some fairly valuable property. The contractor, at his own expense and with General Loper's approval, dredged a pilot channel following approximately the location of the designed channel as it went along the Iowa shore. This was just before the freeze-up in the winter and when the ice went out in the spring, the river took to the pilot channel and broadened it out and saved the dike below. General Loper was responsible for the approval of the dredging on his own and was taken to task by his superiors until they saw how it worked out and then they were proud of him.

Basically, the proposition behind this whole river regulation was for the river to do its own work, and below Kansas City, where they had a much larger river, they found it worked very well. Up here it might possibly work eventually, but it took too much time and cost too much money and the proposal here was that quite extensive dredging would be economical. The witness believes there is no record of that first dredging because it was "kind of illegal" but he had studied the date and tied it in with other events and was certain it occurred in 1936.

As District Engineer, the witness was the direct superior of the four Area Engineers who were practical

men of long experience, and their advice was invaluable. The work of the contractors was laid out by the terms of the contract, and it was the Area Engineer's direct responsibility to see that they performed the contract. The Area Engineers had no authority to change the location, length or strength of any structure. They did have authority to direct the work to proceed or to halt if the local conditions indicated, and if they wanted to change the specifications they could make recommendations and the changes could be made in the District Office. The witness had complete authority to do this as long as it did not violate the basic design. It was fairly common for him to make such decisions which would change the structures.

The witness discussed reconnaissance maps which were made periodically through the District from one end to the other for the general purpose of seeing how the river was behaving, if there were any particular problems showing up which could be detected by a quick path down the river. It wasn't expected that these would be highly accurate and that they would show very accurately the relationship of the depth of the water with respect to any of the given features like the dikes because they were on too small a scale and the men operated from small boats with small outboard motors and, operating at that level above the water, you couldn't see too much of where you were or where the location of bars might be.

Beginning in 1935, they had a District inspection boat, the *Sergeant Pryor*, which was a twin-screw cabin-type boat operated by Captain Ed Hickman. Captain Hick-

man never used the reconnaissance maps that the witness knew of. Captain Hickman considered himself far too superior a pilot to depend upon the reconnaissance maps, and of course, when he piloted the inspection boat, he was at the altitude of some 25 feet above the water, which put him in a far better position to see where the best water was than a man sitting near the water level.

The report which led to the Congressional authorization for the 6 foot channel from Sioux City to Kansas City (1927) was based upon an expectation that the assured minimum flow during the navigation season would be around 12,000 second feet. By 1934, it had been concluded that a 6 foot channel would require a 20,000 second foot discharge. During the years 1934, 1935 and 1936 that discharge was not achieved. 1934 and 1936 were extremely dry years. 1935 was rather fair and in 1937 they had fairly good water.

The witness had an independent recollection of the work which the Corps of Engineers did immediately south of Nebraska City in the Frazier Bend area because it represented another time when he got into trouble with the higher office. Frazier Bend follows the Iowa or eastern shore below Nebraska Bend which is right in front of Nebraska City and passes under the bridge. The problem which existed there was that the river was badly split into two channels, one on either side of Frazier Island. It was a long bend in the first place, and being split in two channels of about equal capacity made it very difficult to hold in the channel they wanted to. The slope was about the same on both sides of the channel and the river entering into it came almost out of a reach,

the river was very flat, so that the river had no natural tendency to take off and shoot toward the Iowa side. The result was that they had two channels carrying approximately the same amount of water coming together at the lower end of Frazier Island and creating a lot of turbulence at that point which made the control of the river below Frazier Island extremely difficult. Below the spot where the two channels from Frazier Island came together, the river was pretty wild. *The tendency was to follow the east bank through that area.*

This channel around the west side of Frazier Island does not appear as water area on Appendix B, but it came down through the north half of Nebraska Section 25 and joined the east channel at about where the designation for Section 30 appears on Appendix B.

Otoe and Hamburg Bends at that time were essentially a single bend in the time of 1934 to 1936, approximately 6 miles long and very unstable. At the time the work started there in 1934, below Frazier Island *the principal water was going down the Iowa side* although there were some subsidiary channels through bars fairly well out into the river bottom.

They solved the problem created by the two channels around Frazier Island by building a solid dam at the head of Frazier Island which was quite unorthodox, but they had started work there in 1934 and had gotten very little improvement of the river below Nebraska City through their normal procedure so they decided to cut that chute off entirely by a solid dam. This was done in the fall of 1936 and was finished before the freeze-up

that year and was the first solid dam structure in the district. In contemplation of the building of this dam, the witness visited Fort Peck in September, 1936, and discussed with the engineers there the problem of closing a chute or channel in the Missouri River, knowing that they were facing the same problem in dealing with the closure at Fort Peck. He recalled that they told him later that when Fort Peck was closed they had to stop a discharge of 9,000 second feet. It was calculated that when the closure was made at Frazier Island, the total river was carrying about 18,000 second feet, of which at least 50% was going through the Nebraska side so that closure was about the same size as Fort Peck. The closure didn't have as good an effect as rapidly as they had hoped. The situation persisted where, as they got the first part of the dike system in place in Otoe Bend, the river kept bouncing off the bank on the other side and coming back to the Iowa side of the river.

They had given a try at canal dredging somewhat farther up the river where a situation similar to the Frazier Island and Otoe Bend situation existed. This was below Nottleman Island and Goose Island in Bartlett Bend where they had dredged a channel through and it worked quite well. The river took to the channel there in pretty good shape. While they hadn't undertaken dredging of a similar channel at Otoe Bend, it was something which he discussed with his successor, Lt. Col. William H. Hoge, in early 1938.

The witness discussed the first part of the dike system in Otoe Bend which was constructed on the Iowa bank just at the head of the bend below Frazier Island.

The lead-off dike was driven in good water and the several dikes below it started off in good water. Some of the lower dikes in the system led across the water and onto land and then perhaps back into the water again. Some of those dikes didn't wash away everything in front of them, and if they could avoid washing away the high ground in the middle of the river, they always avoided it. The system was designed always in complete hope you could cause the water to more or less push its way through the chutes as they existed on the bank where you wanted. If there was no defined chute, or if the bars in front of the dike system melted away easily, then they had no problem.

The only case the witness knows of where they bought right-of-way in those days was at St. Mary's Cutoff which was constructed after he departed, but he had laid out the plans and designed the structures.

General Loper was asked:

"Q. (By Mr. Moldenhauer) Gen. Loper, what then was the general effect of the Corps of Engineers' design and work on that one broad bend which you described which had constituted the Otoe Bend-Upper Hamburg-Lower Hamburg Bend?

A. As I stated, the bend in its natural shape was far too long to expect to maintain. So the design called for making three bends out of the one, the Otoe Bend being fairly short, the other two, the Upper and Lower Hamburg, conforming quite well to our normal requirements or normal idea of something on the order of three-mile bends on the radii of six to nine thousand feet.

Having diverted the water of course from the

Iowa to the Nebraska side by Otoe Bend, it was necessary to get back to the Iowa side in the first Hamburg Bend and then back to the Nebraska side again in the Lower Hamburg Bend." (Vol. XIV, pp. 1907-1908)

In the 1930's, the authorized goal was a six foot deep river, not necessarily for the full 700 foot width but the navigable width to be maintained at six feet was specified to be 200 feet wide. In the bends this meant that you had 200 feet of 6-foot water or greater and the minimum of 6 feet between the bends. Normally the depth within the bend would far exceed 6 feet. The critical points were the crossings between the bends where the river loses its cutting capacity by crossing in the straight line between the two bends. That goal has since been changed. The upper river dams having been constructed, it has been found that you can maintain a guaranteed flow of 30,000 second feet during the navigation season, and thus maintain a 9 foot channel of 300 feet. About 1945 the Congressional authorization called for a 9 foot channel of 300 foot width.

In response to questioning by the Court, General Loper testified that the Missouri River was divided into 3 main sections because there is some difference in characteristics. The lower is considered that section between Kansas City and the mouth. It is a broader, wider stream because of the influence of the Kaw River and several rivers in Missouri which add to the flow. Between Yankton and Kansas City there is no great influx of additional tributaries. That section of the river has the same general characteristics of the lower river, but because of the

much lower volume of water, it wasn't quite the same and was referred to as the middle river. Above Yankton is always referred to as the Upper River because the characteristics change rather markedly up there. The bluffs are in close to the river.

The witness testified there was no substantial navigation until the project was essentially completed, but to get a navigable channel which could be commercially attractive to industry and to induce industry to use river navigation, it required a minimum of 6 feet in depth. To get that six feet they had to have some control of the water to get a certain amount of flow throughout the navigation season from Sioux City on down and this was found to be about 20,000 second feet. This required the conservation of water and release from the upper dams so that during the normal low water season they could let water come down which had been stored.

Upon cross-examination, the witness stated that he remembered the events to which he has testified but has had to refresh his recollection from certain records in order to recall the dates on which they occurred. The events in a number of cases remained with him rather permanently because of the situations which created them and certain problems which he ran into.

The points from which the work was planned had to be stable points of the bank where they would not expect a bank erosion to cut behind the system. Bluff contacts were the best places where the river couldn't cut back immediately above the system, and the river had to be designed under the Nebraska City Bridge and against

the bluffs at that point. The design down through Frazier Bend and Otoe Bend and Upper and Lower Hamburg Bend was all more or less dictated by the fact that the river had to be a certain place up at Nebraska City. Some variation below Frazier Island was available. Otoe Bend might have been made longer, but it couldn't have been made much shorter because it is a rather short bend as it is. The decision to go east of Frazier Island had been made at Kansas City and his job was to construct what Kansas City had planned, but Kansas City had no part in planning the dam across the west channel at the upper end of Frazier Island. Permeable dikes were built above Frazier Island in the fall of 1933 and were in place when the witness first saw the area in 1934, but they didn't work satisfactorily and they were not causing the channel to fill. Water was running through the permeable dikes and also around the east side of Frazier Island and then coming together again at the lower end of the Island.

The Court then asked the witness:

"The Court: Might I interrupt, Mr. Murray. What did the map show at that time about where the channel was going to be, where it was designed to be.

The Witness: What are known as AP maps I'm sure we didn't have at that time. The construction maps, the design maps.

The Court: You had no maps showing one channel in that area at that time, ahead of time?

The Witness: We had a map showing where we were going to put the channel and also a map showing where the major water was going.

The Court: You had a map showing two channels?

The Witness: Yes.

The Court: And no design map had been made of the final channel?

The Witness: Yes; we had the design map to show where the final channel was to go; yes.

• • •

The Witness: There was no change from the design passed to us from the Kansas City District Office along with the contract that had been awarded to do the work.

The Court: Does that show the elimination of the east channel, so to speak?

The Witness: Yes; that map shows the east channel was to be eliminated in the Otoe Bend area." (Vol. XIV, pp. 1914-1915)

After the river came together at the lower end of Frazier Island it was wild for about six miles. It was straighter than they wanted and was a long, flat bend. It also appeared to be about a mile and a half or a mile wide. There was no well-defined single channel in the river below. There were several channels there, *with the major thrust of these being on the east.* Between these channels were low bars that were not as substantial as Frazier's Island. The witness would not state the maximum height of the land between the Iowa side and the designed channel but said it was certainly what they would call a high bar. It had vegetation on it. It was quite a substantial piece of land in there.

The witness was asked about 1931 hydrographic maps (Ex. D-291 and D-292), but he stated he couldn't confirm in any way at all what was there in 1931. He didn't see the river until 1934.

General Loper testified that to get the proper curvature, there was some encroachment on what is called the high bank on the Nebraska side in order to get the curvature of the bend and the correct width. The lead-off structure was on the left bank of the designed channel upstream from the upper end of dike 602.9, a distance of about 800 feet. Upstream from the upper end of the lead-off structure, a revetment was designed and the witness believed that the revetment came after the lead-off structure, although parts of that revetment may have been constructed. The witness did not recall the exact order of construction of the dikes on the left bank after the construction of the lead-off structures. Dike 602.9 was commenced on the Iowa shore and built westerly, 602.7 was commenced on the Iowa shore and built westerly, and the trail dike 602.9-A and 602.7-A were built generally downstream from each of the main dikes. At the time the witness left the area, the river was working on the bank about opposite 602.7 or in that general area. From there on down, it had the tendency to cut back in an opposite direction or easterly. The witness took exception to the conditions shown on the maps of 1931 as depicting the situation as it existed in 1934 and 1936. From 1934 to 1936 there was a great run of water through the slough around the west side of Frazer Island and particularly in 1936 which resulted in building an impermeable dam to prevent the water from doing this. This

dam was built in the fall and completed before the winter of 1936 so these maps do not in any way represent the conditions in 1934.

After building these dikes, they expected the depositions of sand, silt and so forth to occur downstream from them but unfortunately this did not happen after dikes 602.9 and 602.7 were built. The flow of water out of the channel was scouring in through these dikes and therefore they were not getting the deposit behind the dikes which they expected, and for a considerable length of time there was a very well-defined channel along the Iowa shore, and the fact that the water was coming through there and attacking those dikes is the reason they built the dam on the west side of Frazer's Island just upstream. There was some deposition downstream from the dikes, but it all depended upon the stage of the water and what the division of the water was. They might get a deposition one week and a scour the next, which is typical of that type of situation. It is probable that they got a deposition below the outer ends of the dike and could not get any deposition back toward the root ends. Whether that deposition got there and stayed or whether it got there and washed away again would depend upon whether you have a cross current. By the time the witness left, the situation with regard to closing of the channel had not entirely cleared up even though they had built the dam.

General Loper testified that standard procedure was to keep the main channel of the river out in front of the work, in this case to the west, but it wasn't done in

that manner completely in the entire bend. There were places in the bend where at times they had no channel in front of the dikes or no navigable, good channel as it was supposed to be.

The witness recalled the Tobacco-Rock Bluff Bend area to a less extent because the problem there, though somewhat similar, wasn't in any way as serious as it was in Otoe Bend. Below the lower end of the Bartlett Bend they had a problem somewhat similar to this which may have been created by conditions of a split flow above. In that case, in the fall of 1936 they dredged a channel through the bars which were causing the river to retreat or try to hold to the Iowa bank. His first recollection of Tobacco Bend was when there was a split channel there and the design had already been made at Kansas City to go left around Tobacco Island and to swing back close to Queen Hill and King Hill in a curve which would be reversed from the curve that went around Tobacco Island. There was no prolonged trouble that the witness can recall getting the river into the design at Rock Bluff Bend. Apparently, the river reacted well to the construction and went where it was supposed to go. When he first became acquainted with Rock Bluff Bend, there was an island in the bend generally referred to as Nottleman's Island and the design of the channel went on the Nebraska side where it is today. Before beginning the work, he did not know which of the two channels was the main channel, and in general in those cases, it was rather difficult to tell which was the main channel for any great length of time. One might be for awhile and the other might be for awhile, which was the situa-

tion at Frazer's Island later on. The witness was referred to Exhibits D-371, D-372, D-373, and D-374 which were sheets of the 1931 hydrographic survey covering the Nottleman Island, Rock Bluff Bend and Tobacco Bend area. These maps show the area as the witness remembers it only to the extent that they show two channels. There were channels on both sides of approximately the same characteristics in the Rock Bluff Bend area and it was his job to put the designed channel west of the island and that is what he did without too much difficulty. The fixed point above Nottleman Island which dictated the design downstream would be the Plattsmouth Bridge and the river's contact with the hills at Plattsmouth. The river had to be in that location and then somebody in Kansas City made a choice whether to go left or right of Tobacco Island and then that choice dictated to go right at Nottleman Island.

On redirect examination, General Loper pointed out that Exhibit D-428-A, which was a map of the Otoe Bend area, shows that the designed channel at one point encroached upon the Nebraska bank. The revetment line as shown on Exhibit D-428-A is landward of the Nebraska high bank. Also, Exhibit D-428-A had a line labeled "Bank line, September 22-23, 1931" and to the east of that a "Bank line, July 3, 1933". The bank line of July 3, 1933, is about 800 feet east of the line of September 22-23, 1931, as shown on Exhibit D-428-A. On that same exhibit, on the long dike, 601.9, General Loper testified that there was an area indicating a hole in that dike approximately 200 feet from the Iowa shore. These maps referred to by defendant on cross-examination do not show when the work

was done, so you cannot look at the map and determine what happened as of any particular date. There is no relationship between the hydrographic soundings and the bars on the maps as they were when the work was in progress.

The witness also testified that it wasn't abnormal procedure to do some of the driving of dikes across a bar before it was tied to the root of the dike or where it hit the main bank.

The area where the water was going through the dike and removing the sand, or where the sand was not depositing with the rapidity and certainty they needed, was opposite the exit of the water from the right channel around Frazer Island.

The witness was then examined by the Court as follows:

"The Court: As I understand it, those maps of the proposed stabilized channel were prepared by the Engineers without any reference to the boundary line between the two states?

The Witness: Correct.

The Court: They sought to check the river and in such a direction geographically that would be permanent and within a certain channel?

The Witness: That is right; yes.

The Court: So engineers, surveyors have trouble finding from the maps, they would have trouble finding the center line of the channel, wouldn't they?

The Witness: Well, you mean at the present time?

The Court: Yes.

The Witness: To find the center line of the channel with respect to—

The Court: Where it was in 1943 when they adopted the Compact.

The Witness: I would suspect that would be quite difficult.

The Court: Those plans were made for the purpose of forever fixing a line like you survey a section.

The Witness: No. It really wasn't a Federal problem here, this problem between the states as to what they should do about their own boundary. I don't think—

The Court: I want to separate this dispute here for the time being. It wasn't any intention of the Federal Government, the Army Engineers, to change the boundary line, to set it or anything else?

The Witness: No, sir; it was not.

The Court: They adopted afterwards, the states adopted the center line of that channel as the boundary. When do you think now, as to your recollection, that these plans were completed? What can I say that in the report that your plans were complete?

The Witness: Well, you mean the design was completed?

The Court: Yes; the design was completed.

The Witness: Actually constructed?

The Court: Completed first. When was the design permanent?

The Witness: The design of the channel from Omaha—that is, the layout of where we wanted it and what it would take to do it—were completed in the Kansas City District some time in 1933 or 1934—

1933 and 1934. I would judge probably by the end of 1934 in preparation for our contract work for the next year.

Above Omaha I don't know. We had not completed them by the time I left here in 1938 although we had the channel itself laid out where we wanted it, but we had not completed designing all of the structures and placing of the structures, and we did that only for those jobs which were to go on during the period, during the work year." (Vol. XIV, pp. 1938-1940).

The witness also testified that a number of changes from the original design had to be made after the war because the river from Sioux City to Omaha prior to 1940 was still not very well stabilized, especially the latter part of the regulation work. No funds were made available for maintenance during the war, which resulted in that section of the river getting in pretty bad shape again. In putting it back into shape, a number of changes were made in the original design because the river had changed and it made it desirable and more economical to re-design some of the locations, so even the original design would not be a good guide as to where the center line of the channel is. The witness thought there were changes made after the Compact but would not venture how significant they may have been because he was only aware of them from what he had been told.

Medford "Toots" James, born August 4, 1910, a resident of Nebraska City for approximately fifty years, testified that he has been a commercial fisherman from 1927 until about nine years ago. He has fished in the Missouri River from Niobrara, Nebraska, in the northeast corner

of the state to the Kansas state line. The main stretch of the river which he has fished is between Rock Bluff and Hamburg, once or twice a week each way since the 1930's. This was the main strip that he fished. The witness was very familiar with Hamburg Landing and testified he had fished down there a lot of times and had walked back from there, also. He was familiar with the area Henry Schemmel is farming in Otoe Bend and his familiarity with that area commenced in 1927 or 1928 when he first started fishing down there with oars. They had to row down and haul the boat back with a trailer. He is also familiar with the land where Lawrence Yearsley used to live which is directly west of the land Henry Schemmel is presently farming along the Missouri River. Back in 1930, there was an island directly north of the Yearsley land which used to be called Martin and Bates and Gude's Island and they have called it Frazer's Island.

The Corps of Engineers started working on the Missouri River below Nebraska City in the early 1930's. He thought it was about 1932 or 1934. Before the Corps of Engineers started that river work, he fished many times down at Hamburg Landing, which is probably a quarter or half a mile south of the Schemmel land. You can see the south end of the Schemmel land from Hamburg Landing. The deepest water at Hamburg Landing before the Corps of Engineers started to do their river work was right against the Iowa bank; that whole side of the river in there was the deepest. The witness testified that, as he went north from Hambury Landing in the early part of his fishing days, they followed the Iowa side of the river because that is where the water was and that is

where the fishing was. He usually fished hoop nets in six or ten feet of water for big yellow cat.

There were two channels that came around Gude's Island, one to the east, and one to the west. Where the two channels came together at the lower end and headed east or in a southeasterly direction, the water would be approximately a foot higher than the rest of the river.

The witness testified that up until 1930, there were just some pleasure boats on the river and nobody was hauling freight on the river. Any traffic was related to work on the river and a pleasure boat or two. Woods Brothers did some work at the bridge at Nebraska City and took barges up to haul rock and material.

The witness quit fishing on the river about the past nine years but, from 1927 up until that time, he was fishing down in the Otoe Bend area several times a week. He was then asked:

"Q. Can you tell us what the Corps of Engineers did in that Otoe Bend area?

A. Well, they first started driving pile on the Iowa side, shutting that channel off, or trying to shut that channel off.

Q. Was there a channel along the Iowa side when they started driving the pile?

A. Well, there should be. That is where all the boats went through. I don't know whether there was a channel or not, but all the boats had to go through there.

Q. Did you see the Corps of Engineers' boats go through there?

A. Yes, sir; I sure did.

Q. On that east side?

A. Sure did.

Q. Were they work boats, paddle boats? What kind of boats were they?

A. They were work boats and paddle boats, pile drivers, skid rigs, what-have-you.

Q. And then did you observe the progression of this work as they drove the dikes toward the west from the east bank?

A. I was going through there two or three times a week.

Q. Immediately west of this channel along the east bank in that Otoe Bend area, Mr. James, what was the river like?

A. Oh, just an island out there, water going down the east side of it, chutes going down the west side of it, trees, brush.

Q. Did you know Mr. John Grooms?

A. Yes.

Q. Did you ever see him take a boat up the east side?

A. Many a time.

Q. Mr. Grooms just died a week or two ago, didn't he?

A. Just about a week or so ago." (Vol. VIII, pp. 1075 and 1076).

(An error in transcription was made and the individual referred to was named Joe Crumes. Mr. Crumes was listed as a witness in plaintiff's pre-trial statement.)

Mr. James testified that the contractors drove the piling out from the east bank. They started out with a

floating rig until they got over to the island and then they used skid rigs across the island, going west. Mr. James was then asked:

"Q. Was that channel on the east side navigable until those dikes closed it off?

A. It was navigable after the dikes closed it off.

Q. How could that have been? What happened?

A. Well, they had to pull the dikes to get through there.

Q. What do you mean by that?

A. They couldn't get the boat through there.

Q. Couldn't they get the boat through to the west on the western side of the dikes?

A. There wasn't enough water through there." (Vol. VIII, p. 1077).

The witness did not recall the year they pulled the piling but he did know that it was 60 and 65 foot piling which they drove in there. The piling was pulled until they got the channel cut over to the other side.

Mr. James testified concerning dredging in that vicinity. He was oiler on the dragline when they dug the canal. The canal was about a mile long and ran from a little northwest of Hamburg Landing to a point northwest where they wanted the channel to come through from the Nebraska chute.

The canal was dredged on the west side of the river. There were trees where the canal was to be located and they cut the trees off before they went in with the dragline. They cut the strip off and cut the dirt out with the

dragline and roots and stumps and then the floating dredge came through behind the dragline. They cut it down to water and then the dragline pumped it out and pumped it over the dike for more discharge. The witness worked about all summer on that canal. He testified there were trees on both sides of that canal after it was dug. The canal was on the Nebraska bank. It was on the west side of the river.

The witness saw lots of canals dug during his years on the river. Every place they wanted to make a cut, they dug a canal. The witness has also seen the Corps of Engineers dredge along a dike line so they could use a floating driver. They did that so they could get in without using a skid rig. They used a jet pump to pump the sand out to get the driver in. They would use the floating driver across what otherwise would be a dry bar when they didn't have too far to go, but if they had too far to go, they used a skid rig which was a dry land pile driver.

The witness then testified:

"The Court: From the time you started fishing in 1927 until the next twelve years or so, was there anybody on the river more often than you were that you knew of?

The Witness: I tried to beat them out there to get them before they got there.

The Court: Get the fish before anybody else got there?

The Witness: I had to.

The Court: Did you make your living doing that?

The Witness: Well, between that and what I

worked on the river I managed to make a living and raise eight children.

The Court: I wasn't asking you that. I said that is what you did for a living; you made a living fishing. You had reason to be there.

The Witness: That is right.

The Court: You knew the water?

The Witness: Yes, and still do.

The Court: Still do?

The Witness: Yes, sir.

The Court: When you started, where was what you considered the main channel when you started in in 1927?

The Witness: At what particular point?

The Court: Do you know where Schemmel Island is?

The Witness: Yes.

The Court: Where was the water then?

The Witness: The main channel was right down along the Iowa bank.

The Court: The Iowa bank?

The Witness: Yes, sir." (Vol. VIII, pp. 1080 and 1081).

The river was narrow, there were places with ten or twelve feet of water in there and the narrower the river the deeper the water. There was a chute over on the Nebraska bank; there wasn't much water in it and the main channel was on the Iowa side of the island. If it hadn't been for dikes and roots and stuff, this river right today would be in Hamburg, right against the Hamburg bank on

the east. Where the river is running today, it is ten or twelve feet higher than Hamburg. The channel today was put where it is by the Corps of Engineers on the Nebraska side. Schemmel Island was originally west of this channel as the witness knew it and learned it when he started to fish there.

On cross-examination, the witness testified he was not on the river prior to 1927. There was just a boat occasionally such as a steamboat or snagboat on the river, but nothing like later years. The witness went through the dikes east of Schemmel Island. In 1928 there was a shack on Schemmel Island and there were trees on the island. The island was on the west side of the main river. It wasn't on the Nebraska shore; it was on the island but there was this small chute that ran down between there and you could wade over there and they had this tent there and they had a duck hunting camp there. At high water, there would be several channels.

The witness testified that Schemmel Island has been there as long as he can remember, but not always as one great big solid island. There have been various water ways through all that land for years as long as he can remember, but the deepest water was always along the Iowa shore. He was certain of that. There were other channels at high water. He always tried to fish the main river when he was fishing and he always hung where the deep water was. This is where there was a current and high, cutting banks where the water was deep and swift.

The fact that the main channel of the Missouri River was on the east side of Schemmel Island immediately prior

to the Corps of Engineers work was also confirmed by Mr. Fred Walker, age 53. Mr. Walker is a farmer residing at Nebraska City since December, 1968, but before that he lived in Hamburg, Iowa, where he had lived since boyhood. In 1930, Mr. Walker lived within a half mile of the Missouri River just above the state line and about a mile south of Hamburg Landing. Mr. Walker testified the Schemmel land is about a mile north of the Hamburg Landing and you can see the south end of the Schemmel land from Hamburg Landing. The area where he lived was known as the Missouri River bottom. He lived there from 1930 to about 1941 when the Missouri River "went to flooding quite a bit out there and we got away from it a ways."

The witness testified that he was familiar with the river in the area before the Corps of Engineers started doing their river work. He first saw boats on the river when the Corps of Engineers started moving material in about 1933, and when the boats came up past Hamburg Landing they would go along the east bank. These boats would be pushing barges, moving pile drivers, and were work boats of all types. Some of them had paddle wheels. They were good-sized boats. Sometimes he rowed out to some of these boats such as those with paddle wheels and had one of the men on deck throw him a line and pull him up the river as far as he wanted to and then they would shove off and he would drift back down the river. He came back down the east bank which was the fastest water. The river today is quite a distance west of where it was in those days. What placed the river over to the west was the changing of the channel by the Engineers.

On cross-examination, the witness testified that Schemmel Island was there in 1930. The river went between the Schemmel Island and the east bank because he traveled up through there; and as of today, the river is clear across the Schemmel Island at the west side of it. There was only one channel at that time that amounted to anything and that is the one that ran along the Iowa side. The river in there could have been as much as a mile wide and ". . . there would be little streams running, bars, and little streams running, and bars, but there was just one channel." Right there at Schemmels' it wasn't that wide because there was another island over on the other side. The west chute, if you wanted to call it a chute, was on the west side of the Schemmel Island and the main river was on the east side of it. There was a chute in 1930 over where the river is today. They closed off the channel so the river now is on the west side of the Schemmel Island. The witness reiterated that the river in 1930 was at the east side of Schemmel Island and it is on the west side now. He was then questioned by the Court as follows:

"The Court: The Iowa shore was visible, there was no question about that, in 1930?

The Witness: That is right.

The Court: You know where the Iowa shore was?

The Witness: And a good, high bank.

The Court: A good high bank?

The Witness: Yes.

The Court: And the main channel, you say, was over there?

The Witness: Yes.

The Court: Running water was over there. Now, where is the deepest channel and the running water?

The Witness: Down at the west side of the Schemmel Island because this has been closed off.

The Court: The Iowa side has been closed off?

The Witness: Right.

The Court: So the main channel is now on the Nebraska side?

The Witness: That is right." (Vol. VIII, p. 1119).

The work by the Corps of Engineers in the Schemmel area was described by Glenn Doyle, age 65, a farmer residing at Percival, Iowa. He has lived at Percival since 1919 and worked on the Missouri River from 1933 to 1936. In 1933, he started to work for Ross Construction Company weaving mat. He started to work one-half mile below the (Nebraska City) river bridge in the fall of 1933 and they worked their way down the river on the Iowa side in 1934. He worked on mat the whole summer of 1934. The witness testified he was familiar with the Lawrence Yearsley farm in those days and that Yearsley was pretty well known to the Ross Construction Company workers. The witness worked on almost all of the dikes that came out from the east bank or the Iowa shore near the Yearsley place. There was much water running along that Iowa shore and it was approximately 12 feet deep or somewhere between 10 or 12 feet. He had particular occasion to remember the depth of the water in that area because a man drowned there in about 12 feet of water where the Corps found him on the east side of the river.

This was just about straight across from the Yearsley farm. At that time, two pile drivers were tied up to the east bank about a hundred yards below where he drowned.

The witness worked on a long dike that came out across toward the Yearsley farm from the east in the area where Henry Schemmel is farming today or just below there. They used a floating driver out for probably a hundred and fifty yards and then they had to use the skid rigs from there on out and then hit water again. Right at the Iowa bank the water was ten or twelve feet deep and tapered off onto the bar. They unloaded the skid rig off the barge and used the skid rig on the bar. When they hit water again, the water was 3 to 4 to 5 feet deep, just enough to float the barge driver.

The witness explained how they drove piling and laid mat. They wove the mat and then put their header on it and drove the pile right through it on the bar. They would sink it with rock and then drive the dike through it. The mat was made out of 1 by 4 boards. After they got the mat laid on the water, they rocked it and sunk it. The mat was supposed to keep the river from washing the bottom out or washing the piling out from the bottom. It would accumulate material on the bottom.

The witness testified that before they started the work, opposite the Yearsley land, the boats went up and down along the east bank until they got it shut off and then they had to go around. In those days all they had there were tow boats pushing barges and drivers. Once a barge load of rock got away from them in that area and went through the dike to the north and made a hole

and they just left it that way until fall. The witness testified he only saw a little bit of dredging and that they did most of the dredging after he quit there. He worked three days on a little dredge but most of it was done after he left. Most of the time they laid the mat and drove the piling through, but some places they had to weave the mat under the pilings after they drove them. Most of it was pretty rugged, rough work.

When they got farther west from the Iowa bank opposite Yearsley, they used a land driver because there was lots of bar across there. Sometimes they had to wait until the water would get up high enough so they could use the floating drivers. Sometimes they drove the piling on bare bars with no water at all. It was easier to drive pile with a floating driver. There was not always water right ahead of the dikes as they drove them and they drove across islands with trees on them. At different times they cleared off places so they could dig out to put their dikes across. They had one place down there where they worked a month getting the brush cleaned off for a place to put a dike across. The Yearsley land was on the Nebraska side of the river and when they came out from the east or Iowa bank they drove toward the Yearsley land.

On cross-examination, Mr. Doyle testified that most of his work was done on the Iowa side. In the Schemmel area, lots of times they would have to dig out to put their dike line across the bar. It would be too high and they would have to dig out a place 20 feet wide and 4 feet deep to get the mat down so that they could get a dike across. The dike was tied to the stringers and they had

to get down to a certain depth. The stringer was the same as a piling 60 or 50 feet long tied with cable. The piling would be three to a clump and they would drive them and pull them together with a cable and tie them. Now there are some 5-pile clumps but in those days they mostly put in three. The mats were woven on a mat boat and then they slid right off in the river where there was water to float. Where there wasn't, they had to wade and weave the mat, move them off the boat as you wove them. He reiterated that he worked on the river from 1933 through 1936 weaving mat all the way through except for a week off once in a while to do something else.

The long dike in the center of Schemmel Island was built in 1934. There were some built north of that before. They started north of Schemmel Island and worked down and built the dikes down the river as they went. The dike north of this long one had a hole in it. This was evidently when they were working on the long one. While they were working on the long center dike, they floated the piling down.

When they were going across the islands and bars, they had to excavate. The deepest the witness remembers they ever had to go was about five feet. There were lots of willows on it and they had a lot of work getting it cleaned off and getting across there.

On redirect examination, Mr. Doyle stated that when they were laying mat and driving piling across the bar with a land driver or skid rig, they would weave the mat right on the bar and walk across there. They then

carried the rock. That was "quite a deal hauling and carrying." He remembered carrying them very well.

Lewis Martin, age 59, testified that he farms on Frazer's Island Bend. He has been familiar with the land that Henry Schemmel is farming on the eastern side of the Missouri River for about 46 years. He worked for W. A. Ross doing construction work on the river in 1935 and worked in the area of the Schemmel land on the second dike above Hamburg Landing.

In the spring of 1938 in May, he worked on a dredge in that area for the U. S. Engineers. The witness identified a photograph from the Corps of Engineers (Ex. P-2636) which showed the dredge *Billy Peters* in the Otoe Bend Canal. He was a deck hand on the dredge. The drag line first took the cut out and then they dredged on the lower side. Looking at the picture (Ex. P-2636), the dredge was coming up the canal and this was on the right bank of the proposed channel of the Missouri River. The canal was approximately a mile long and started across from Hamburg Landing. It was very nearly across west from Hamburg Landing and they worked in there until about June and then they came up and took the *General Chittenden* out and they continued on up and finished the canal. The canal started down by Hamburg Landing and went mostly northwest. There were small willows on both sides of that canal as they dredged. They had been chopped off and the drag line had cleaned the right-of-way. T h e r e was another little dredge hole they had s t a r t e d and quit. The '38 cut was north of the earlier cut and on the right bank and was cutting through Nebraska accretion land and would be approximately

straight southwest of the Schemmel land where the proposed new channel was going to be. The river is there now.

In 1936 the witness worked on the driver on the channel on the east bank and they left a hole in the dike for the traffic to go through. They used to be able to go down between Schemmel Island and the Nebraska right bank, but they couldn't come back. The launch would drag on the sand bar. The water was too shallow. Otherwise, you could wade it. They came back up the left bank.

The canal was dug in the proposed channel as it is today. The witness estimated it was approximately 100 feet wide when they dug it. It is approximately northwest from Hamburg Landing and was dug in 1938.

In response to questioning by the Court, the witness testified that he lived for 46 years in Frazer Bend. He could look down and see Schemmel Island. Forty-six years ago, the island was approximately 600 feet wide and a mile or a little better long. It is bigger now as they drove the dikes and they have got accretions to it. The island was there in 1923. There was nobody living on the island. There were a couple of shacks on it a half a mile above Hamburg Landing for duck hunters and somebody growing a little something there. There was a little corn and there was an old harrow and a plow there. The witness had the first outboard ever on the river around Nebraska City so he knew about this. He knew where the water was. The boat traffic was on the east side of Schemmel. There were boats going north to

do these river jobs and they were traveling the left bank. They couldn't get up the other bank, too shallow water. What commercial traffic there was used the left or Iowa bank. The switch was made to the other side when they dug the canal in 1938. The Court then asked:

"The Court: The Engineers changed the river so that it changed the channel, stabilized it?

The Witness: Changed the channel from one side of Schemmel's Island over to the other.

The Court: Over to the Nebraska side?

The Witness: Yes, sir." (Vol. VIII, p. 1151).

Mr. Stewart H. Smith, age 51, of Blair, Washington County, Nebraska, testified that he has been Washington County Surveyor since 1955. He is a registered land surveyor in Nebraska and Iowa. Before becoming County Surveyor of Washington County, Nebraska, he worked about a year for an engineering firm and before that he worked for the U. S. Army Corps of Engineers, having started with them in 1936.

He started out with the Corps as a rod man, chain man, and then advanced to instrument man, and then to party chief, and then later on to field engineer in charge of two or more survey parties. He became a party chief in 1939. A party chief coordinates the work of the party and is in charge of the actual survey being performed and a chief of parties is a field engineer in charge of two or more survey parties. He was chief of parties from 1940 until August, 1943, when he entered the military service and then he returned to the Corps of Engineers in October of 1945. Between 1945 and 1947, he

was in charge of survey crews along the Missouri River in the construction of the preliminary and layout surveys for agricultural levees along the Missouri River. In 1947 and 1948 he was assistant section head of the field hydraulic section in charge of hydraulic crews engaged in making studies of the Missouri River and its tributaries in regard to silt deposits, configuration of stream beds, volumes and velocities of water of the Missouri River and its tributaries. In late 1948, he went to the Onawa Area Office as assistant chief of surveys where he stayed until December of 1952 when he returned to the Omaha District Office where he worked on military plans and specifications until he went with a private engineering firm.

He first worked along the Missouri River in 1937 and was assigned to the Plattsmouth area for approximately four months and then he was transferred to the Auburn, Nebraska, area. The Auburn area covered from Nebraska City bridge to Rulo, Nebraska and in 1937 the witness worked in the Otoe Bend area. He would have been twenty years old and this was about a year after he went to work for the Corps of Engineers. Prior to going with the Corps in 1936, he had been in Oregon working for the Forest Service for about 18 months on surveys, laying out fire trails in the mountains.

In late 1937 when he first went to work on the Otoe Bend area, he was a rod man and chain man and instrument man on a survey crew. When he first arrived, there had been some preliminary surveys completed with survey control lines in the area. There had been some trees cleared and just the general preparation for the staking

of a canal, but the canal itself had not been staked. They were working at that time on the Nebraska side of the river and would drive to the area in a truck and then walk from the vehicle to the site of the work. They staked the canal on dry land and did not have to cross any water to get to it. Their work consisted of staking the pilot canal which at that time was a strip of land of about 75 feet wide. They set stakes on either side of the proposed canal on offset lines so that the drag-lines could go between the stakes and not interfere with them. Trees had been cut right in the location of the canal. They cut the trees right down through where the canal was going to go and there were trees on both sides of the proposed canal. The canal, as he recalled it, was about a mile long.

The witness was referred to the pages in the 1937 Project & Index Maps (Ex. P-412) and the 1938 Project & Index Maps (Ex. P-413) and testified that the 1938 maps show where this canal was staked and dug. He also located the canal on the 1947 Corps of Engineers tri-color map (Ex. P-1036 and Appendix B) and identified the "Top" and "Bottom". The witness did not have a scale when he first marked this canal and with a scale, he extended the marks downstream, because he recalled that the upper end of the pilot canal was near dike No. 601.9. As he recalled the actual pilot canal, at the upper end it was near the right bank of the designed channel and at the lower end it was near the left bank of the designed channel.

With reference to the Otoe Canal, as the witness marked it on the 1947 Corps of Engineers map (Ex. P-1036 and Appendix B), the witness was asked:

"The Court: Are you saying that was dry land at that time?

The Witness: Yes.

The Court: In between those marks you put there?

The Witness: Yes.

The Court: It was all dry land?

The Witness: Yes. At the time we worked on the canal, it was dry land. It was subject to overflow.

The Court: No current in there?

The Witness: No.

The Court: No river current. No water."
(Vol. IX, pp. 1165-1166)

The witness testified that he did many surveys for the laying out of dike lines. They took to the field Missouri River construction maps, which were maps on a scale of 1" equals 400', and on these maps were located traverse lines or control lines and the dike structures were tied directly to these control lines. From the control lines, they could get the zero points of the structures and then the alignment of the structures had a bearing or an azimuth and distances, and they would stake the actual structures on the ground. He was also present during the construction of dikes. They would establish a line of three targets and then the pile drivers would proceed to drive the piling on line with these targets, and then periodically, as they were in the process of driving the dikes, they would need additional stakes and the surveyors would move up onto the actual structure itself and place more targets so that the drivers could see to continue

their structure. Many times the stakes were driven o
bars, and there would be times they would cross a chu
and go from the chute onto a bar, and there were tim
that the bars would have quite a bit of vegetation and the
tures. They did not always wash away everything or
all vegetation that was on the bars. They used floating drivers that would actually float on the water and then they used skid rigs that would drive piling across exposed bars. These skid rigs were quite common in the period of the 30's while he was working on the river and they would bring them out to the bar by barge. The witness has seen the Corps dredging a channel ahead of the driver so that they could use a floating driver. In many cases it would be more feasible to dredge ahead of the driver so that they could use the floating driver rather than to bring in a land driver because it was easier to use the floating driver. The skid rigs were often moved by winches on the driver itself and they would anchor cables to piling and pull themselves and they sometimes were moved by Caterpillar tractors. It was fairly common to see dikes driven out and then the water cut back in behind the root end of the dike. This was especially so in high water stage.

The witness worked many times on reconnaissance crews during the nine years he was on the river. A reconnaissance survey is a sounding survey and it is more or less a survey to determine the effect that the pilot structures have on the configuration of the stream bed. They were made with a small boat powered by an outboard motor. There were three men in the crew, a

leadsman or sounder, recorder, and an outboard operator. The soundings were made going downstream at usually a speed of about 12 to 15 miles an hour. The soundings varied in distance between soundings due to the different depths. The boat operated downstream under power and was probably a 16' boat. He was a leadsman in many cases and recorder in many cases. The leadsman would sound the actual depth of the river with a sounding pole or, in deep water, a lead line. He would cast that lead line ahead of the boat as they were going downstream and let the rope slide through his hand, and then as the boat moved forward the lead would sink to the bottom and he would call out the depth as he read it on the lead line, which was graduated in feet and marked with red and black stripes. The recorder was in the center of the boat and he would record soundings on a roll of maps that covered the area upon which the reconnaissance was taken; and as the boat moved down the river, he would roll the maps so that he could be marking the soundings in the general area where the boat actually was at the time. In addition to that, he would sketch bars and in some cases, sketch a bank line. As the boat proceeded down the river he would periodically check himself as to the location by some known feature along the bank of the river, whether it be a dike structure, the mouth of a creek or any identifying object. Depending upon the depth of the water, the distance between soundings could range from 100 to 500 feet. In recently dug canals, the soundings could be spread out pretty far because usually the water is pretty fast and the boat would be moving pretty fast.

As far as locating the soundings on the map, if you were in an area that you could not easily identify anything on either bank, it would be possible to be off as high as 1,000 to 1,500 feet longitudinally with the river and, not having any instruments to gauge where you be off 500 to 600 feet laterally. The witness recalled one particular time when he was in a stretch of river where there was no identifying object on either bank, and he was attempting to sketch a few bars, and by the time he got to a place where he could identify his location, he was off over 2,000 feet.

In the 1930's, they made these reconnaissance trips once a month. The witness has made a trip from Nebraska City to Rulo, which is approximately 80 miles, in one day. They did not always have time to sketch in the bars and islands. They used a base map which was on a scale of 1" equals 2,640' and the physical features on the maps that they used probably dated back to 1930 or 1931. Sometimes they would sound across areas which were sounded as deep water but which were shown as bar on their underlying map. Sometimes they would make an "X" on their map which would indicate the bar was gone, but it wouldn't necessarily get taken off the map. They attempted to sketch in the bank lines in some locations, but only where the bank would be cutting heavily. In sketching the bank lines, the accuracy was probably within 300 to 500 feet laterally or perpendicular to the flow of the river.

The witness was referred to the book of ground-level photographs in the Otoe Bend area (Ex. P-2637)

and explained that picture No. 317 depicts the starting off of a dike at the bank head which is dike 602.9, left bank. The picture, dated 7-25-34, shows the dike driven out into the water and beyond the water is a bar. This dike is at the upper part of Schemmel Island.

Picture No. 316 shows the same dike 602.9 on 7-13-34 and shows a woven mattress floating on water. In many cases, they placed the mat first and then drove piling through the mat and then there were other cases where they drove the piling first and would weave the mat along the piling. The mat would be built and anchored to the piling, then after the floating mat was constructed they would ballast the mattress with rock and sink it, and it would lay down against the piling so that it would act as a retard so water would not flow freely through the dike structure. It would be perpendicular and act as a screen in front of the dike. Immediately below a structure and depending upon how fast the waters were moving through the dike, it would start forming a bar directly below the dike structure. The witness has seen some cases, where, in comparatively fast water, a bar would start to form within a week and would build into quite a bar within a period of a month. That could happen where the water had been relatively deep.

Picture No. 300 is dike 602.7 dated 8-9-34 showing the dike which has been built across water and then across a bar. Picture No. 301 is the same dike dated 8-17-34 and No. 301 shows the bank head and the dike across open water and then across a bar and then water beyond that. To the witness, a bar is any land or alluvium or silt that is above the water surface. It could be sand or mud or it may

be a mixture and it could have vegetation growing on it, so the distinction between "bar" and "island" isn't always observed. The witness also has seen bars or chutes or depressions scoured out later on behind dikes and this happens usually by over-bank flow or when the river is at flood stage or near flood stage.

Upon examination by the Court, the witness testified that in 1937 in the Otoe Bend area when he came there to work, preliminary surveys had been done, willows had been cleared to facilitate the actual layout of the pilot canal, and in other areas, there had been dike structures or dike systems put in above and below all the way from Plattsmouth down to Rulo. Cutting was taking place on both sides of the river depending upon the bends of the river. The main plan of the Engineers was initially to construct a 900 foot navigable channel and it was felt that a series of curves would be needed in order to slow down the flow of the water but not to the point where it would deposit all of its silt but to strike a happy medium where there could be a navigable channel and protection to the adjacent landowners on both sides by having the dike structure, rock revetment and pile revetment; but the main thing was to establish a navigable channel. The river was navigable to small craft and there would be many places where, if you would attempt to get through with a larger boat, you could run into trouble and there were places where the Missouri River was spread out to the extent you could sound across the whole river and never find over 5 to 6 feet of water in depth. There was commercial traffic on the river in the 50's and probably late 40's depending on the location.

The idea was to build a navigable channel from the mouth of the river upstream, and they would build a stretch and use that stretch and then they would attempt to go further and build another stretch of river that would be navigable and they just kept doing that and now, supposedly, the river is navigable from the mouth to Sioux City, Iowa, and above.

On cross-examination, the witness testified that the Otoe Bend Canal was actually dug something less than a hundred feet and more than fifty feet wide. The plug was pulled on this canal sometime in 1938. The Corps expected it would immediately scour out the bottom and widen it and eventually reach somewhere near the designed channel, which at that point the witness thought was 700 feet. As the witness recalled, the Otoe Bend Canal was dug about 4700 feet long with drag lines and then after the drag line work they moved in dredges to dredge the canal. Exhibit P-2630 is a photograph of a dredge in operation which was casting spoil over the spoil that was placed by the drag lines. Exhibits P-2629 and P-2630 are both photographs of the Otoe Bend Canal and the big machine pictured in both of them is a floating dredge. In Exhibit P-2630, it would appear that you are looking downstream because there is a tow boat tied up immediately below the dredge and it appears there is open water beyond the tow boat which would indicate it would be downstream from the dredge. In the other picture, it appears that the canal is to the left of the barge and they are in the process of widening the canal. In Exhibit P-2630 to the right of the dredge is a bank of the canal, which would be the right bank. The pile of dirt

on the right bank would not be the right bank of the designed channel because the Corps of Engineers always proposed that you would cast the spoil out to make the pilot canal and when you took the plug out, then the river or part of the river would start through the pilot canal and as it went through it would cut on both banks and do away with the spoil or carry the spoil down the river, so the right bank of the designed channel would be far beyond the spoil bank that is shown.

On redirect examination, the witness testified that on Exhibit P-2635 you can tell that the spoil bank was cast by a drag line because it is in rough condition, whereas, if it were put up there by a dredge, it would be completely smooth. A dredge only works with water, and as the discharge from the dredge goes out, the water runs with the discharge and smooths it out. A drag line dumps a bucket.

Picture No. 341, dated May 15, 1938, in Exhibit P-2637 shows Otoe Bend Canal with a barge and on the barge is a drag line.

While making a reconnaissance trip in the area of Nottleman Island, if King Hill and Queen Hill, which are about a mile and a quarter apart, were the only identifying objects in the area, you couldn't get very close in recording the soundings. Because of the scale of the reconnaissance maps (1″ equals 2,640′) a quarter inch would be equal to 660 feet. If you were to write a number with two digits such as 15 or 16, conceivably that number could take up space on the map that would be equivalent to 300 or 400 feet.

The witness testified upon examination by the Court that there definitely was a complete design layout on maps as early as 1940. During the time that it was being planned, there were periodic changes because a certain area would not lend itself to the plan, but it actually took field work and field construction to find out whether or not it would work; so in cases where they found that it absolutely would not work, then they would make changes in their design and this is still going on. The witness testified on re-cross examination that the canal was dug in 1938 and that at the end of 1938, the river was in its designed channel at Otoe Bend all the way. In July of 1943, the main body of water of the river was entirely within its designed channel south of Omaha.

Upon further questioning by the Court, the witness testified that when they dug the canal, they could walk to the site from land on the right bank or west bank side. They walked down to the river from the Nebraska side and there wasn't any question about that.

The witness further testified that, in designing the river, the Corps of Engineers would change it wherever necessary to slow it down to the speed that they would want it to fit in with their curves, but wherever it could be used in its present position, they did strive to use it there but they also had to maintain the constant. In this particular case it fit in with their design to put the river through the canal or in the location of the canal. His experience was mostly out in the field watching the river and not sitting in an office working with theory.

The progress of the work of the Corps was illustrated

in the Project & Index Maps of the Omaha, Nebraska, District prepared by the United States Engineer Office which were referred to in Mr. Brown's testimony. This series of maps showed the status of the work as of September 30 of each year commencing in 1934. These exhibits were obtained from the Chief of Stabilization Section in the Corps of Engineer Omaha Office. Mr. Brown testified that the function of this set of maps is to indicate the progress of the work as they go along through the different years. They indicate areas where there were contracts. Structures are shown and those that are completed appear as a solid line and structures or portions of structures which are designed but not built appear as dotted lines. These sets of maps cover everything within the Omaha office which would be from Rulo to Sioux City.

The book of maps for 1934 (Ex. P-410) indicates that, in the Otoe Bend area, the dikes at the upper end of the Schemmel land, 603.1, 602.9 and 602.7 are complete with the exception of the trail dike, 602.7-A. The dikes on the Nebraska side of the river in the Otoe Bend area are not indicated as having been built at this time. Proposed trial dike 602.7-A extends down across the right bank and proposed dike 601.9, which is the long dike through the center of the island, extends onto the right bank. The function of the dikes from the Iowa side is to force the river into a pre-determined alignment. The ones at the head of the island would force the water to the west or toward Nebraska. The 1934 map also shows revetment opposite dike 601.9 on the Nebraska shore which is identified as 602.3. This revetment appears on

dry land west of the right bank.

The 1935 maps (Ex. P-411) show trail dike 602.7-A near the top of the Schemmel land as completed and dike 601.9 which goes through the central portion of the island has been extended. Dike 601.9 as planned extends into the Nebraska shore. The revetment on the opposite or right bank which is identified as 602.3 can again be seen running well inside the Nebraska shore. Mr. Brown testified that the map indicates they planned to put the dike all the way across to the Nebraska side and they did. The 1936 maps (Ex. P-1699) show dike 601.9 as completely a solid line which would indicate it is completed but Mr. Brown testified that this dike appears longer in later Corps plans. In the 1937 set of maps, Ex. P-412, the designed channel is shown by parallel lines and from approximately the riverward end of dike 601.9 downstream to the riverward end of proposed dike 600.6, the designed channel appears to be completely on the right bank or bar land. A small portion of trail dike 601.9-A is completed and the end of this proposed trail dike is on an area appearing as trees or willows on the west side of the river. The trail dikes have the same numbers as, and are attached and extend downstream from, the dikes extending from the bank but they have letters appended.

The 1938 Project & Index Maps (Ex. P-413) show the designed channel with the words "OTOE BEND CANAL" in the designed channel between the end of trail dike 601.9-A and dike 600.6. The legend states:

"OTOE BEND CANAL MILE 601.3. Work Order

> No. 122-8-7, Removal of 107,263 Cu. Yds. of earth by leased dredge started May 6, 1938 and completed June 10, 1938; W. O. No. 122-8-15,229,507 cu. yds. by leased dredge started July 28, 1938 of which 96% (211,292 cu. yds.) had been completed on Sept. 30, 1938."

The cost figures show $13,538.78 expended for the leased dredge. In the 1938 Corps of Engineer Official Reports (Ex. P-2687) reference is made to Otoe Bend, "Improve existing canal" and the amount shown there was $21,600 to improve the existing canal.

It should be pointed out that the 1938 Project & Index Map shows a tree area at the downstream end of dike 601.9-A which was cut off from the right bank by the Otoe Bend Canal. This same tree area appears on the Alluvial Plain Maps which were used as the basis for the Iowa-Nebraska Boundary Compact (Ex. P-1770).

The Plaintiff offered into evidence the following interrogatories to Defendant and Defendant State of Iowa's answers:

> "Interrogatory 233, 'Was a canal dug by the United States Army Corps of Engineers in the year 1938 in the vicinity of Otoe Bend and the land involved in the case of Iowa versus Schemmel?
>
> 'Answer. Yes.'
>
> Interrogatory 235, 'If the answer to Interrogatory No. 233 was 'yes', state in which state the canal was dug.
>
> 'Answer. Nebraska.'" (Vol. VII, p. 927).

The 1939 maps (Ex. P-414), the 1940 maps (Ex. P-415), and 1941 maps (Ex. P-416) show the river generally to be confined to its designed channel and each shows

the tree area at the end of trail dike 601.9 which was cut off by the Otoe Bend Canal. Sheet No. 10 of the Alluvial Plain Maps with date of March 29, 1940 (Ex. P-230) and the mylar transparency (Ex. P-231) also show this tree area and, when the Windenburg traverse (Ex. P-233) is placed upon the A. P. Map, that tree area is within the area encompassed by the traverse and is on the so-called island property.

By placing together the overlays of the Alluvial Plain Map (Ex. P-231), the Windenburg traverse (Ex. P-233), and the diagram locating the trees (Ex. P-234), Mr. Brown was able to locate the Otoe Bend Canal with relation to the features shown on those exhibits. The canal would be near the center of the designed channel starting somewhere between the letters "e" and "o" in "Otoe" on the A. P. Map (Ex. P-231) and running in a southeasterly direction to within a half inch of the letter "B" in "Bend" on the A. P. Map. Tree numbers 1210 and 1220 appear on the tree area shown as having been cut off the right bank by the Otoe Canal. Mr. Weakly testified that tree number 1220 was cut down on May 1, 1965, and he determined that it first started to grow in 1932. Tree number 1210 was a tree which had been cut down some time before and Mr. Weakly took a slab from the stump about a foot from the ground and he compared the rings with those of a living tree cut down that day and determined that tree 1210 commenced its growth in 1932. Mr. Weakly testified that it was tedious but not too difficult to compare a live tree with a tree on the ground. If you chart the rings of the tree according to width on cross-section paper, you can compare

those charts and arrive at a date for the outside ring or in some cases an inside ring, and from there on it is a very simple matter. If the work is done carefully, they will correlate with a correlation or co-efficient almost as high as 80.

Tree slabs taken from trees numbered 1140 and 1150 which were located below 601.9 and just to the east of trail dike 601.9-A also show that all of the land was not washed away by the Corps of Engineers as it moved the river into the designed channel in Otoe Bend. These had been pushed over the bank and Mr. Weakly testified tree 1140 still had dirt on the roots. It was his opinion that the first year of growth of tree 1140 was 1932 and of tree 1150 was 1933. Tree numbers 1115 and 1130 north of dike 601.9 commenced to grow in 1930. Tree number 11 north of dike 601.9 on the Schemmel land, commenced to grow in 1936 according to Mr. Weakly. Photographs of all of these trees are in evidence (Ex. P-373, Ex. P-375 through P-380). Six of the trees commenced to grow on the area prior to commencement of the river work by the Corps of Engineers in 1934 when the channel was to the east. They were not washed away by the later movement of the river to the west by the Corps of Engineers.

Further evidence that, when the river was moved from east to west in the Otoe Bend area, it was done without washing away the land and vegetation, can be found in the Corps of Engineer ground-level photographs offered by plaintiff in a book (Ex. P-2637). Mr. Brown testified that he prepared the index maps in the front of Ex. P-2637 which identify the structure numbers and tell

where the pictures were taken. These ground-level photographs show dikes being driven out from the Iowa side, and in some instances, they show land drivers or skid rigs being used on bars with water between those bars or islands and the bank. Some of them show areas of vegetation on both sides of the dike structures as they are being built. One of these pictures (No. 323) shows the commencement of dike 603.1 at the upper end of the area on 7-14-34 with a work boat, barges and a floating pile driver along the left bank of the Missouri River. This shows a considerable amount of water right along the left bank at the north end of the area. Another picture (No. 320) shows the root end of dike 602.9 which is just below dike 603.1 at the north end of the Schemmel area and there is open water between the dike and a bar or land area; and on this land area the mat has been laid, rocked and there is a land driver in operation. Water can also be seen on the opposite side of that land area. This illustrates that the river was not pushed ahead of the piling and that they did not drive the piling from the bank washing away everything in front of it. In this case they left an open channel along the east bank.

Several pictures appear in Exhibit P-2637 of the Otoe Bend Canal and enlargements of some of these photographs are also in evidence. Exhibit P-2636 is a ground-level photograph dated 5/21/38 showing Otoe Bend Canal at mile 601.4 with a dredge. The photograph is facing downstream and the dredge is working up the cut in the canal. Some vegetation can be seen on the left bank of the canal. Exhibit P-2635 shows the canal on 5/23/38 and is looking upstream. The spoil bank is on

the left of the picture or the right bank and a drag line can be seen in the background with the canal headed directly toward an area of large trees. Exhibit P-2630 is also a photograph dated 5/23/38 showing the Otoe Bend Canal and a dredge in the canal with a work boat behind it. This picture is looking downstream with the spoil on the right bank. Exhibit P-2633 shows the canal on 6/17/38 with vegetation on both sides and there is now water in it.

Exhibits P-2628 and P-2629 are photographs taken on 8/17/38 showing the canal and again show vegetation on both sides. The canal appears to have widened and has high banks on both sides. Exhibit P-2632 was taken on 9/30/38 and shows the Otoe Bend Canal with a high bank and vegetation on both sides and a dredge in the canal. Exhibit P-2631 is a view of the canal from the upstream entrance taken on 9/30/38 and shows a much wider body of water and a very substantial area of large trees on the left or east bank of the canal. Exhibit P-2634, dated 5/15/39 taken at structure 601.4 on the right bank at the upstream end of the canal shows the area cut off the right bank and now lying on the left or east bank of the designed channel as a very substantial area of vegetation and high trees.

The book of ground-level photographs (Ex. P-2637) also shows the Frazer Dam mentioned by General Loper which shut off the water around the west side of Frazer Island just upstream from the Schemmel property. Picture No. 334, dated 11/16/36, shows most of the dam in place with a channel closure about to be made. This is

an earth fill dam. Picture No. 336, dated 12/4/36 shows the channel closure as complete.

The Nebraska State Surveyor located the Otoe Canal on an aerial photograph of the lower and eastern part of Schemmel Island obtained from The National Archives and dated 10/16/38. He placed in red the words "Upper Otoe Canal" in the upper end of the canal as it showed on the picture, but he thought possibly the beginning of the canal might not appear on the picture. He also identified the "Lower Otoe Canal" and indicated trail dike 601.9 by an arrow and drew a large arrow pointing downstream. He labeled the "Iowa Chute", the Propp farm and the Givens place. There are areas of vegetation appearing in the location of the Schemmel land.

From 1940 until the present date, the river has been maintained in the designed channel except for times of extreme flooding.

The Plaintiff contends the evidence shows the main channel of the Missouri River was east of the Schemmel land immediately prior to the commencement of the construction work by the Corps of Engineers in 1934, and the Corps moved the river to the west of present day Schemmel Island without washing away all of the vegetation. They accomplished this by the construction of the dikes and the Otoe Bend Canal, creating another avulsion. Plaintiff contends that all of this river work was done within the State of Nebraska because of the 1900 to 1905 avulsion but, if it would be assumed that the Missouri River constituted the boundary between the states at the time the Corps was doing its work, then certainly the

Corps work constituted an avulsion which moved the river to the west without moving the boundary and the Schemmel land would have remained in Nebraska although on the east or left bank of the river.

Ownership and Possession of the Schemmel Land

The island surveyed in Nebraska in the original government survey and later referred to as Frazer Island was patented in Nebraska (Ex. P-1614 through P-1617). In 1895, the Otoe County Commissioners ordered the accretions surveyed in the Pierce Survey added to the tax rolls of Otoe County. Reference has already been made to this fact and to the 1905 tax suit by the State of Nebraska (Ex. P-138) and the Treasurer's Deed from the County Treasurer of Otoe County, Nebraska to H. H. Hanks dated December 14, 1908 (Ex. P-141). The area included within this deed includes a considerable portion of Schemmel Island and is all within the boundaries of the Pierce Survey and west of the Pierce Survey. It extends into what would be Nebraska Section 33 which is to the east of the present Schemmel land. The deed states:

> "Whereas, at a public sale of real estate under a Decree of the District Court in the State Tax suit for the year 1905, held in said County aforesaid, on the 8th & 13th days of November, 1905. . . ."

the described real estate was sold. It further stated that the real estate had not been redeemed and the Court confirmed the sale and ordered the execution of a deed of conveyance; and the County Treasurer conveyed the real estate to H. H. Hanks "in fee simple, subject, however, to all unpaid taxes and assessments thereon." On

October 21, 1918, Howard Huston Hanks and his wife conveyed the land to George Ward by Special Warranty Deed filed for record with the Register of Deeds of Otoe County, Nebraska on October 29, 1918 (Ex. P-1529).

Then on January 11, 1938 George Ward, widower, conveyed by quit claim deed to Dan Hill and Henry E. Schemmel by three deeds (Exhibits P-2644, P-192 and P-193). These deeds were recorded with the Register of Deeds of Otoe County, Nebraska on January 29, 1938 and were filed of record with the Recorder of Fremont County, Iowa on August 22, 1939. Thus, record notice was given in both states prior to the Compact of the conveyance of this land as Nebraska land.

Henry E. Schemmel, age 76, testified that he presently resides southeast of Nebraska City at Minersville. Minersville at one time was called Bennett's Ferry and then Otoe City. The witness is a retired farmer and first moved to the Nebraska City area in the spring of 1934. From 1911 until 1916, he was in the United States Marine Corps and he re-enlisted in the Corps of Engineers during World War I and served from 1917 until 1919. He was with the United States Seabees during World War II from June 16, 1943 to July 28, 1945.

In the years following 1934, the witness hunted and fished on the Missouri River and became familiar with the area now called Schemmel Island. He first saw the area in 1934 when it was a long island with willows on it. In partnership with Dan Hill, the witness testified that he first took title to this property under a tax sale certificate in Otoe County, Nebraska. About a year later, the witness

and Dan Hill obtained deeds to the property from George Ward. These deeds were recorded in Otoe County, Nebraska and also in Fremont County, Iowa. The reason for recording in Iowa was that after the Otoe Bend Canal had been cut, some of the land had been cut over so they recorded the deeds to show ownership in Iowa.

The tax records from the Otoe County Treasurer's Office list Dan Hill, et al., as owners of all of Nebraska Section 29 or 640 acres and Section 32, which is listed as 695.78 acres, commencing in 1937 until the Schemmels started paying taxes on the land in Iowa after the Compact (Ex. P-108 through P-125).

After receiving the deeds from George Ward, the witness went to look at the land and, to get to the land on the other side of the main channel, they crossed the bridge at Nebraska City and went down a winding road south of what is called Payne Junction and to the dike line at the head of the island, and walked the dikes down and onto the island. The island was what is called bar land. There was no water running over the island but there was water running in a channel to the east. That is why they had to cross the dike line. The island had willows and some small trees on some of it. They walked out there in the spring of 1939 and while his boys were putting "No Trespassing" signs on the dike line, the witness seeded some Reed's Canary Grass on an open space where he thought it would grow. At that time none of the land on the Iowa side was under cultivation. In the years before, someone had been farming the land on the Nebraska side of the Otoe Bend Canal. They later found out it was Almon Engleman who had some

corn there. The Iowa people called it Engleman Bar. The witness explained that the engineers cut this Engleman Island into three pieces by canals, and the farming was south of the Otoe Bend Canal.

At about the same time the witness filed his deeds in Iowa, he wrote a letter in 1939 to the Fremont County, Iowa officials advising them that some of his land was now on the Iowa side of the canal. This letter was recorded with the Fremont County, Iowa Recorder on August 22, 1939 which was the same date the deeds from George Ward were filed in Iowa, and the letter stated that the Federal Government Improvement Program from 1933 to 1939 had changed the Missouri River by levees and dikes so that this land would be on the Iowa side of the river but was Otoe County land (Ex. P-1613). This letter constituted additional public notice of record prior to the Compact of Mr. Schemmel's claim to the property.

Having learned that Mr. Engleman was farming some of the land that later became south and west of the Otoe Bend Canal, Mr. Schemmel and Mr. Hill decided to obtain a release or deed from Mr. Engleman who might have a claim by adverse possession. They went to his home place which was just below the Missouri line and made arrangements for him and his wife to come to Nebraska City and a warranty deed was obtained from Mr. & Mrs. Engleman which was filed September 13, 1939 with the Register of Deeds of Otoe County, Nebraska which conveyed:

"The Missouri River Island and accretions of land thereto within and including the south half of Sec-

tion Thirty-Two (32), Township Eight (8), Range Fifteen (15), All of Section Five (5), Township Seven (7), Range Fifteen (15), and the North Half Section Eight (8), Township Seven (7), Range Fifteen (15), Otoe County, Nebraska." (Ex. P-1603)

A considerable amount of the south half of Section 32 is on the present Schemmel Island and the southern part of the traverse is included within Section 5. Part of Nebraska Section 32 can be identified on Appendix B just south of the Otoe Canal which was also included within the land conveyed.

The witness identified dike 602.9 on Exhibit P-230, the A. P. map, as the dike he used to take across to the island in 1939. On that occasion, he was accompanied by his sons, Robert and Douglas. The boys nailed metal signs on the dike line which said "No Trespassing, Hill and Schemmel".

Mr. Schemmel had a controversy with Dr. Zimmerer and Martha Higgins over some of this land which was Section 32 in Township 8, Range 15 and Sectons 5 and 8 in Township 7. There were law suits in Otoe County District Court which disposed of the controversy and the Court awarded Section 32-8-15 and the north half of Section 5-7-15 to Dan Hill and Henry Schemmel. These were Nebraska descriptions. The transcript of pleadings and decree in the case of *Charles G. Zimmerer, plaintiff, vs. Dan Hill, Mildred Hill, his wife; Henry Schemmel, Lucile Schemmel, his wife; George Ward, the County of Otoe, et al.* from the District Court of Otoe County, Nebraska are in evidence. After the decree was entered, the witness notified the Iowa county officials of that fact by letter

(Ex. P-1612) which was originally sent on June 5 or 6, 1941 and was returned without recording. The witness later recorded the letter on March 1, 1956 in the Fremont County Recorder's Office. The letter stated that it was to certify that the District Court of Otoe County decreed on May 28, 1941, that Dan Hill and Henry Schemmel were the owners in fee simple of Missouri River Island land, including a good portion of what was presently called Schemmel Island, and that the land and accretions had been assessed on the Otoe County, Nebraska Tax Books since 1895. It further stated that, due to the changing of the Missouri River by the construction of pile dikes, dredging and revetment works by the United States Government Corps of Engineers, a large part of this island would be on the Iowa side of the main channel of the Missouri River. The decree in *Zimmerer v. Hill* of May 28, 1941 was filed by Henry Schemmel with the Office of the County Recorder of Fremont County, Iowa in Book 46 at Page 283 on August 25, 1941 (Ex. P-195). These actions by Mr. Schemmel show notice to all the world in Iowa of the Nebraska quiet title action of *Zimmerer v. Hill* and that Mr. Schemmel did what he could to give notice and make his Nebraska title of record in both states.

The other law suit which Dan Hill and Henry Schemmel were involved in to quiet title to the land was captioned *Martha Higgins, Plaintiff, v. Dan Hill, Mildred Hill, his wife; Henry Schemmel, Lucile Schemmel, his wife; George Ward, the County of Otoe, et al.* This case quieted title in Nebraska to a portion of the Schemmel Island land in Dan Hill and Henry Schemmel (Ex. P-190).

AT THE TIME OF THE IOWA-NEBRASKA BOUNDARY COMPACT, HENRY SCHEMMEL AND DAN HILL HAD A TITLE WHICH WAS "GOOD IN NEBRASKA" AS RECOGNIZED BY THE NEBRASKA COURT DECREES AND NOTICE OF THIS WAS ON RECORD IN FREMONT COUNTY, IOWA. Mr. Schemmel's title to the land which remained on the right bank of the Missouri River and in Nebraska following the Compact was recognized in Nebraska by private individuals and the Nebraska Courts. This is part of the original land where the canal was cut through.

Further evidence that this title of Mr. Schemmel and Mr. Hill was good in Nebraska is shown by the fact that Dan Hill and Henry Schemmel conveyed property which was obtained through the same deeds and conveyances as were recognized in the *Zimmerer* and *Higgins* cases to Charles Tyson and David Tyson by warranty deed dated May 29, 1943 and filed in June of 1943 in the Office of the Register of Deeds of Otoe County (Ex. P-1743). This deed conveyed a little strip in the northeast quarter of Section 5 which was on the west or right bank of the present stabilized main channel and is presently owned or occupied by Forrest Binder who purchased the land from Minersville Farms. Mr. Schemmel testified that the State of Iowa has never made any claim to that land.

Mr. Schemmel testified that when the property west of the designed channel was transferred by the Schemmels, they reserved hunting rights on the land. Those hunting and fishing rights have been recognized and preserved in a decree in the District Court of Otoe County in a recent quiet title action.

Defendant offered several Nebraska quiet title decrees and, included in Exhibit D-708 is a copy of a Decree in the District Court of Otoe County, Nebraska in the case of *Forest D. Binder, et al. v. Karl H. Schminke, et al.*, dated January 15, 1965. That Decree states:

> "9. Defendants Henry E. Schemmel, Douglas Schemmel and Robert Schemmel, his sons, and the families of said named defendants and their guests accompanying them, by reservation in a deed made, executed and delivered by defendant Henry E. Schemmel and Lucile E. Schemmel, husband and wife, and Douglas Schemmel, single, to Karl H. Schminke, on October 13, 1955, and duly recorded on October 26, 1957, in Book of Deeds 104, at page 507, reserved the right and license to hunt and fish on said lands in Section 32, Township 8 North, Range 15 East of the 6th P. M., Otoe County, Nebraska, in the manner provided by law. That said right and license granted to defendants Henry E. Schemmel, Douglas Schemmel and Robert Schemmel, their families and guests accompanying them, is valid and subsisting and said defendants Schemmel are entitled to enjoy same pursuant to said conveyance as described herein." (Ex. D-708)

This action recognized the rights of Mr. Schemmel which he reserved to that portion of Section 32 not cut off by the Otoe Canal which remained in Nebraska following the Compact.

From 1939 until 1943, the witness seeded the island property to Reed's Canary Grass and then south of that put down a well and put in a tent which washed away in the first flood. In 1943, Mr. Schemmel went to the service and Dan Hill took care of the real estate. After the witness returned from the Philippines and found out that the land on the left side of the present channel was

in the State of Iowa by virtue of the 1943 Boundary Compact, he realized that he would have to pay taxes in Iowa so he went over and asked the Auditor of Fremont County to place the property on the tax records so that they could pay taxes in Iowa. In January of 1947 the witness became the Otoe County Treasurer and at some time after that, officials of Fremont County, Iowa, Mr. Cowden, the County Auditor, and Mr. VanSyoc, County Treasurer, came over to talk about the transfer of the land. They told the witness that there had been a court case in Mills County, Iowa and they were required to put the land on the tax books and the witness was busy at that time and asked them to go over to the Clerk's Office and check the plats to verify the location of the land. After that, the land was put on the Iowa tax records and Mr. Schemmel and Mr. Hill started paying taxes in Iowa in 1949. It was placed on the Iowa tax rolls under Iowa description.

Mr. Schemmel testified that the land is taxed in Iowa under the Iowa descriptions as all of Section 15, Township 67 North, Range 43 West of the 5th Principal Meridian and the fractional west half of the northwest quarter of Section 23, Township 67, Range 43 West of the 5th Principal Meridian. Some of their land also is in Iowa Section 22, Township 67 North, Range 43 West and part is in Iowa Section 14 which is covered by the Nebraska description of Section 32-8-15. Tax receipts in evidence show the Schemmels also are paying taxes on land in Iowa Section 10 (Ex. P-2643).

The Schemmel corn cribs and buildings are in the northeast corner of Section 15 and the witness testified

that the State of Iowa has never tried to get that land. The Nebraska State Surveyor prepared a mylar map showing Schemmel Island and showing an area which is dotted in the northeast corner of Iowa Section 15, Township 67 North, Range 43 West, which extends outside of the traverse of Schemmel Island and the map shows the area claimed and occupied by the Schemmel family and presently assessed in Fremont County, Iowa and the Windenburg traverse. This dotted area is identified as Schemmel property in Section 15 not included in the Windenburg traverse (Ex. P-2224). Plaintiff would point out here that, should Iowa prevail in its claim to the Windenburg traverse area, the Schemmels would still hold land to the east which is now in Iowa as a result of the Compact, and they would be in the incongruous situation whereby they had obtained title to property and their title to the western part which stayed in Nebraska as a result of the Compact was good, their title to the eastern part which was in Iowa as a result of the Compact is good, but they would have lost the middle of their property to the State of Iowa. Their claim to all the area is based upon the same acts and instruments and if their title is "good" on the Nebraska side and is "good" or not subject to attack by the State of Iowa on the eastern side in Iowa, then certainly their title to all the rest of the land should be free from attack by the State of Iowa.

The witness made an agreement with Schwake as to the property line and the witness told Schwake he would give them from the west of their Section 14 down to the half section corner.

Mr. Schemmel testified that Dan Hill is presently deceased and he obtained deeds from the heirs of Dan Hill and from the owners of Nebraska land to the west of his property and to the north of his property to dispense with any dispute as to whether or not there were any riparian claims to his land.

On advice of counsel, the witness let the property go for taxes one year because the Auditor in Fremont County, Iowa gave the land a different description from the Nebraska surveys and he wanted to get title from an Iowa description for the same land in order to clarify and establish his rightful ownership in case of sale or if mortgaged or something like that. He then bought it in at tax sale and assigned the tax sale certificate to his daughter, Mary Leah Persons, and tax deeds were issued to her. Three tax deeds are in evidence dated November 2, 1955 from the Fremont County Treasurer to Mary Leah Persons conveying the greater portion of Schemmel Island. These deeds recite that the land "was subject to taxation for the year A. D. 1950;" and the Treasurer on December 3, 1951, by virtue of the authority in him vested by law, at regular sale sold the land at public sale to Henry Schemmel who, on October 27, assigned the certificates to Mary Leah Persons. The deeds state that the time of redemption allowed by law had expired and three years had passed since the date of said sale and the property had not been redeemed (Ex. P-1553, P-185, and P-186). Mary Leah Persons lives in Albuquerque, New Mexico, and through various deeds and transactions title to the larger portion of the land is in the name of Mary Leah Persons. She has delegated power of at-

torney to Douglas Schemmel. The witness and his wife conveyed any interest they had to Mary Leah Persons, also.

Mr. Schemmel testified that after the 1952 flood, they tried to burn the timber off the land with no success. Then they started girdling the trees in order to kill them so they could be removed. If you girdle a ring around a live tree, leaving the body of the tree without any bark connection, the tree will die. Some of them will die the first summer, some will possibly come back with leaves and then die during the second summer. The witness said they had a garden but deer spoiled most of it and he thought this was in 1954. He also thought the first crop of corn they got off the land was in 1955 and they built the first corn crib in 1957 or 1958. The buildings were built in the northeast corner of Section 15 which was on the Iowa side of the agricultural levee.

Since putting up the first No Trespassing signs in 1939, the witness and his family have continuously excluded trespassers and no one other than the Schemmels or their tenants have ever been in possession. The Iowa Conservation Commission has never put up signs around the land. The Windenburg survey was done with permission of Mr. Redd, attorney for the Schemmels. The Conservation Commission did not ask permission to survey but his sons, Robert and Douglas, were over there when they started to survey and his sons told them they couldn't do it and to go over and see the Schemmel attorney at Sidney. The first indication they had that the Iowa Officials were trying to take their land was when a newspaper reporter called at their house in Minersville just

before the 1961 Missouri River Planning Report was published.

The witness identified a 1960 aerial photograph of the island which shows approximately 500 acres of cleared land used for agriculture (Ex. P-256). He testified there has been some land cleared since 1960 which is in the area of the trees to the west on the photograph.

The witness identified a picture showing water in the Iowa Chute immediately west of the Propp farmstead taken in September of 1965 (Ex. P-2646). He stated that this shows water in the abandoned channel to the east which the Iowa people call the Iowa Chute.

Mr. Schemmel testified that it cost a tremendous amount to clear the land and it took 8 or 9 years. He supposed they had paid out over $60,000 and that broke down to a little over $100 per acre.

In order to defend the law suit brought by the State of Iowa in Fremont County, the witness had to have an abstract made at a cost of about $500 and retained a lawyer to whom he has paid $3,750 and the case is still pending. No one from the State of Iowa or the Iowa State Conservation Commission ever came down and asked the witness what his claim to the land was and the State Conservation Commission never offered to pay any damages for taking the land.

Mr. Douglas Schemmel, age 42, of Minersville, Nebraska testified that he is a farmer by occupation and is the brother of Robert Schemmel and Mary Leah Persons. He first saw Schemmel Island from the east

side of the river in Otoe Bend in the early spring of 1939 when he and his father and brother walked the upper dikes over onto the island. The water was 200 to 300 feet wide through the dike line and it was very swift water, some of the swiftest in that area. The land was fairly flat with some willows on it. The boys nailed up metal No Trespassing signs and the father seeded grass. The witness went all the way around the island and over to the west and north the willows were heavier. He walked down the east side of the island and wherever he found a piling he put a sign on it. The area next to the water was exposed from 20 to 40 feet and otherwise it was willows. It was hard to walk through the willows.

The next time the witness was on the island was when he got back from service in 1946 and he hunted there in 1947 and later years. At that time they came in from the river side with a boat, leaving from the Nebraska bank. The island had grown up quite a bit and, on the east side where the old channel was, it was a fairly deep ditch with water running through it. There were some pot holes on the island where ducks came in. They still had periodic floods at that time which would deposit silt on the island. The big flood was in 1952 and it pretty well leveled and built up the island. In 1953 and 1954 they were over there seeding grass and experimenting with girdling. They were seeding with Reed's Canary Grass which is good on flood land and also makes hay and pasture. In 1947 or 1948 they tried to get Paul Womack to start clearing and in the 50's they had a preliminary survey and had Charles Shannon make an official survey. After they tried to burn unsuccessfully

in 1954, they got a real fire through there in 1955 which killed a lot of willows and some cottonwoods. In the winter of 1955 and 1956 they started to doze on the east side of the island along the old channel and paid Harvey Wilke about $500 for the work at $9.00 an hour and he cleared about 20 or 25 acres. They cleared about 5 acres immediately on the west side of the agricultural levee also. Further to the east of them, the Schwakes were clearing their timber. The witness identified dead trees on the Schemmel land on photographs taken by the Corps of Engineers in September of 1957 (Ex. P-2639 and P-2640). These trees appear near the river and they had cleared quite a bit on the east by that time.

The first crop was planted in 1956, being about 25 or 30 acres of corn. In those days, there were holes in the upper dike and the long dike in the east channel and there was water flowing through there in 1956.

To get their dozers over to the island, they pushed dirt ahead and got over that way. They had a bridge to get across with their daily work but the dozer had to push its way back and forth. By the end of 1958 they would have had better than a hundred acres cleared. They hired Cecil McAlexander to run the Cat and they got a contractor to furnish the Cat and, just for clearing, it cost $20,000 for hired machines. By about 1960, they had all but a little strip on the west side of the high part of the island cleared. In 1958 they had a little over a 100 acres in cultivation, mostly to corn and a little milo, and in 1959 they had another 160 acres cleared. All the family helped with this clearing in picking up sticks.

Cecil McAlexander was the dozer operator. The family also had a little Ford tractor over there.

In 1957, they rented the land to Thurman Hukill so they could devote more time to clearing and they collected rent from him until 1961. They then leased to Roger Mattes and LeRoy McAlexander for about four years. They have not leased it since that time but have farmed it themselves. On the main island, they have under cultivation today around 400 or 450 acres. Crops have also been taken during the years from 1960 including 1967 when they were flooded out but replanted. In 1967, they had a short season corn and soybean crop and got about 3,000 bushels of corn and 1,000 bushels of beans. In 1968 their corn yield averaged 105 bushels to the acre and beans averaged 40 bushels to the acre. They have been in the government farm program since 1957 with the exception of one year and their present crop base in that program is 93 bushels of corn.

The witness testified that they started building corn cribs in 1957 on the protected side of the levee in Section 15. Every year up until 1962 they were either building on a crib, quonset, or round bin. The material for these buildings cost about $10,000 and they did their own labor. The Schemmels have stored and sealed grain in those cribs starting in 1957.

The Schemmels have paid real estate taxes on the land since 1949 in Iowa. Iowa has also taxed and assessed the Schemmel buildings.

The witness testified that the trees on the west side of the land which show along the red mark on the 1960

aerial photograph (Exhibit P-256) were cleared in 1961 and 1962 by pushing the trees over the bank. They did not push them more than 200 feet.

On the 1966 aerial photograph of the Schemmel land (Ex. P-2647) there is on the upper left hand portion of the island a white area in the same general position as the trees which appeared on the 1960 aerial. The witness testified that this is where alfalfa had just been cut and he circled that area in red. To the riverward side of that alfalfa was low ground which has since been built up. The land is now cleared all the way to the river except a little strip of trees which was left along the river down below next to the high bank. Exhibit P-2648 is another agricultural photo dated 9-7-66 showing the southern part of Schemmel Island and the witness circled a cabin on the land and identified Hamburg Landing with an "H". He also marked a line indicating the southernmost part of the land which has been cleared.

On the 1966 aerial photographs (Ex. P-2647, P-2648) there is a little standing water in some places along the east side of Schemmel Island but there is no running stream through where the old channel had been. A road leads to the land and it is no longer an island.

Robert E. Schemmel, age 46, of Lincoln, Nebraska testified that he has been a school teacher for 19 years. He is presently a teacher in the Lincoln Public Schools and is the son of Henry Schemmel and the brother of Douglas Schemmel and Mary Leah Persons. He is in farm partnership with his brother, Douglas, and presently Schemmel Island is being farmed by Douglas, the witness,

and his son Gary.

The witness first saw the island land shortly after his father and Dan Hill bought it in the late 30's. His first recollection was of the land that is now on the southwest side of the river and the thing that stood out in his mind was the spoil that was deposited near the river bank. On the west side, there were some cottonwoods, willows, and a lot of sand. The following year, 1939, they went over to the land on the east side of the river and he remembers that there was a lot of open land with some willows and some cottonwoods. The witness and his brother nailed No Trespassing signs on the dike lines as they went down the east channel. Their father was seeding grass seed. The witness did not go all the way around the island but went down the east channel part way and then went over to the west. The trees along the west side were quite thick and higher than they were along the east side.

After military service from 1942 until 1945, he hunted ducks on the southwest side of the island. The first year he hunted would have been 1946 and he hunted all through the latter part of the 40's. By this time the trees were grown up and quite dense. They went to the island by boat from the west bank. The witness walked over to the east side of the island to the old channel where there was still flowing water. There were dike lines visible in the east channel and also on the west side where they stuck out into the main channel. He saw no dikes extending across the island. It was all solid land in there. In the late 40's, the land was quite uneven and the vegetation

was quite thick. As a matter of fact, it was easy to get lost.

During the 40's, they had maintained the No Trespassing signs. They had a little difficulty with some duck hunters before then, and after they posted the signs they had no more trouble. After the 1952 flood they were on the land to look it over and there had been a lot of fill as a result of the flooding; and they decided at this time they would try to clear it. They tried to burn and then they experimented with girdling of trees. At that time, they went into the land from the Albert Propp farm on the road. Immediately to the east of the Schemmel land some of the land on the Schwake place had not been cleared at that time. The witness testified that they never had any trouble with where their east line was between them and Schwakes.

The witness testified that they started girdling in 1953 and his father continued to seed grass and had a garden plot for two or three years, commencing in 1953 or 1954. The first clearing of the trees which had been girdled was in 1955 to 1956. The witness didn't operate the dozer but he helped pick up sticks and so forth. In 1956 they purchased a small tractor and did their first farming. Then, starting with the 1957 season, they rented the land out so they could devote more time to the girdling and picking up. There were windrows and stumps which had to be cleaned up. This was very hard work clearing the island. They hired a contractor and Cecil McAlexander was the operator after the first year. Then in 1963, they bought their own D-7 machine and Mr. McAlexander continued to operate the dozer; and then as

time progressed, his brother Douglas began taking over more and more of the operating. Estimating the amount of work done with their own D-7 and the amount paid to outside contractors, the witness estimated the amount spent clearing was approximately $50,000. There are about 450 to 500 acres under cultivation today, primarily in corn and soybeans. They have set aside some land over there for a sort of game preserve, especially in the abandoned east channel which is in grass and pasture and they have planted a considerable amount of sorghum-sudan with that in mind.

To get to the island today, they cross the Nebraska City bridge, coming down the east side to the Albert Propp farm, and then go straight west to where the buildings are located. They have an easement agreement with the Schwake Estate on the part of the land where the road crosses the Schwake property and the road is privately maintained. After you cross the levee, the road goes along the old bank and the east channel a little way south, and then it crosses the rock dike to get across to the island. The rock dike was put in by the Corps of Engineers in the early 60's.

The witness testified that the 1968 taxes were something over $1200 and the total taxes paid since 1949 would be approximately $7,000 paid in Iowa. On the island there is a hay shed and a windmill tower and the Schemmels' No Trespassing signs have been maintained in the 50's and 60's. There have never been any signs put up by the State of Iowa.

Paul Womack, age 52, of Nebraska City, whose occu-

pation was construction work and clearing using Caterpillar tractors, testified that in April of 1948 Henry Schemmel and his boy came to the house and told Womack they wanted to show him a job. The witness went with the Schemmels over across the river. The river was running along where the Schemmels wanted to put a road across to get to the island and he "wasn't about ready to stick a 20-ton Cat in there." There was a 35 or 40 foot swath of water running down there between the east bank and the island fast enough so that he didn't want to undertake it.

In 1966, the witness worked 2 or 3 weeks on the island clearing and leveling on the east end, clearing big cottonwood trees and willows at a cost of about $170 or $200 an acre. In 1968 he cleared and did a little land leveling on Schemmel Island, working about three weeks. At that time it was a little bit cheaper, running from about $135 to about $150. With the prices as of the time of trial, the cost would have been about $200 or over to clear land like that. In 1966, the witness crossed from the mainland to the island on a rock fill. The place where Schemmels have the crossing now to go over to their place was the chute where the channel was which Mr. Schemmel wanted the witness to doze in to get across to the island in 1948.

Cecil McAlexander, age 50, a truck driver now living in Nebraska City, testified that he has lived in Iowa all his life except the last three years. For about twenty-seven years he lived 3½ or 4 miles north of Henry Schemmel's Iowa farm which is right straight west of Propp's. To get to the Schemmel land you cross up over

a levee and go over what you call an old river bed where there is a rock dam across there, which has been there since about 1961.

This witness has done most of the clearing and leveling on the Schemmel land, having started in 1956 or 1957. In order to get to the island in 1956 or 1957, he had to build a road out of anything he could find to get ahead of his Cat such as trees, dirt and everything. When he first went on the island, it was a mass of trees which had been girdled or sprayed by airplane and most of them were dead. When he first went on the land, probably fifteen acres or so had been cleared just after you went over the levee. The land was cleared in spots and this had been done by a contractor, Harvey Wilke. The land that had previously been cleared was in crops and the whole timber area was covered with Reed's Canary Grass. When he first went on the land, they didn't have a rock dam. They built a road across it and this was in the winter time and they went over there and the ground was frozen but he almost didn't make it because it wasn't frozen that hard. He had difficulty operating because of the Reed's Canary Grass which would get in his radiators and plug them up. The land was posted with "No Trespassing" signs with "Henry Schemmel" at the bottom of them. He never saw any State of Iowa Conservation Commission signs.

The witness testified how he cleared the land. He tried to break the trees off, shear them off right at the bottom at the ground. They were rotten. Most of the island was cleared that way. Some of the trees were too large to take out that way and they let them sit until

later on. They started out where it was easy to clear and where they could make time because they wanted to get the land into production. On the island proper they would clear in the spots that were easiest. After the trees were knocked down, they were piled and meanwhile two of the Schemmels were picking up tree limbs and carrying them over and piling them. They also had a Caterpillar helping.

The witness started working in 1956 or 1957 and worked clear up until 1968 off and on. He worked every winter except 1961 when they ran into trouble with trees which he couldn't dig out along over next to the river. They had been girdled, but there was just too much tree there. They finally used three Cats to take the stumps out and it was all they could do to get them out. The other two Cats were operated by people hired by the Schemmels. The witness was referred to the 1960 aerial photograph of the Schemmel area (Ex. P-256) and testified that he cleared some of the trees shown in the picture on the west side of the Schemmel land and pushed them over the river bank. That tree area on the west side of the island has been cleared and leveled. The witness placed a line just to the east of the long area of trees which gave him trouble and marked it with an "A" at the north end and a "B" at the south end. The big trees were pushed over the bank but were not pushed into the river. There is a high bank along there.

Henry Schemmel rented the farm to the witness, his son, and his son-in-law in 1961 until 1965 on a share-crop arrangement. A man named Hukill had been renting it from Henry Schemmel and had planted corn, beans, milo,

and wheat. The Schemmels bought their Cat in 1963 and the witness continued to clear and level to get more land into production. The last time he worked on Schemmel Island was in 1968. He testified the Schemmels had done a lot of work over there by themselves and it is hard work. The clearing, the picking up of sticks, the girdling and everything would cost about $200 an acre by the time they Rome Disc it and get it ready for production. The Schemmels have a hay shed on the island and off the island they have other buildings. One of the buildings was built in 1957 and a quonset in 1958 and in 1961 they built a big 8,000 bushel crib. The cribs are on the east side of the levee.

The witness testified that the Schemmel land is the best ground in the country. The witnesses' son raised one crop of 40-acres of corn and averaged 187 bushels to the acre. The Schemmels have built this ground up with fertilizer and alfalfa and they have really tried to get it built up into good land and the witness has tried to help them with the knowledge the witness had of farming and dozing. There are about 500 acres cleared now.

Conduct of State of Iowa with Reference to Schemmel's Island

As discussed in a previous section, the Iowa records indicated that the land west of the Iowa Chute was washed into the Missouri River. Testimony of the Schemmels established that the land was placed on the tax rolls in Fremont County, Iowa and taxes have been paid continuously upon it since 1949.

Miss Winifred Rhodes, age 47, testified that she has been Fremont County Treasurer since 1956. She is a lifetime resident of Sidney, Iowa and was Deputy Treasurer from 1945 to 1956. Miss Rhoades testified that in 1948 or 1949 there was some discussion between the Treasurer and Auditor about Nebraska land being put on the Fremont County, Iowa tax rolls. It is the function of the County Treasurer's Office in Iowa to collect taxes.

At the request of Mr. Schemmel, the witness examined her records to see whether Section 15-67-43 has appeared on the tax rolls in Fremont County and taxes collected on it. She found that in Section 15, in 1880 the east part of the northeast quarter and the east part of the southeast quarter were listed on the records. In 1881 and 1882 there was no listing. In 1883 she found no book. In 1884 and 1885 she found no listing of Section 15. In 1886 she found no book. In 1887 this Section was not listed. In 1888 through 1933 there were no books. In 1934, 1935 and 1936 there was no listing. In 1937 through 1942 there were no books to be found. Then in 1943 to 1948, the only description which she found was the north half of the northeast of 15-67-43 listed to Frank Schwake. In 1949 she found the northeast of the northeast, the northwest of the northeast, the southeast of the northeast, and the northeast of the northwest of Government Lot 1 of 15-67-43. In the years which she stated there was no listing, there were books found but no listing of this particular land.

In 1949, additional land went on the rolls in Section 15-67-43 which was the southwest of the northeast, the southeast of the northwest of Government Lot 1, the

northeast of the southwest, Government Lot 1, part of the southeast southwest, the northeast southeast, the northwest southeast, the southwest southeast fraction, and the southeast of southeast, all in 15-67-43, which were listed to Dan Hill and Henry Schemmel.

From 1949 up to the current date, Section 15-67-43 has been taxed. There have been some tax sales during that period and the names have changed on different ones. There was a tax sale on the northeast northeast, northwest northeast, southeast northeast and the northeast northwest part of Government Lot 1 which was sold to Mark Sheldon on December 4, 1950. These were later redeemed by Henry Schemmel.

There was a tax sale on the southwest northeast, southeast northwest part of Government Lot 1, the northeast of southwest Government Lot 1, part of the southeast southwest, the northeast of the southeast, northwest of the southeast, southwest of the southeast, and southeast of southeast, 15-67-43, and those were sold at tax sale to Henry Schemmel on December 3, 1951. The witness said there were tax deeds issued by the County Treasurer's Office of Fremont County, but she didn't have the exact name of whom they were issued to.

The witness also looked at the tax history of Section 23-67-43. In 1880 it listed the north half of the northwest of 23-67-43 and also the south half of the northwest of Section 23-67-43. They were also listed in 1881 and 1882. In 1883 she found no book. In 1884, lot 1 of the northwest northwest and lot 2 of the southwest northwest, 23-67-43 are listed. This was also listed in 1885. In 1884

there were 43 acres and in 1885 43½ acres. In 1886 no book found. In 1887 the property was listed and in 1888 to 1933 no books were to be found. In 1934, 1935, and 1936 there was no listing. In 1937 to 1942 no books were found and in 1943 to 1948, inclusive, the description wasn't listed. In 1949 the northwest of the northwest and the southwest of the northwest fraction of 23-67-43 were listed to Dan Hill and Henry Schemmel and they have been on the rolls ever since.

On Section 23, taxes were delinquent for 1949 and 1950 and sold to Henry E. Schemmel on December 3, 1951. In 1951 it was the same listing as Dan Hill and Henry Schemmel and taxes were paid on a subsequent tax sale certificate by Henry Schemmel and then in 1952 the taxes were paid subsequent to tax sale certificate by Henry Schemmel. These certificates were assigned to Mary Leah Persons on October 27, 1953. Then in 1953 taxes were paid subsequent to tax sale certificate by Mary Leah Persons; in 1954 they were also paid by Mary Leah Persons; and then a deed was issued to Mary Leah Persons on November 2, 1955. Taxes have been paid ever since then including the current year.

The witness testified that she collects all real estate taxes in the county assessed by any municipality, school board and including the state on soldier's bonus. She collects all taxes, all personal and real estate. The witness identified 1968 tax receipts, payable in 1969, on all the property, paid by Henry Schemmel including the Mary Leah Persons land. The total amount shown on these tax receipts is $1,183.06 (Exhibit P-2643) for real estate taxes in 1968.

Iowa's Traverse of the Schemmel Land

The land claimed by the State of Iowa in the case of *State of Iowa v. Henry E. Schemmel, et al.* was described by metes and bounds in Iowa's Petition (Ex. "L" attached to Complaint, Ex. P-1691). This has also been described as the Windenburg Survey (Ex. P-237). The description runs

> ". . . to the ordinary high water line on the east bank of the abandoned channel of the Missouri River, which is the point of beginning, thence along said ordinary high water line. . ."

It also runs

> ". . . to the Iowa-Nebraska boundary as established by States of Iowa and Nebraska and approved by the 78th Congress in 1943, thence along said boundary. . . ."

Plaintiff's Interrogatory No. 250 was offered:

> "What is the physical feature, if any, which was followed by the State of Iowa in determining the easterly boundary of the tract as described in the petition in equity case of Iowa versus Schemmel?

The Answer by the State of Iowa is:

> "The same as answer to Interrogatory No. 249."

The Answer to Interrogatory No. 249 is:

> "The left bank ordinary high water mark of the former channel which separated the island from the east bank of the Missouri River." (Vol. VIII, p. 945).

The Nebraska State Surveyor retraced the Windenburg traverse along a portion of the easterly boundary

and, when asked if it followed the east high bank, he stated it did not. He couldn't find that it followed any particular feature. A reduction of the Windenburg survey by photographic process was offered showing the location of the hubs along the traverse where the witness took pictures (Ex. P-383). These photographs show the traverse going through an alfalfa field, across flat open ground, crossing a high bank at right angles, and across land with no depressions or banks (Ex. P-385, P-388, P-391, P-393, P-396, & P-397). Just as in the *Babbitt* case, the eastern line is apparently an arbitrary determination by the surveyor without justification in fact.

The Plat prepared by Mr. Windenburg (Ex. P-237) indicates the Schemmel land was surveyed in July and August, 1961. It shows the "Gov. meander line of east bank, 1846," which runs through the northwest portion of the island. Then it shows the "Approximate location of west bank as surveyed by C. W. Pierce, County Surveyor, Otoe County, Nebraska in 1895." This line runs considerably to the east of Schemmel Island except at the very lower portion. In the middle of the Schemmel land, Mr. Windenburg has shown the designation of the Section Corner common to Nebraska Sections 30, 29, 31 and 32 but has indicated that the corner was not set. It also shows in the southern part the section corner of Iowa Sections 15, 14, 23 and 22 with an indication the corner was not set. In the middle of the island below the section corner common to Sections 30, 31, 29 and 32, or in Iowa Section 15, are the words "*Mary Leah Persons*". On Iowa Section 14 in the west half of the southwest quarter, are the names "*Douglas Henry Schemmel & Robert*

Edgar Schemmel". He has other property names to the east of the Schemmel land. He has some elevations on the map which show an area on the western half of the island as being higher than some of the land along the eastern side.

The traverse of the Schemmel area was made with the same lack of precision or justification as the traverse of Nottleman Island. It does, however, apparently recognize there are individual claimants to the land.

GENERAL TREATMENT OF OTHER AREAS ALONG THE MISSOURI RIVER

Plaintiff has introduced into evidence facts concerning several specific areas along the Missouri River which point up problems created by Iowa's conduct following the Iowa-Nebraska Boundary Compact of 1943. In some instances they establish conduct by Iowa prior to the Compact significant to its meaning. The Nebraska State Surveyor testified that he has not had an opportunity to study the areas which Iowa claims to own in the detail which the Schemmel and Nottleman Island areas have been studied. There would be no comparison. Most of the information found in these other areas is a by-product of the study. They haven't really been concentrated upon as have the Nottleman and Schemmel areas. However, it is Plaintiff's position that this evidence is significant in order to determine the meaning and effect of the Iowa-Nebraska Boundary Compact of 1943. These facts are also essential in order to give the Court a better overall picture of the conduct of the river and of the State of Iowa authorities both before and after the Iowa-Nebraska

Boundary Compact of 1943. They point up some of the problems which existed prior to the Compact and some of the problems that now exist as a result of Iowa's conduct. These situations are not isolated instances but must all be considered in determining what the meaning of the Compact is. They do not necessarily include all the problems that exist but do point up many of them, and a determination of applicable law with regard to these situations is essential if the Iowa-Nebraska Boundary problems are ever to be resolved.

Plaintiff offered a filing by the State of Iowa in this case of a list of areas which the state claims to own captioned LIST OF AREAS OWNED BY STATE OF IOWA ALONG THE MISSOURI RIVER AND DISCLAIMER (Ex. P-2651). Plaintiff also offered a series of Corps of Engineers 1946-1947 tri-color maps for the length of the Missouri River along the Iowa-Nebraska border and Mr. Brown testified that he had placed on these maps dashed red lines which represent where the river was in 1965. The solid parallel red lines on these maps represents the 1943 designed channel (Ex. P-2652 through P-2654, P-2662 through P-2667, P-2673 through P-2676, and P-2679 through P-2683).

These maps were kept in the State Surveyor's Office primarily for a quick index as to whether the river was in the designed channel. The dashed lines are placed merely for reference. The witness made a study to determine whether the Missouri River was in the designed channel at the time of the Iowa-Nebraska Boundary Compact of 1943 and he testified the river was within the

designed channel with the exception of something in excess of 2,000 feet.

The witness has outlined on this series of maps the tracts of land which the State of Iowa claims to own. These penciled outlines of the tracts are placed more accurately than the dashed line designating the present channel because he was able to place the area drawn by Iowa in their list of areas claimed (Ex. P-2651) underneath the tri-color sheet on a light box and trace it. The scale of the plats of areas Iowa claims attached to Exhibit p-2651 are the same scale as the tri-color maps with some small differences, but they fit very well and by using the light table he was able to trace them so they would be accurate. However, to go out on the ground and identify the tracts is a different story.

These tracts were numbered by Mr. Brown on the various maps and many of them extended across the 1943 Compact line and into the State of Nebraska. The numbers assigned to these various areas are not necessarily the same numbers as those shown on Iowa's list of claimed areas since Iowa's list idetified some areas numbered differently from the photographic maps attached.

Evidence was presented by Plaintiff with regard to several specific areas along the Iowa-Nebraska border. These areas are treated individually commencing upstream and working downstream toward the Missouri border.

Winnebago Bend and Flowers Island

An action was filed by the *United States of America, Trustee and Guardian for the Winnebago Tribe of In-*

dians, Plaintiff v. Wilbur Flower, et al., in the United States District Court, District of Nebraska, Omaha Division on December 4, 1934, to quiet title to certain land in Thurston County, Nebraska, which was on the left bank of the Missouri River. The Petition alleged that the Winnebago Indian Reservation was riparian to the Missouri River on the right bank and the river moved gradually and imperceptibly in an easterly direction until in the spring of 1911, or about such date, the Missouri River, by avulsion, abandoned its channel and suddenly and perceptibly formed a channel further west. The pleadings were offered as Exhibit P-2661. On September 14, 1937, the State of Iowa, on the relation of John H. Mitchell, Attorney General of the State of Iowa, filed a Petition for leave to intervene. Iowa alleged that the land included in the plaintiff's bill of complaint existed on the east side of the Missouri River and: "Par. 6. That in order to protect its rights as a sovereign in and over a territory belonging to it, and to save and protect its rights to assess and collect taxes on said lands as aforesaid, this intervener desires to intervene in this cause on the side of the defendants and to adopt paragraphs 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, and 12 of the Answers of the Defendants, Wilbur Flower, State Bank of Winnebago, and Ernest J. Smith, Receiver of the State Bank of Winnebago, heretofore filed herein." The Answers of those defendants, in general, denied that the lands were in any way accretions to the lands of the Winnebago Indian Reservation and alleged that the land built up by accretion to land in the State of Iowa. The Answers also stated:

"Par. 11. Answering paragraph ten of the bill of

> complaints, these answering defendants admit that the Missouri River has by avulsion abandoned its channel and formed a new channel at numerous places throughout its course, which is a common characteristic of said river, that these answering defendants specifically deny that at the time alleged in said paragraph of said bill, the said river, by an avulsion, formed a channel which now constitutes the western boundary of the land here in controversy, as described in paragraph one of the bill of complaints."

These Answers further alleged that the lands were wholly within the State of Iowa and were either originally surveyed or platted as being within the State of Iowa or were lands that have accreted to said lands within the State of Iowa.

On October 8, 1937, the Court file shows a Memorandum Concerning Intervention of State of Iowa entered by J. W. Woodrough, U. S. Circuit Court Judge, which states that, when the case was called for trial, the State of Iowa appeared and asked leave to intervene on the side of defendants and such leave was granted. On further consideration, the Court concluded that the pleading of the state was insufficient in law to justify the intervention. The Court stated in the memorandum:

> "As I view the testimony there is proof that part of the river bed was abandoned by the river and it has been shown that a least some part thereof belongs to the State of Iowa and the state would be entitled to contest the apportionment of such abandoned river bed. Accordingly, unless the state shall elect to amend within twenty-days (sic) its intervention will stand dismissed.
>
> Final decision of the case will be deferred until

indication is made whether the state of Iowa desires to amend."

On October 29, 1937, the State of Iowa filed a Withdrawal of Petition of Intervention signed by the Attorney General of Iowa and an Assistant Attorney General in which they withdrew their petition of intervention "without prejudice to said intervener" and Judge Woodrough entered an order granting Iowa leave to withdraw without prejudice. On that same date, Special Findings of Fact and Conclusions of Law were entered by the Court. The Court found that there were two avulsions in the area. One occurred between 1870 and 1879 leaving some Iowa land on the right bank of the Missouri River immediately following the avulsion but which presently is again on the left bank of the Missouri River. The Court also found that the evidence showed the channel upstream from or above the aforementioned avulsion made substantial movement to the eastward and there was then an avulsion in 1916 which left Nebraska land on the left bank of the Missouri River.

There was a final judgment entered and the case was appealed to the Circuit Court of Appeals, 8th Circuit, which entered an opinion in the case of *United States v. Flower, et al.*, 108 Fed. 2d 298 (Dec. 27, 1939). The Circuit Court of Appeals affirmed the District Court and recognized the 1916 avulsion leaving land belonging to the Winnebago Indian Tribe on the left bank of the Missouri River. The Nebraska State Surveyor placed the description contained in the Judgment on Mandate in the case of *U. S. A. v. Flower* on the 1946-47 tri-color map (Ex. P-2661-A) showing the tribe's Nebraska land on the east

side of the Missouri River with an exception of a small tract which was not in issue and which everyone admitted belonged to a private owner.

Mr. Leo M. Peterson, age 70, of Silverton, Idaho, testified by deposition taken February 8, 1969 in Wallace, Idaho. He has been a retired surveyor since January of 1962 and prior to retirement was in Alaska two and one-half years as Chief Cadastral Engineer for the Division of Lands, Department of Natural Resources. His duties were to advise on the selection of the 103,000,000 acres granted to the State of Alaska by the Federal Government on Statehood and after obtaining those acres to advise and consult on the Federal Government portion of it in order to give the State title to the lands. He was also to advise and direct the state surveys for disposal of the lands. Prior to this employment he worked practically all his life with the Federal Department of Interior, starting in 1916. He was associated with surveying and surveying work all the time he was with the Department and in 1959 was presented by the Secretary of the Interior with the Department's highest honor, a distinguished service medal, and his name appears on a plaque in the Department of Interior Building in Washington.

Mr. Peterson testified that some time in the 1920's he had occasion to survey lands along the Missouri River in connection with the investigation of lands which might belong to the Winnebago Indian Tribe (Pl. Ex. 1 Peterson). He commenced the survey in 1927 and copies of some of the maps which he obtained are in evidence (Pl. Ex. 2 Peterson, through Pl. Ex. 6 Peterson).

Mr. Peterson's field notes obtained from the United States Department of Interior Bureau of Land Management were offered in evidence (Pl. Ex. 12 Peterson and Ex. 13 Peterson). Mr. Peterson circled an entry on page 15 of his field notes (Pl. Ex. 13 Peterson) which indicated that he identified two bearing trees which Surveyor Beaman had marked in 1875 in the original government survey of Nebraska. One of these was a standing and live cottonwood, 34 inches in diameter and the other was found to be the outer rim of an old tree, partially decayed and burned, visible in a stump hole indicating the tree was over 30 inches in diameter. Mr. Peterson circled the location of these trees in green on a copy of the plat of his 1927 survey (Pl. Ex. 9 Peterson). These trees appear on the east or left bank side of the Missouri River as it was flowing at the time of the survey in 1927. Mr. Peterson also testified that in Beaman's survey of 1875, Beaman meandered the ordinary high water line of the right bank of the Missouri River through this area and Mr. Peterson made a recovery of that line with his survey and placed it on Plaintiff's Ex. 9 Peterson. He retraced that bank on Plaintiff's Ex. 9 Peterson which is all on the left bank side of the Missouri River. Part of this recovered line generally followed the foot of a sloping bank several feet high. The Nebraska State Surveyor testified that this bank is still visible today.

Mr. Peterson also testified that, in connection with the bearing tree which he found standing and circled in green on Exhibit 9 Peterson, he chopped into the scar with right angle blows at the bottom of the cut and found that this was a deeply embedded scar and the sur-

face area had been squared off with an axe cut; and in counting the rings outward on the lower right angle cut to the axis of the tree, he found the number of rings approximating the number of rings back to 1875. This was the date of the Beaman survey.

From the study of the area and the result of this survey, the witness concluded that there was a small area in fractional Sections 17, 18 and 19 of Township 26 North, Range 10 East that had never been washed away by the river since either 1852 or 1875. He outlined in yellow the area that was Nebraska land which appeared in 1875 in the Beaman survey and never washed away (Pl. Ex. 10 Peterson). This is a crescent shaped area between one-quarter and one-half mile east or southeast of the Missouri River on the left bank side as the river flowed in 1927.

Mr. Peterson also obtained affidavits at the time he did his survey and these accompanied his report of March 21, 1928 concerning investigation of the status of the Winnebago Indian Lands (Pl. Ex. 15 Peterson and Pl. Ex. 14 Peterson). One of these affidavits by D. D. Whitcomb dated January 19, 1928 states:

> " . . . During the first night we were on the land I heard loud roars and noises such as the river would make when cutting heavily. The next morning I discovered that the river had broken through along the Nebraska bluffs and that the main channel of the Missouri River was between our camp and the Nebraska bluffs and was flowing in a southerly direction. Later I found that the river broke through because of an ice gorge. About two days after we came to this place some indians (sic) came and took my brother and one

of the Londrosh boys back to the Nebraska side. Myself and the other boy stayed on the land which was now an island. We had our camp on land that was somewhere in the vicinity of where Flower's house now stands. We were on high land covered with big timber. The indians (sic) assured us that we were safe, that the island had never overflowed and probably never would. I do not know who the indians (sic) were that came to us on the island. Myself and Londrosh were on the island for about 7 or 8 days before the indians (sic) came the second time and took us off."

The witness testified he only used the affidavits as supporting evidence in preparing his report and probably to a lesser extent than what he actually found on the ground.

Mr. Peterson's plat which was prepared in 1927 and entitled Plat No. 2 Investigation of Winnebago Indian Lands Group No. 56, Nebraska, also shows a cut bank 12 to 15 feet high just to the left of what he called on his survey an "Outside Chute". This Outside Chute appears on the A. P. maps and other Corps of Engineer maps and aerial photographs of recent years.

It also shows up clearly on defendant's Exhibit D-1152 and on the Alluvial Plain maps (A. P. 2).

Willis Brown testified that on April 21, 1969 he retraced a portion of the Peterson Retracement of the Beaman survey of 1875 on the Iowa side of the river in the Flower Island area. He found at least 6 or 7 of the brass caps placed by Mr. Peterson in his 1927 survey. Mr. Brown testified that it was his opinion that these caps were undisturbed because they were all facing south and,

when he was working with the General Land Office it was the instruction of that office that the date on all brass caps set be placed on the south. Photographs were offered showing these caps (Ex. P-2656 through P-2660) and they were located on a copy of the Peterson survey (Ex. P-2655). Mr. Brown testified that he didn't hunt for all corners and where the bearing tree was which Mr. Peterson referred to there was about 10 feet of sand.

Mr. Brown also testified that these corners were found along the geographical feature testified to by Mr. Peterson. Around the eastern area it followed, as he described in his notes, at the toe of a bank, and these banks compare favorably with the height he gave the banks on his survey. Some areas had filled in with sand. To the west of this area is a sizeable lake and then beyond the lake is an area covered with high sand dunes.

The fact that Mr. Peterson's corners are still in existence and undisturbed conclusively proves that this land has not been washed away by the Missouri River since 1927 or the date of the Peterson Survey. Therefore, this is still original Nebraska land and the Missouri River flowed entirely through Nebraska at that point at all times following the 1916 avulsion recognized by the Court in the *Flowers Island* case until the Iowa-Nebraska Compact of 1943, at which time the land was ceded to Iowa with the supposed safeguard the title would remain good in Iowa.

The Alluvial Plain map upon which the Compact was based for this area, A. P.-2 shows the designed channel in the Flowers Island area or Winnebago Bend as being

through Nebraska bank with willows between the designed channel and the Missouri River. This is also shown on the 1939 Project & Index Maps (Ex. P-414). In 1939, the Corps of Engineers dug a canal through the right bank to place the Missouri River in the designed channel in the Glovers Point-Winnebago Bend area and this canal is clearly shown on the right bank on the 1939 Corps of Engineer aerial photograph (Ex. P-1878). Mr. Brown marked this canal in red. It is shown going through the Nebraska mainland and some of the crescent shaped area which Mr. Peterson testified was original Nebraska land is visible on the left bank side of the river. Consequently, there was an additional man-made avulsion in the Winnebago Bend area created by the Corps of Engineers by the canal. However, at the time the Corps of Engineers dug the canal in 1939, the river was already completely in Nebraska because of the avulsion described in the case of *U. S. v. Flower* and what the Corps did was just move it further over into Nebraska. At the time of the Iowa-Nebraska Boundary Compact of 1943, the entire title to the river was in Nebraska claimants since they owned both banks of the Missouri River and their title extended to the middle of the main channel from each side.

After the Iowa-Nebraska Boundary Compact, the Missouri River then moved again south and east in the Winnebago area where the 1939 canal had been dredged and worked its way back into what was then Iowa shore. In 1961, the United States of America filed an action to condemn an easement to construct and maintain channel improvements in the same location as the 1939 canal

and the designed channel of 1943. The pleadings in the Nebraska case were offered as Exhibits P-2684 and contained a map which shows the designed channel and the 1959 Missouri River bank line. The Corps of Engineers dredged another canal through the location of the 1943 designed channel and placed the river by an avulsion back in that designed channel. The witness, Larry Hart, on a copy of the A. P. maps (Pl. Ex. Hart 1) outlined Flowers Island in black and circled in red the original Nebraska land and put an "N" within it. He also showed where the river was running in 1939 and 1940 and marked in red where the canal was dug. The witness Huber also shows two canals in Winnebago Bend, one before and one after the 1943 Compact (Pl. Ex. Huber 1). Iowa is apparently claiming the area from the Iowa-Nebraska boundary as established in the middle of the designed channel of 1943 to the extreme easterly portion of where the river had moved following the Compact. However, the movements of the river following 1943 never washed away the original Nebraska land as surveyed by Mr. Peterson and as further evidenced by the corners which are still in place and undisturbed today. Consequently, the entire river since 1927 has been in Nebraska or in land ceded by Nebraska to Iowa. Iowa is required by the Compact to recognize the Nebraska titles which include title to the bed of river.

The case of *U. S. A. v. Flower* found that the boundary line between the States of Nebraska and Iowa was along the east and west center line of what would be Iowa Section 28 and the land south of this line was awarded to the Indian tribe as Nebraska land. On July 20, 1956,

an action was filed in the District Court of Iowa in and for Woodbury County captioned *Clyde Kirk and Maxine Kirk, Plaintiffs, v. Douglas Wilcox, et al.*, which joined the State of Iowa and Woodbury County, Iowa, as defendants. This action described land immediately adjacent to and north of the east-west center line of Iowa Section 21 and the Petition alleged:

> "6. That the defendant, State of Iowa, has an interest in this action in that the East and West center line of said section twenty-eight (28) herein referred to is the boundary line between the State of Iowa and State of Nebraska and the location and establishment of said center line affects the jurisdiction of the State of Iowa and that the State of Iowa may also be interested in a determination of the western boundary line of the accretions herein claimed by the plaintiffs.
>
> 7. That the defendant, Woodbury County, claims, or may claim, some interest in the said premises by reason of unpaid personal taxes of parties other than the plaintiffs herein." (Ex. P-2339).

The State of Iowa filed an Answer admitting some of the allegations in the Petition but denying others because it " . . . has neither knowledge or information sufficient to form a belief as to the truth of the allegations. . . " The Answer was filed by George West, Assistant Attorney General, Attorney for Defendant, State of Iowa. The Court entered a Decree on November 20, 1956 which recited:

> " . . . and the defendant, State of Iowa, appearing by its Assistant Attorney General, George West. The plaintiffs and the defendant, State of Iowa, being ready for trial, it is ordered that hearing on the

issues joined between the said plaintiffs and the said defendant be now had. The said defendant having filed Answer herein denying the plaintiffs' petition because of lack of knowledge and information, now admits that for reason of information since obtained that the plaintiffs are the owners of the real estate described in the plaintiffs' petition as accretion land . . . ''

The Court then found that the plaintiffs were owners in fee simple of the property described and that the defendant, State of Iowa, had no right, title or interest therein. The Decree also recited that, by agreement of the parties, it was further adjudged and decreed that the plaintiffs '' . . . shall protect any interest which the State of Iowa may have in the matter of its jurisdiction along the center line of said Sections Twenty-Eight (28) and Twenty-Nine (29) extended westward to the Missouri River at the plaintiffs' own cost.'' (Ex. P-2339). The decree is shown as approved by George West, Assistant Attorney General of the State of Iowa. The index map prepared by Mr. Brown describes this land and he has placed the description of the land as shown in the decree on the 1946-1947 tri-color map (Ex. P-2661-A). He has also shown on the tri-color the land included within the decree in *U. S. A. v. Flower,* and the *Kirk v. Wilcox* land abuts the *U. S. A. v. Flower* land on the north. Consequently, although there would have necessarily been abandoned channel along the boundary of the land decreed to be in Nebraska by virtue of the avulsion recognized in the *U. S. A. v. Flower* case, Iowa made no claim to this abandoned channel in the case of *Kirk v. Wilcox* and the decree indicates that Iowa was only interested in pro-

tecting its jurisdiction and was making no ownership claims to abandoned channel in that area.

The land adjacent to and immediately north of the *Kirk v. Wilcox* area was also the subject of a quiet title action in the District Court of Iowa in and for Woodbury County in the case of *Douglas Wilcox, Plaintiff v. Adah L. Pinney, et al.* The Petition was dated October 30, 1956 and joined as defendants Woodbury County, Iowa and the County Auditor of Woodbury County, Clyde Kirk, and Sybil Jauron, an aunt of the witness Jerry Jauron. There were other individual defendants but the State of Iowa was not a party (Ex. P-2338). The Court quieted title to the land described and Mr. Brown has shown it on the index maps attached to Ex. P-2338 and on the tri-color map (Ex. P-2661-A). This area is adjacent to and immediately north of *Kirk v. Wilcox.* The area to which title was quieted includes a considerable amount of land between a topographical feature shown as a bank line and the Missouri River.

The case of *Wilcox v. Pinney* was appealed to the Iowa Supreme Court and an opinion rendered by the Court on October 20, 1959 found at 98 N. W. 2d 720 (Ex. P-2338). The opinion includes a drawing which shows the land described as extending from a "chute" on the east over to the Missouri River. This feature is also visible on the 1946-47 tri-color map (Ex. P-2661-A).

The Winnebago Bend situation is significant for several reasons. It points up an inconsistency in Iowa's conduct concerning abandoned river beds. The State was aware of the fact that there was abandoned bed in the

Winnebago Bend vicinity as shown by their participation in the *Flower's Island* case. Yet they were making no claim to such beds prior to the adoption of the Compact. They made no claim to the abandoned bed in the *Kirk v. Wilcox* case and are not claiming it today. However, the State is presently claiming lands in Winnebago Bend which were ceded to Iowa by Nebraska by the Compact.

Blackbird Bend or Kirk Bar

Iowa's discriminatory treatment against Nebraska landowners is further illustrated by their actions in Harrison County, Iowa, in the area known as Blackbird Bend. This land is shown on sheet number 72 of the 1946-1947 Corps of Engineers tri-color map and is between river miles 725 and 720 north of Decatur, Nebraska, and just to the west and a little north of Onawa, Iowa, and Blue Lake. The tri-color map (Myrland Exhibit 1) shows what appears to be a large bend which had developed to the east with substantial water area and marsh along the eastern side of the bend, but the river today is at one point about three miles west in the designed channel. The testimony of Mr. L. C. Myrland of Onawa, Iowa, was offered by deposition taken on December 19, 1967. Mr. Myrland, age 69, was the Monona County Assessor appointed by the Monona County Board of Supervisors and the Monona Board of Education and the Mayors of the ten existing towns in the County. He was first appointed Monona County Assessor on November 1, 1949, and has held the position continuously since that date. His duties were to assess properties, real and personal, and included

the duty of locating and placing upon tax rolls real estate which has not previously appeared on the tax rolls. He testified that Monona County is bordered on the west by the Missouri River and some of the land on the western edge might disappear and some new land might re-appear after river changes. It was necessary for his office to make some kind of adjustment in the records when this happened to the land on the western border. The supervisors had hired an engineer or surveyor to survey land along the river about six years ago but none of the land thus surveyed had been placed on the tax rolls as yet because the Monona County Board of Review, who was his governing body, asked that the entire survey all be placed on at once.

Mr. Myrland was referred to the 1946-1947 tri-color (Myrland Exhibit 1) and drew in red the high bank of the old Missouri River which would be the east high bank prior to 1952. This line which he has outlined in red goes around the apparent former easterly bend of the river to the left bank side of the water and marsh area and shows, riverward and to the west of that line, approximately eight sections of land (5,120 acres). Mr. Myrland testified there had been a survey of the land between his red line or high bank and the river done by Mr. Virtue, a surveyor, for Mr. Lakin who claimed to be the owner of some of this land. He thought Mr. Lakin claimed approximately 2,000 acres. He didn't know the acreage embraced between his red line and the river but testified the Lakin survey included parts of Sections 19, 20, 24, 25, 28, 29, 30, 31, 32, 33 & 36, Township 84 North, Ranges 46 and 47 West. Mr. Myrland testified that this

land was not on the Iowa tax rolls at present but the land east of that high bank is presently on the tax rolls. He testified that they called this land accretion land and they don't call it bar land. They called it accretion land without any particular technical reference to how it actually formed.

The witness testified that after the land descriptions and acreages are entered on the tax rolls for the purposes of assessment, the County Auditor is the one who finds out, if he can, the owners and the Auditor will place it on the tax books. However, the witness makes a determination of land that is exempt from taxation either by state ownership or for some other reason. He testified that there was some land within the area defined by his red line which lies against the river which the State Conservation has title to. As he remembered, this was about 200 acres and was along the west edge of sections 24 and 36 along the river. He had no information as to how the state obtained the title for that land. There was a deed filed and he thought this deed specified them purchasing it from Lakin sometime within the last year.

The witness testified that the County Board had hired two surveyors to conduct this survey of these bottom lands, Jack Virtue and Larry Hart. He estimated that the first part of October (1967) the engineers estimated that 8,500 acres of land in four townships would be placed on the tax rolls when the surveys were completed.

Mr. Myrland testified that the area enclosed within the red line which he has drawn on Myrland Exhibit 1

and the Missouri River had not been on the tax rolls during his tenure of office.

Mr. Jack Virtue of Onawa, Iowa, age 37, testified by deposition taken December 16, 1967, that he is a registered engineer and a land surveyor licensed to practice in the State of Iowa. He had been a licensed land surveyor since 1956 and had been engaged by the Monona County Board to make some surveys for Monona County along with Larry Hart, another land surveyor from Onawa. They had been asked by the Board of Supervisors to extend congressional land lines (from the existing records available) to the ordinary high water mark or the 1943 Compact line to allow Monona County to tax various tracts of land that are now being farmed and utilized and not on the tax rolls presently. They had been engaged in that endeavor about four years, although doing other work in addition. He and Mr. Hart worked together and the survey was about 95% complete.

His best guess as to the amount of acreage that might be added to the tax rolls was in the neighborhood of 7,500 to 8,000 acres although they probably had to survey 70,000 acres in order to pick up lines as they exist and extend them from both the north, south, east, and west directions. The witness had done surveys in the vicinity of the so-called Lakin-Peterson land in Monona County which was the area probably more well-known locally as Kirk Bar. Mr. Virtue identified on the 1946-47 tri-color map, Myrland Exhibit 1, the area generally bounded approximately by the red line as the Lakin-Peterson land or Kirk Bar. In this area, the witness had extended congressional land lines and did some

surveying for the partition agreement between Mr. Lakin and Mr. Peterson. He also did some surveying in that area on behalf of the State of Iowa Conservation Commission. His instructions from the State Conservation Commission, by letter dated October 15, 1963, stated:

"Dear Mr. Virtue,

This letter is to confirm our conversation on October 10, 1963.

Please survey the agreed-upon boundary between Lakin and the State of Iowa in Sections 25 and 36 of T84N, R47W and Section 1 of T83N, R47W.

This line is to follow the ordinary high water line from Lakin's north boundary to the intersection of said O. H. W. line and a projection northwesterly of the chord between the two corner posts at the northern end of the proposed fence line. Then follow the fence line—marked by steel posts set in concrete—to the Iowa-Nebraska compromise boundary line which appears to be just a short distance south of the recently surveyed line between Townships 83 north and 84 north.

From the intersection of the fence line and the State boundary please determine the State boundary and left bank of the abandoned channel to connect with Larry Hart's survey at the north line of Section 8, T83N, R46W.

When determining the abandoned channel tie the left bank to the Iowa-Nebraska boundary line at a point 20 feet southeasterly from the southernmost extremity of the slough in the abandoned channel. This location is approximately 2,150 feet southeasterly from the northwest corner of Section 6, T83N, R46W.

The survey should be platted showing ties to recently established civil corners and property lines

and the notes indexed and in legible condition'' (Vol. X, p. 1312).

The letter was signed by Lloyd Bailey. Virtue proceeded to make the survey in part by traversing the area from Mr. Lakin's north line down through and on the fence that had at that time been erected and to the southern end of said fence and then waited until Mr. Hart had extended the 1943 State Line to the intersection mentioned in the letter and then they made the actual intersection in the field. A representative of the State Conservation Commission accompanied him or gave him instructions when he did this work. He had conversations with Jerald Jauron about running this line but they were not official instructions. The witness was present at a meeting on the bank of the river when this stated agreed-upon boundary line was more or less established. He wasn't actually with Mr. Jauron or Mr. Lakin when they agreed upon the boundary as he was checking some hubs along the ordinary high-water line at that time. But as a result of that agreement, Mr. Jauron told the witness as soon as Mr. Jauron got his fence built, to run along it. The witness didn't remember any conversation to the effect that that was supposed to be the high bank line.

He was asked if there were any visible signs of a bank line east of the high water mark which he surveyed for the State of Iowa and he said there were several. The number would depend upon which course you decided to start on and which direction you went. He would say on an average there were about probably three, but in some cases there are less than that and some more than that. Referring to Myrland Exhibit 1,

the witness sketched in a rough approximation in green and placed three irregular lines indicating old visible high bank lines. Mr. Virtue agreed with Mr. Myrland for a portion of the high bank line indicated in red but he went further easterly about a half a mile on the eastern side of the area. This is outlined in green and includes land in Sections 28 and almost an additional one-half section in Section 33. There is some water or marsh area shown along a portion of the outside of this bend. Then Mr. Virtue placed two green lines closer to the river within the bend, both of which represented old visible high bank lines. The one to the farthest west or closest to the river represented within 500 feet the line he surveyed for the State of Iowa. The topography along that line was sand dunes with heavy timber and some small brush. There was no water there. There is another green line representing an old visible high bank line to the east of this line but to the west of the Myrland high bank line.

Mr. Virtue testified that, during the period which he had been active in this area, there has been clearing of timber going on. In the last seven or eight years he estimated there has probably been 1200 to 1500 acres cleared on the Kirk Bar. The witness was reasonably sure that the Lakin-Peterson agreement was filed of record. The agreement between Mr. Lakin and the State of Iowa was part of an equity action to quiet title and he was not furnished with a copy of that agreement in order to make his survey. He just got the letter of instructions.

Mr. Virtue marked on Exhibit Virtue Sheets 1 and 2

(Ex. P-2225 and P-2226), which are copies of the drawings he made for the Conservation Commission before the originals were sent to Mr. Bailey of the Conservation Commission in Des Moines, the ordinary high water line in green and, to the east of it, the agreed-upon fence line which is shown in red. This ordinary high water line followed the line of apparent end of vegetation.

The witness was asked about the reference in the instructions from Mr. Bailey to the "slough in the abandoned channel" and stated that, when they built the fence, they didn't build the fence through what the witness would call the slough. Part of the fence was northerly and part of the way it was westerly. There was not a hollowed-out visible abandoned channel at that location. The land between the ordinary high water land and the agreed-upon line was very irregular and in timber and brush covered with largely sand content that was visible upon the surface. The elevations varied in this tract as much as 20 feet with some of the sand dunes blown up into small hills. Where the agreed-upon line varies along the slough, there would be the bank line between the slough and the agreed-upon line. The state boundary line was determined by Mr. Hart and appears on Virtue Exhibit 1 as 500 foot chords.

The witness was asked to describe the land between the Myrland high bank and the Missouri River and he stated that some of it was under cultivation but the area west of the agreed-upon line with Iowa had not been cleared nor was it under cultivation. There are areas where water stands a good part of the year. One such area in the north part of Section 29 was circled and that

has existed for five or six years and has a beaver dam which holds back some water. He circled an area between Sections 19 and 20 which holds some water on both sides of the road and there were some water areas in Section 24 immediately to the river side of the existing levee which the witness marked. In approximately the east quarter of Section 19 which is riverward from the Myrland high bank there is a set of buildings.

The witness was present when Mr. Jerald Jauron made a statement about the kind of land the State was interested in. He thought that Mr. Lakin and Mr. Murray were also present. This conversation took place when they had just gotten out of a boat at the southeast corner of Section 36 which is within the area referred to. There had been discussion about this agreed-upon line and the statement, as the witness remembered it, was to the effect that "We are not interested in agricultural land." He assumed the "We" indicated the Conservation Commission.

Upon redirect examination, the witness clarified his testimony that the agreed-upon line was east of the high water line.

Mrs. Bertha Kirk testified by deposition taken on December 19, 1967, that she was the widow of Joe Kirk, Sr., who had passed away five years ago from the previous August. Her own place was northwest of Onawa where they had lived all these years and Kirk Bar is nearly straight west of their house. She and her husband at one time owned the land that had been known as Kirk Bar. Joe Kirk built the cabin and as she re-

membered they went in a boat over to it about 1915. This would be the year the cabin was built or along about that time. A photograph of the log barn which her husband built to the east and a little bit north of the house is in evidence (Kirk deposition Exhibit 1). Mrs. Kirk also identified a photograph of the log cabin which they built. The cabin was built before the barn (Kirk deposition Exhibit 2). Mrs. Kirk then circled the place where the cabin was on Myrland Exhibit 1 and wrote the word "Cabin". This appears in Section 19 riverward from the Myrland high bank and just south of the two areas which Mr. Virtue identified as having standing water on both sides of the road.

When they first went to the cabin the witness testified that they went in a boat. There was high bank and there was all bayou in there and they went across in a skiff. They had to cross water from the north side north of the cabin down onto the bar. Later on, they built a road in there and put in willows and about everything he could get and finally got a pretty solid road there with a lot of dirt and willows and everything. She didn't really know how wide the water was that they had to cross to get over to the cabin but it was pretty wide. At one time the water went all the way around Kirk Bar. She couldn't identify the date but it was "after even we built the house". She thought the water connected up to the Missouri River. When they first started going over there the ground was just some little willows. It was real sandy with sand knolls and small willows and cottonwoods. They later sold the land on Kirk Bar to Raymond and Henry Peterson. The cabin which she

referred to is still on the land today. She didn't think the barn was still there because Mr. Kirk built a different barn later on. The house is there though.

On cross-examination, Mrs. Kirk again stated she didn't remember exactly how high the water was which they crossed in the boat to get to the cabin but she said the water was moving there with a kind of current. There was a current down there. She repeated that they first built the cabin along about 1915. It was a pretty big river then. Although she had never traveled the length of the bayou, she said her husband probably has lots of times and it came from the north from the river and went around to the south.

Mr. Merle Cutler also testified by deposition taken December 19, 1967. He was born in 1911 in Lincoln Township in Monona County, Iowa, which is north and west of Onawa. The witness had heard of Joe Kirk probably as far back as 1917 or 1918. He first got to know Joe Kirk personally in about 1923 or 1924. He did a little work for Joe Kirk in 1925 and before that he just knew him as a neighbor. The witness testified he was familiar with the area known as Kirk Bar. The area circled by Mrs. Kirk was the location of the old cabin which Joe Kirk built.

The witness circled the farm which Joe Kirk bought north of the cabin site which is about 90 rods north of the cabin and half a mile south of Maple Landing. The witness was born and raised about two miles northeast of Maple Landing. He also marked the Kirk home place to the east of Kirk Bar about a mile and three-quarters.

He remembered the road which Joe Kirk built to get out to the cabin and testified the road is still there. Joe Kirk had put brush in on the water and when the river was low he got in with a spade and spaded the dirt up on the brush. The road was built before the witness' time, but when the witness first became familiar with it, it was water at high times of the river. When the river was up, there would be water running across the road and there was a little dirt sticking out with a couple of roots, ditches that they drove in with the wheels of a wagon or car running down on the brush and running clear through the dirt. There were a couple of tubes put in that road which the water ran through at low times and of course, when the river was up, the river ran over the top of the road. Mr. Cutler marked in black the road where it crossed the water and testified that road went across ". . . that old chute that came around following this high bank around." There were a few willows growing in the chute and there was water about knee deep which was moving back in 1925 and 1926. The most of the year around there would be a little water moving through these tubes in the road. When asked if he ever followed this water around to see how far it went or where it came from, the witness testified that he did at high times when the river was up. He has been clear around there in a boat years ago. The water came from out of the river up west of Maple Landing where the red line starts which was drawn by Mr. Myrland and it ran clear around the bank which Mr. Myrland identified and back into the Missouri River down west of Onawa.

In places, that chute or slough filled in. In about 1934 Mr. Kirk built a levee across about a mile west of the cabin. This was done on a drag line on mats sitting in water about a foot deep. The witness did quite a lot of work on the Kirk Bar and in 1934 when the old cabin had begun to deteriorate, he put three or four new logs under the cabin and put some new windows in it and a new floor. The witness last saw the cabin two days before his testimony and he stated that the cabin is still there now. The road which he referred to is also there but there is a new road on the east side of the old road.

Mr. Dale R. Blankenhorn, a farmer living 5 miles west of Mapleton, Iowa, in Monona County, testified that he had been on the Monona County Conservation Board for about six years and he was also on the Monona County Conference Board composed of the members of the County Board of Education, the Mayors, and Board of Supervisors. They hired the Assessor and his assistant. He had lived in Monona County all his life and is 55 years old. Mr. Blankenhorn identified the area on Myrland Exhibit 1 and said he had been familiar with that particular piece of ground in varying degrees from the early 1930's. It has been land east of the river since the early 30's but has had some water and marsh areas. That property was placed on the tax rolls in Monona County in 1969.

The witness has hunted and fished in the area and said they knew it as English Bayou and this is where he hunted. The area west of it was known as the Kirk Bar. He described English Bayou as for all substantial

purposes what is now known as a small oxbow lake. To get to where they hunted, they went down over a high bank. The witness identified his blind as being just riverward from the Myrland high bank on Myrland Exhibit 1 and stated that they first hunted at that site in 1939. A photograph was offered taken in a northeasterly direction from the blind in 1940 and showing a large amount of water and a high bank (Ex. P-2650). That high bank line is a natural feature. Another photograph was identified by the witness which was taken from substantially the same location but looking sutheasterly (Ex. P-2649). This also shows a substantial body of water. Where they had their decoys, the water was wadeable with hip boots if you were careful. Over on the high bank at that time there was approximately 5 to 6 feet of water adjacent to the far shore which was to the northeast.

They later moved approximately a mile south and this area was identified on Myrland Exhibit 1. Their blind was below what the witness called the secondary bank out in the slough. At that particular location, what he considered the actual high bank ran over fairly close to the road and then you dropped down on a shelf and out and then the bank of the actual slough was beyond that. This secondary bank was about where the red line was marked by Mr. Myrland and the green line which was the high bank is the line marked by Mr. Virtue. The water in the vicinity of Blankenhorn Blind No. 2 was similar to the area in Blind No. 1 in that there were areas of deep water next to the bank but as you got out away from the deeper water, the shallow water covered

a wider area. The witness also had been west approximately a half mile and at that time the terrain was under water. There was water and rushes. He identified the area on Myrland Exhibit 1 marked "Cabin" as the site of the Peterson barns and buildings. A man named Lakin, to the best of his knowledge, owned the area where they had Blind No. 2. The present road into the Peterson Buildings crosses the slough immediately north of the buildings and there is a bank line discernible in that vicinity. Mr. Blankenhorn fished in that area and has fished consistently in Blackbird Bend Cutoff. He fished in English Bayou at the time they were hunting ducks.

Photographs of this area taken by Willis Brown were offered by Plaintiff and emphasized the water along the Myrland high bank around Kirk Bar and the height of the bank. These photographs were taken on June 28, 1969, and Mr. Brown located them on the 1946-1947 tri-color (Ex. P-2263) map which is the same base map as Myrland Exhibit 1. Mr. Brown's son appears in some of these pictures holding a 9-foot rod which further accentuates the height of the bank (Ex. P-2709, P-2712, P-2713 & P-2714). There is still a lot of water in that slough or old channel as depicted in these pictures (Ex. P-2711 & P-2715).

On the 1946-47 tri-color map (Ex. P-2663 & Myrland Exhibit 1) the 1890 channel line can be seen to run through the eastern half of the Kirk Bar land and at some places measured from east to west is more than two miles east of the present Missouri River. However, in spite of the fact that Kirk Bar when originally settled was bar area with water from the Missouri River running around

its perimeter, the Iowa Conservation Commission never made any claim to the bar and it was not even on the Iowa tax rolls until 1969. To the contrary, the State of Iowa recognized the claim of title of the Iowa claimants, namely Mr. Peterson and Mr. Lakin, and even went so far as to disclaim title in the Iowa courts.

It is Plaintiff's position that the evidence in the Kirk Bar situation shows that the cabin built by Joe Kirk was built on island or bar land with water flowing around it and a high bank on the left or Iowa side which is still obviously visible today. There is a large amount of water riverward of this high bank and it has the appearance, as was testified by Mr. Blankenhorn, of a cut-off lake. The cabin was built on this bar in about 1915 and has remained until the present time so the area has never washed away or been obliterated by the river. If Iowa's position is that it "owns" all land within the ordinary high water mark of the river, the testimony and exhibits showing the high bank clearly indicate this land would qualify within Iowa's definition of state owned land. However, Iowa has not made that contention in this location against these particular Iowa land owners.

The pleadings in the case of *Charles E. Lakin, plaintiff v. State of Iowa, Monona County, Iowa, et al.*, show that Mr. Lakin filed a quiet title action to the south half of Kirk Bar and joined the State of Iowa, alleging that Iowa makes or may make some claim to a portion of the real estate as abandoned channel of the Missouri River or as lying below the high water line of the Missouri River and plaintiff in that action alleged that the channel of the Missouri River, over a period of years, gradually

shifted towards the State of Nebraska and the area was built up through the process of accretion. This case was filed in the District Court of Monona County, Iowa, on May 7, 1963 (Ex. P-1761). The index maps show the areas included in the Judgment and Decree as being the south half of Kirk Bar except for some land over within a half mile of the river. A Real Estate Sale Contract through which Mr. Lakin acquired the land is also in evidence (Ex. P-1779).

The State of Iowa, after first filing a Motion for a more specific statement and after amendment of the petition by the Plaintiff on November 12, 1963, filed on November 15, 1963, a "Separate Answer And Disclaimer By Defendant State of Iowa" and alleged they made no claim of any right, title or interest in or to the real estate specifically described in plaintiff's amendment to petition and disclaimed any right or interest in said real estate and, on November 15, 1963, a decree was entered quieting title in the land to the Plaintiffs. The index maps attached show that this includes the south half of Kirk Bar and land riverward from the Myrland high bank and the Virtue high bank.

A warranty deed from Bertha Kirk to Raymond Peterson conveying approximately the north half of Kirk Bar for the sum of $63,000 is in evidence (Ex. P-1760). Also, an agreement of October 30, 1959, is in evidence dividing the approximately 5,000 acres called Onawa Ranch, which the index map indicates is a description of Kirk Bar, into two tracts of approximately 2500 acres each between Raymond G. and Henry K. Peterson and Charles E. Lakin (Ex. P-1778). Also in evidence is an

assignment of interest in a contract from Joe Kirk and Bertha Kirk dated January 2, 1948, and conveying most of Kirk Bar. The assignment indicates that the interest in the land has been conveyed so that Raymond J. Peterson became the owner of approximately the north half of the Kirk Ranch and Charles E. Lakin the owner of approximately the south half of said tract. On October 12, 1964, an action was filed in the District Court of Iowa for Monona County captioned *Raymond G. Peterson, Plaintiff v. State of Iowa, Monona County, Iowa, et al.*, to quiet title to the north half of Kirk Bar. Again, Plaintiff alleged that the State of Iowa makes or may make some claim to the above described real estate as an abandoned channel of the Missouri River or as lying below the high water line of the Missouri River, but the plaintiff alleged that none of it was below the "existing high water line of the Missouri River" or that any portion was within the abandoned channel of the Missouri River and the Plaintiff alleged the Missouri shifted gradually toward the State of Nebraska and the area formed as accretions. The State of Iowa first filed an Answer denying some of the allegations on December 2, 1964, and, after the Plaintiff amended its petition to withdraw the words "and all accretions to the above described premises" and disclaimed interest in these so-called "accretions", the State of Iowa on May 14, 1965, filed a Disclaimer in which they disclaimed any right, title, interest or claim in and to the real estate which includes the major portion of the north half of Kirk Bar. This disclaimer was signed by Lawrence F. Scalise, Attorney General of Iowa, and by Robert B. Scism, Assistant Attorney General of Iowa and Michael

Murray (Ex. P-1755). Consequently, title was quieted in the Plaintiff by decree entered June 11, 1965.

The agreement of January 2, 1948, between Joe Kirk and Bertha Kirk and Henry K. Peterson and Raymond G. Peterson which conveyed the major portion of Kirk Bar states that the consideration was $126,000. This was a Real Estate Contract (Ex. P-1758).

Iowa also disclaimed land in another quiet title action brought by Mr. Lakin captioned *Charles E. Lakin, Plaintiff v, State of Iowa, Monona County, Iowa, et al.,* in the District Court of Iowa for Monona County filed on April 6, 1965, in which the state was joined as a defendant because it might make claim to some portion of the described real estate as an abandoned channel of the Missouri River or as lying below the high water line of the Missouri River. This disclaimer was also signed by Mr. Scalise, Mr. Scism, and Mr. Michael Murray. The disclaimer of the State of Iowa was filed on May 28, 1965, and on that same day the Court entered a quiet title decree (Ex. P-1757). This area is immediately south of and adjoining Kirk Bar and, according to the description in the Petition and the Decree, includes the east half of the designed channel of the Missouri River (1943 design).

On Kirk Bar, it is incredible that the bar area could have formed as accretion to the bank when the situation still exists today that there is an extremely high bank with standing water remaining in an oxbow configuration adjoining and riverward to that bank. The bar could not have built up to the bank because there is even now water between the bar and the bank.

The law and the application of the law should be the same whether the land is in Harrison County, Iowa or Mills and Fremont Counties. The law should not be such that it can be applied in one area to the benefit of certain landowners and in another area to their detriment.

Middle Decatur Bend

On June 28, 1960, the United States filed an action in the United States District Court for the Northern District of Iowa, Western Division captioned *United States of America, Plaintiff v. 66.95 Acres of Land, more or less, situate in Woodbury and Monona, Counties, State of Iowa; Cylde Kirk, et al., Civil No. 1184.* Among the defendant's listed were Riley J. Williams, Norma Jean Williams, and the State of Iowa and Woodbury County, Iowa, and Monona County, Iowa (see Exhibit P-2693). A plat of the Corps of Engineers showing the land taken in Iowa identifies the area as Middle Decatur Bend (Ex. P-2695). The Complaint filed by the United States indicates that Riley J. Williams and Norma Jean Williams have or claim an interest in Tract No. 103E (Iowa) in Middle Decatur Bend. It also states that offers to sell easements to said lands have been accepted by the United States of America and consents to said offers had been signed by Riley J. Williams and Norma Jean Williams who are shown as Owners. The declaration of taking was filed 6-28-60 and states that the estate taken for public uses,

> ". . . is a perpetual and assignable right and easement to construct, operate, and maintain channel improvement works on, over and across the land de-

scribed in Schedule 'A', including the right to clear, cut, fell, remove and dispose of any and all timber, trees, underbrush, buildings, improvements and/or other obstructions therefrom; to excavate, dredge, cut away, and remove any or all of said land and to place thereon dredge or spoil material; . . ."

The estimated compensation for Tract No. 103E is shown as $2,070.00 and the names and addresses of the purported owners lists Riley J. Williams and Norma Jean Williams, Husband and Wife, Decatur, Nebraska.

The State of Iowa filed a Resistance To Motion For Judgment in which Iowa indicated it had filed an answer in which it claimed to be the absolute and unqualified owner of Tract No. 103E and Iowa alleged that Riley J. and Norma Jean Williams had no right, title or interest in or to said Tract No. 103E. Iowa then stated in its Resistance To Motion For Judgment:

"6. Further concerning said issue, this defendant, the State of Iowa, states that it claims to own said tract because it is either a part of the bed of the Missouri River, being below the ordinary high water mark of the River, or because same is accretion to the State-owned bed of the River.

7. Further concerning said issue, this defendant states that if Riley J. Williams and Norma Jean Williams are Nebraska riparian landowners claiming to own said Tract 103E (Iowa) Middle Decatur Bend as accretion to their Nebraska lands, such claim of ownership has no validity because, under the law, there can be no extension of accretion lines across a fixed and established State boundary line and into the State of Iowa from the State of Nebraska. That this legal issue is now under consideration by the Circuit Court of Appeals for the Eighth Circuit, said

matter having been submitted to said Circuit Court on September 19, 1960. In view of the fact that said legal question is now under consideration by the Circuit Court of Appeals for the Eighth Circuit, this defendant, the State of Iowa, states to this Court that trial of the title question as to Tract 103E (Iowa) Middle Decatur Bend should be continued until a decision has been handed down by the said Circuit Court of Appeals, and all rights and interests of all parties in and to said Tract 103E (Iowa) Middle Decatur Bend should be preserved in status quo." (Ex. P-2693).

This Resistance was signed by Michael Murray as one of the attorneys for the State of Iowa with the names Norman Erbe, Attorney General of Iowa, and James A. Gritton, Assistant Attorney General of Iowa, also appearing in the signature block.

On October 7, 1960, Michael Murray, one of the attorneys for the State of Iowa, sent a letter to Mr. F. E. Van Alstine, United States District Attorney, regarding this case, indicating he planned to be present to resist the Motion for Judgment insofar as it might apply to Tract 103E (Middle Decatur Bend). This letter included the following statements:

"Perhaps you are wondering what the theory of the State of Iowa is in this matter and what a trial as to title might involve: Tract 103E (Middle Decatur Bend) is a tract of land on the West side of the main channel of the Missouri River, but it is in Iowa because it is East of the State line established by 1943 compact. We believe that the tract is accretion land, that is, it is land that has been created in relatively recent times by action of the River. I do not know how or why it is alleged in the Complaint that Riley J. Williams and Norma Jean Williams

own it, but I suspect that they are alleged to be the owners because they probably own the upland Nebraska land immediately West of it, and their claim to the tract in Iowa would be based on the theory that it is accretion to their Nebraska holdings. It may be that Riley J. Williams and Norma Jean Williams claim the tract on the basis that they hold record title to it from the Government going back to the early days. If their claim is based on record title, the State asserts that such record title is of no validity because the land which existed in that location in the early days was washed away and destroyed and it is clearly the law that, when such land is washed away and destroyed, the record title becomes worthless, and land which later appears in the same location is accretion land. The State claims that, if Riley J. and Norma Jean Williams claim the land as accretion to their Nebraska holdings, such claim is invalid because, as a matter of law, there can be no accretion across a fixed State boundary line from Nebraska into Iowa. In this connection, I will say that in 1959, we tried a case to Judge Hicklin at Council Bluffs involving this legal proposition and Judge Hicklin ruled and held that the Nebraskans could not extend their accretion lines across the fixed State boundary line into Iowa. Judge Hicklin held that the tract in controversy was property of the State of Iowa. The Nebraska claimants to the tract perfected an appeal to the Circuit Court at St. Louis and the appeal was submitted there on September 19, 1960. We have no decision from the Circuit Court as yet.

This case is of considerable importance to the State of Iowa for a number of reasons: First of all, it is one of a series of cases which the State has determined to litigate until there is some final answer. Secondly, although that portion of Tract 103E situated in the State of Iowa contains only 22.84 acres, you will see by looking at the plat that there is con-

siderable more land, both above and below Tract 103E which the State claims to own. The decision in the pending case will probably, as a practical matter, determine ownership of the additional land also. I do not seek to argue our case to you in this letter, but I wanted you to know the general nature of the State's position so that you will know what to expect whenever trial of the title question is reached." (Ex. P-2694).

Mr. P. M. Moodie, age 53, of West Point, Nebraska, testified that he is a lawyer admitted to practice in the State of Nebraska since 1938 and actively engaged in practice continuously since that date. He has a client, Riley Williams of Decatur, who has been engaged in litigation with the State of Iowa in Federal District Court sitting in Iowa. The United States started a condemnation proceeding to acquire an easement for channel improvements of the Missouri River across land which Mr. Williams claims to own and an agreement was reached between the United States and Mr. and Mrs. Williams as to the value of this land. The money was paid into Court. When a motion was made to distribute the money to Mr. and Mrs. Williams, the State of Iowa resisted the motion and claimed the money in the amount of $2,070.00. Mr. Moodie testified that a pre-trial conference was held in Sioux City before Judge Delehant and the matter was set down for trial before the Court without a jury. It was necessary to secure Iowa counsel because the witness is not admitted to practice in the State of Iowa.

The witness and counsel from Iowa did some investigation in preliminary trial procedures. They consulted

with the Corps of Engineers in Omaha on a number of occasions, secured maps, went to Tekamah, Burt County, Nebraska, to secure title records and had some conferences with the Nebraska State Surveyor in addition to interviewing witnesses in the Decatur area. Mr. Moodie testified that the amount of legal expense involved in the investigating stage of the case would approach the value of the lawsuit. They contacted the Nebraska State Surveyor who indicated that they would have to deposit $300.00 as a preliminary amount to cover the expense of survey and that possibly the survey would cost more than that. It was felt that a survey was a necessary part of the case.

At the pre-trial conference before Judge Delehant, the Judge inquired as to the probable amount of time it would take to try the case, and counsel for the State of Iowa said they had sufficient evidence to present to take between 2 to 3 weeks for the trial of the case. Based upon that estimate, Mr. Moodie said they came to the conclusion that they couldn't afford to try it under any circumstances because, even if the Williamses won, they would lose from a monetary standpoint. The fee schedule in the witness' community would run $150.00 to $200.00 per day for services in Federal Court and he believed it is higher in Iowa. The $2,070.00 that was deposited in the Registry of the Court is still there.

Mr. Moodie also testified that the State of Iowa started a quiet title action against Mr. Williams in 1961 or 1962 in Monona County, Iowa, and last August they started an injunction proceeding against him in Monona County. When the injunction proceeding came on for

trial, it was determined that the State did not have any evidence to support their complaint and the matter was, by agreement, dismissed. The quiet title proceeding in Monona County is still pending so far as the witness knows. The quiet title proceeding involved other defendants and other counsel.

On cross-examination, Mr. Moodie testified that he thought there was some question as to whether the lands involved are now in Iowa. Apparently the United States, when they started the condemnation proceedings, felt there was because they designated this particular tract as being in Nebraska on the maps that were shown to the witness and they determined apparently that Mr. and Mrs. Williams were the proper people to pay the money to. The case was started in the Northern District Court in Iowa but it included a lot of other landowners and other tracts. The reason for saying that there is a question as to whether the land is in Iowa is by reason of the documents that came into the hands of the witness from the United States District Attorney in which the land was designated as Decatur Bend, 103E East Iowa. The map that was furnished to the witness has the word "Nebraska" on it. The caption of the case refers to 66.95 acres of land, more or less, situated in Woodbury and Monona Counties, State of Iowa, so the allegation of the United States was that the land was in Iowa regardless of what the map showed. The pilot canal was constructed across the piece of land that was involved in the condemnation case in Federal Court, and the witness assumes that the Missouri River was diverted through it and it has widened out to its designed width

and is presently in that location, although he hasn't viewed it recently.

The witness further testified that he encountered difficulty in finding maps which were necessary to the presentation of the case and he had to spend considerable time just looking for things.

This case illustrates the disadvantages of the small landowner involved in a title fight with the State of Iowa.

The Walter Pegg Area

Stewart Smith, County Surveyor of Washington County, Nebraska, testified that he prepared a Cadastral Map (Exhibit P-1625) which has a parcel of land outlined on the left bank which is on the Iowa side of the Missouri River but is on the Nebraska side of the Nebraska-Iowa Compact line. A Cadastral Map is a map made for tax purposes depicting ownership boundaries, and in this particular case it was a map with the information overlayed on a print of an aerial photograph. He enclosed the Nebraska area on the left bank of the Missouri River in red and identified "Iowa" and "Nebraska". This map shows both the east bank and west bank of the present stabilized channel of the Missouri River in Nebraska. The area enclosed is in Washington County, Nebraska. The map depicts the "1943 Nebraska-Iowa Compact" line which is now on the left bank of the present river and Mr. Smith testified that this line went down the geographical center of the designed channel as it appeared in the Nebraska-Iowa Compact; and the right and left bank according to a Compact would be 350 feet either side of that

line. Exhibit P-1625 was prepared by the witness in about 1965.

The witness also identified a 1959 aerial photograph (Exhibit P-928) and testified that the Nebraska area which he outlined in red on Exhibit P-1625 is generally the same area which is depicted between the blue line and the Missouri River on the 1959 aerial photograph (Exhibit P-928). The blue line is to the east and the river is towards the west.

Mr. Smith testified that the land enclosed in red on Exhibit P-1625 is on the tax rolls in Washington County. He was requested to make it into tax lots and enter those tax lots in the irregular tract books of Washington County and he later found out from the County Clerk that it was of record in the County Clerk's office and then later on it became of record in the County Assessor's office. It was placed of record about three years ago at the request of Mr. Murray on behalf of some people by the name of Walter Pegg and Wynn. That land is presently being taxed in Nebraska as Nebraska land to Mr. Pegg and Mr. Wynn, although there might be different ownership on it now. The witness worked with the County Clerk and the County Assessor in connection with the tax lot designations for the land and, in Washington County, the County Clerk serves the same function as the Register of Deeds.

Bob Utman, age 48, of near Modale, Harrison County, Iowa, testified that he farms around 500 acres of land belonging to his father-in-law, Walter Pegg. He has been acquainted with the area around the Missouri River most of his life and has hunted and fished on it.

The 1959 aerial photograph (Exhibit P-928) shows the area where the witness lives. He circled the buildings where he lives in red and he outlined the land which he farms. Some of this land adjoined the left bank of the Missouri River. The witness drew in green the old dike line along the river immediately west of his buildings. He testified that there is a bank line which in some places is pretty close to the dike and in other places is out quite a ways. He drew the high bank line in blue on the aerial photograph. There are a lot of dike structures on the high bank east of the present location of the river. They have been filled in around. On some of them crops of piling stick out.

The witness was asked if he had ever had any conversation with any representative of the State of Iowa or the Iowa State Conservation Commission concerning the ownership or the right to occupy the land west of the blue line or high bank and he testified that he had. Mike Murray has gotten title for Walter Pegg on this as Nebraska land on 103 acres. This area was outlined by the witness on the Exhibit in black (Exhibit P-928). On the Exhibit there is an area between the blue line, or what the witness called the "high bank", and the area to the west which he had designated in black and which has been labeled "Nebraska". The witness has never had any conversation with any member or representative of the State Conservation Commission or any other department of the State of Iowa concerning the right to occupy any land lying east of the area outlined with the black pen. The area between the black and blue lines would necessarily have been the east one-half of the designed channel of

the Missouri River according to the Iowa-Nebraska Boundary Compact of 1943.

The witness has never had any conversation with any member or representative of the State Conservation Commission or any other department of the State of Iowa concerning the right to occupy any land lying east of the area outlined with the black pen. Mike Murray has told him that the State of Iowa was not interested in any of that land. Both Gerald Jauron and Mike Murray have hunted on the land and the conversation with Mr. Murray took place before he got title for Mr. Pegg to the piece enclosed in black as Nebraska land. This was done approximately two years prior to the date of the deposition of December 20, 1967. Walter Pegg's title to the land is recorded at Blair where he pays the Nebraska tax.

Between the blue line and the river on Exhibit P-298, the witness testified that "back from the river, there is an old chute which has a little water in it when you get a lot of rain or when the river gets up. There isn't any outlet when the river gets in there unless it gets pretty high. Whenever the river is up, the water seeps up from the bottom in that old chute which is out west of the middle enclosed in black. Mr. Utman said that as you cross the high bank where the blue line is, you go down a bank about six feet at the highest part.

This evidence shows an abandoned Missouri River bed in Iowa which Iowa officials have knowledge of, which the State of Iowa is not claiming and has never claimed.

Tyson Bend

Tyson Bend is mentioned at page 34 of the Planning Report (Ex. P-2609) and the comment is made under "Recommended Action":

> "It was in this area that the question of whether or not a Nebraska landowner can accrete across a state line arose. The case was tried in Federal District Court and the owner ruled against. The case was appealed to the Circuit Court of Appeals. The lower courts decision was upheld."

The photographs in the Planning Report show the state line and an island or bar area on the left bank side and then water before the mainland is reached on the Iowa side.

Mr. Jauron was asked if he agreed with statements made by counsel for the State of Iowa in the *Dartmouth College* case describing how the land formed in the Tyson case. The statement which Mr. Jauron was referred to is:

> "The facts were that prior to 1946 the main and only channel of the river was the designed channel which was west of the area in dispute in that case. The Iowa-Nebraska boundary was the center of said channel by reason of the 1943 Compact.
>
> In 1946, 1947 and 1948 the main channel left its designed channel and gradually moved southeasterly, washing away all of the land then existing in the disputed area. In 1947 or 1948, two small sandbars appeared in the disputed area behind this southeasterly movement of the main channel, with the main channel flowing to the east of them and with water still flowing to the west of them in the designed channel. Vegetation appeared on the sandbars in 1948 indicating that they were above ordinary high water mark and had attained the status of islands.

Later in 1948, the Corps of Engineers repaired some of their dikes in the area so as to again place the main channel in its designed channel to the west of the islands. The islands were not destroyed by this movement.

In the spring of 1949 the main channel again escaped from the designed channel and moved to the channel east of the islands. This movement of the main channel in the spring of 1949 was also accomplished without destroying the islands.

Water continued to flow through the designed channel until the 1952 flood, during which it became filled with silt and sand. The main channel continued to flow through the channel east of the islands until about 1959 when the Corps of Engineers again repaired their dikes so as to again place it in the designed channel. The 1959 movement was also accomplished without destroying the islands." (Vol. XXV, pp. 3659-3661).

He agreed with all of this statement except in the last paragraph. He did not agree that "the '43 Compact line was filled by the '52 flood—that channel." That was the only part he disagreed with and he said "it still runs water." (Vol. XXV, p. 3661). This case was decided by the United States Court of Appeals, Eighth Circuit and is found at 283 Fed. 2d 802 (1960).

This area appears on Sheet No. 68 of the 1946-47 tricolor maps (Area # 21 on Ex. P-2667) and Sheet No. 5 of the A. P. maps (Exhibit D-1158). It borders the Missouri River on the present Iowa side. The testimony of Mr. Jauron, who is also mentioned in the opinion as testifying to the physical facts in the Tyson case, establishes that the river was in the designed channel where the Compact Boundary Line is located, that it moved into

Iowa and an island built up behind this movement of the river and the river was then placed back in the designed channel without destroying the island. The Eighth Circuit based its opinion upon the fact that all of the land involved arose in Iowa and that the lower court found that the entire river bed was located in Iowa and the State owned the entire river bed at the point in controversy. The Court then stated at page 811:

> "Lastly, Tysons claim the court erred in stating the Nebraska land owners could acquire no accretion rights to their banks across the fixed state boundary. We have considerable doubt whether the court intended by such statement to say more than that Iowa law controls since all the land in controversy is located in Iowa, and that the Nebraska law of accretion did not operate to create riparian rights within the territorial limits of Iowa. So limited, the court's view would coincide with our view of the law. If the court intended its statement to have any broader implications, it is our view that the statement was made only as an alternate or an additional basis for supporting the result reached by the court and that the court had already decided the case on the basis discussed earlier in this opinion.
>
> We have held that the court's judgment is entitled to be affirmed upon the basis of the court's determination that the origin of the land in controversy was independent islands formed in the bed of the Missouri River, belonging to the State of Iowa and that the additional land formed as an accretion to such island. Such determination is decisive of these appeals."

This is a situation where had it not been for the Boundary Compact establishing a fixed line between Nebraska and Iowa, the result would necessarily have been

different. If there had been no Boundary Compact, when the river moved out of the channel towards the south and east or into Iowa, the boundary would have moved with the river and the islands forming behind this movement would have been on the Nebraska side of the river and part of the Nebraska riparian owners lands. Then when the river was placed back to the northwest without washing away those lands, there would have been an avulsion leaving the islands in Nebraska although on the left bank of the river. These islands would have remained the property of the Nebraska riparian owner. The State of Iowa in the Tyson case used the fixed state Compact line as the commencement of its ownership, ignoring the fact that the Nebraska riparian owner owns the bed to the middle of the main channel and owns any island or bar areas in that bed.

In the Planning Report, Iowa's Conservation Commission said, "This action will help in declaring islands to be state-owned." (Ex. P-2609, p. 4).

Although it is easy to make the statement that the Compact has no effect upon private titles, it can readily be seen that by merely applying "Iowa law" the Nebraska riparian owner has been deprived of his property rights whenever the river moves to the east following the Compact. If this is the situation, then his title has been severely impaired.

California Bend

One of the areas which Iowa is claiming is in California Bend which is just north of Blair, Nebraska on the

left bank of the present Missouri River. Reference has previously been made to the 1890 Annual Report of the Missouri River Commission which has a map showing the area surveyed in 1883 by Geo. S. Morison and showing a "CUT-OFF 1881." California Bend appears upon the 1946-1947 tri-color map (Ex. P-2627) and the area or oxbow configuration shown as cut-off in the 1890 report (Ex. P-2686) appears as marsh area on the tri-color map (Ex. P-2667) in an ox-bow configuration starting in Iowa Section 35 and curving into Iowa Section 36 and 4. The 1890 "thalweg" which appears on the 1946-47 tri-color map is very close to the same location as the channel of the river as shown in the Geo. S. Morison map in the 1890 Report. This is approximately two or three miles from the present designed channel of the river at various points. This was an easterly bend which was cut off and left on the Iowa side of the Missouri River. Iowa has made no claim to any abandoned river bed or channel in that 1881 cut-off.

In 1938, the evidence shows that the river was to the west and south of this 1881 cut-off in the California Bend area. Sheet No. 15 of the 1938 Project & Index Maps (Ex. P-413) shows the river in an easterly bend with the drawing of the designed channel placed some distance to the west through the penninsula on the Nebraska side of the river. On November 7, 1938, a condemnation action was filed in the District Court of the United States for the Nebraska District, Omaha Division, captioned *United States of America, Petitioner, vs. Certain Lands in the County of Washington, State of Nebraska Hereinafter Described and Dorothy M. Mencke, et. al.* Also included

as defendants were The State of Nebraska, The County of Washington and The County Treasurer or Tax Collector of Washington County as well as all persons having, or claiming to have, any right or title to the several tracts of property described. The pleadings in this case were offered as Exhibit P-2670. Attached to the Complaint were various plats showing the area taken in Nebraska and the Complaint alleged that, in execution of the project for improvement of the Missouri River for navigation to secure a permanent navigable channel 6 feet in depth, it was necessary to acquire an easement to excavate and maintain a channel approximately 900 feet in width across the point of land at California Bend for the Missouri River in Washington County, Nebraska. The Complaint also alleged that the Secretary of War of the United States of America had determined that it was necessary and advantageous to the United States of America ". . . to acquire a perpetual easement to excavate a cut-off channel in, through and across the properties hereinafter more particularly described and designated as Tracts No. 1, 2, and 3, and the perpetual right, power, and privilege to excavate, cut away and maintain as a part of the navigable waters of the United States any or all of said lands hereinafter more specifically described and designated, and to utilize the portions not so cut away or excavated for the deposit of spoil or for any other purpose in connection with the construction, preservation and maintenance of said navigable channel . . ." A Notice of Lis Pendens was filed on November 8, 1938 in the Office of the County Clerk of Washington County, Nebraska by the United States District Attorney

for the Nebraska District (Ex. P-2671). An absolute and perpetual easement was granted to the United States (Ex. P-2670).

Two Agricultural photographs dated 12-15-38 were placed together by Mr. Willis Brown so that they depict the California Bend area as of 1938 and these photographs show the configuration of the river at that time and the location of the Designed Channel which has been located in blue through the Nebraska land (Ex. P-2668). The picture shows fields and a large tree and land area to the east of the proposed designed channel in the cut off area. The Corps of Engineer aerial photograph of 1938 is also in evidence (Ex. P-2380).

Sheet No. 16 of the 1939 Project & Index Maps (Ex. P-414) shows the river running through the Nebraska land which was condemned for the canal and it has been labeled "CALIFORNIA CUT-OFF" with revetment shown on the left bank and further to the east the old river bed is shown and designated "CALIFORNIA BEND". A 1939 Corps of Engineers aerial photograph (Ex. P-2382) shows the river in the designed channel through the cut-off and the large area which is cut off can still be seen as trees, fields and bar. There is still a small stream running around the old channel.

As a part of the case of *U. S. A. v. Mencke* (Ex. P-2670), there was attached a plat of the area (Ex. P-2669) showing the area taken with the designation "CALIFORNIA BEND PILOT CANAL CONTRACT". Ground level photographs from the Corps of Engineers were introduced showing the canal being dug by a drag

line operating from dry land in December of 1938 and showing the canal in January of 1939 (Ex. P-2424, P-2425 & P-2426). Another photograph shows the canal on March 2, 1939 (Ex. P-2427) and then the photographs show the plug being pulled and the opening of California Bend Canal on April 1, 1939 (Ex. P-2428 through P-2432). The plug was opened by a drag line operating from the bank. These photographs illustrate the dramatic and immediate change of the channel in this type of construction. Aerial photographs were also offered from the Corps dated 10-28-39 showing the river in the designed channel and the cut-off area transferred to the left bank.

Mr. Brown then identified a June 1956 aerial photograph obtained from the Corps of Engineers in Omaha showing the river in California Bend (Ex. P-2421), and a 1959 aerial photograph of the California Bend area obtained from the Department of Agriculture (Ex. P-921). He testified that he placed the river as shown in 1959 and which was the designed channel on the 1938 aerial photographs (Ex. P-2668) in blue and identified it as "Design Channel". He also placed the location of the river as shown on the 1956 aerial photograph (Ex. P-2421) on the 1938 aerial photographs (Ex. P-2668) in red and wrote between the bank lines "1956 River". Mr. Brown testified that the Corps of Engineers dug a canal in the same location as the designed channel in June, 1958. There is some sand and vegetation in the area east of the designed channel and west of the 1956 location on the 1959 aerial photograph (Ex. P-921) and Mr. Brown outlined this area in red. The witness testified that the river is still

in that second designed channel which is identical to the first designed channel. Photographs from the Corps are also in evidence showing California Bend on September 17, 1956 (Ex. P-2438) and California Cut-off on May 13, 1964 (Ex. P-2432).

The 1938 aerial photographs with the identification of the 1956 river and the designed channel (Ex. P-2668) illustrate that the Corps of Engineers created an avulsion through Nebraska land in 1939, placing the Missouri River in the designed channel entirely within the State of Nebraska in California Bend. The Compact was then adopted establishing a fixed boundary down the center of that designed channel. Immediately prior to adoption of the Compact, the land on both sides of the river and the bed of the Missouri River were in Nebraska subject to the easement by the United States for maintenance of the river pursuant to the *Mencke* case and the right of the public under Nebraska common law to the use of the river. Subsequently, the river left the designed channel and moved back to the east to the 1956 location but did not wash away all of the ceded land. In 1959, the river was again placed back to the west in the designed channel by a canal dredged by the United States Army Corps of Engineers creating another avulsion in the California Bend area.

In 1965, the State of Iowa filed an action in the District Court of Iowa in and for Harrison County to quiet title in California Bend captioned *State of Iowa, Plaintiff, v. Harrison County, Iowa; Clifford L. Simmons, et al.* (Ex. P-2672). A plat obtained from the Iowa Conservation Commission describes the area claimed (Ex. P-1521).

Mr. Brown outlined the area in California Bend which Iowa is claiming on the 1946-1947 tri-color (Ex. P-2667) using the description of areas given by Iowa in its LIST OF AREAS OWNED BY STATE OF IOWA ALONG THE MISSOURI RIVER AND DISCLAIMER (Ex. P-2651). The area is outlined in black and Mr. Brown has given it the designation "# 22". (See also Exhibit D-1155-A through C.) Much of the area which Iowa is presently claiming in its quiet title action in the Harrison County District Court was ceded by Nebraska to Iowa pursuant to the Iowa-Nebraska Boundary Compact of 1943.

Up until the time the State of Iowa filed the quiet title action of *Iowa v. Harrison County, Simmons, et al.*, it had failed to make any claim to abandoned channels in the California Bend area. Not only did Iowa fail to claim abandoned channel resulting from the 1881 cut-off but it also failed to claim any of the abandoned channel resulting from the 1939 avulsion created by the Corps of Engineers.

On June 19, 1959 a quiet title action was filed in Harrison County District Court captioned *Chicago and Northwestern Railway Company, Plaintiff, v. Clifford L. Simmons and Helen H. Simmons, et al.* Included as defendants were The State of Iowa and Harrison County, Iowa (Ex. P-2716). Mr. Brown pointed out the area described in the Petition on the 1938 aerial photograph (Ex. P-2668) and testified that it included "quite a stretch" of what was 1938 river bed of the Missouri River. The State of Iowa filed an "Appearance and Motion for Additional Time to Plead" on July 22, 1959 in which it alleged

"That the State of Iowa has reason to believe that it claims by title and interest a large section of this area, but due to the nature of the claim of the State of Iowa, the exact boundaries thereof are difficult to ascertain, and that it may be necessary for a complete survey of the area to be made prior to the filing of ANSWER by the State of Iowa." (Ex. P-2716, Vol. XXVI, p. 3707). The appearance was signed by Norman A. Erbe, Attorney General of Iowa and James H. Gritton, Assistant Attorney General. The court file showed an order setting the motion for hearing on August 31, 1959 and then the Judgment and Decree. The certificate of the Clerk of the District Court of Harrison County states that she had searched the case record and found no record in the file or noted on the docket that the hearing mentioned was ever held or a ruling made. On August 24, 1969 the Court entered a Judgment And Decree quieting title in the plaintiff to land in the California Bend area which included a good deal of abandoned channel of the Missouri River created by the 1939 canal in California Cut-off. The decree is signed "Approved As To Form" by James H. Gritton, Assistant Attorney General. Although there are some differences in the description, there is a deed on file in Harrison County from Chicago & North Western Railway Co. to G. William Coulthard (P-2719) conveying most of the land described in the case of Chicago & Northwestern Railway Co. v. Simmons, et al. to G. William Coulthard.

On February 16, 1968 a Petition in Equity was filed in the District Court of Harrison County in the case of *G. William Coulthard, Plaintiff, v. Clifford L. Simmons*

and Helen H. Simmons, Defendants (Ex. P-2718). This was a quiet title action and the area described in the Petition has been outlined by Mr. Brown in red on the index map which is a copy of the 1946-47 tri-color map. Mr. Brown has outlined in green Lot 5, a portion of which is included within the area claimed by the Plaintiff in the *Coulthard* case. Mr. Brown placed this Lot 5 on a 1930 Corp of Engineers Map (Ex. P-2717) and Lot 5 appears to be entirely on the Nebraska bank or penninsula described in the *U. S. A. v. Mencke* case which was cut off from Nebraska by the 1939 Canal. Mr. Brown also placed Lot 5 in white upon the 1938 aerial photograph (Ex. P-2668) and it was entirely on the Nebraska bank at that time. The land which Mr. Coulthard is claiming in *Coulthard v. Simmons* includes the southern part of Lot 5 and all of the abandoned Missouri River bed south of Lot 5 which was left as a result of the 1939 canal. Consequently, it necessarily includes what was both the right and left bank of the 1938 Missouri River as well as all of the bed. The southern part of Lot 5 as described in *Coulthard v. Simmons* is land which was ceded from Nebraska to Iowa by the Compact. Mr. Murray signed and verified the Petition in *Coulthard v. Simmons* and described the formation of that southern part of Lot 5 as follows:

> "That during the 1930's and 1940's the U. S. Army Corps of Engineers worked on the Missouri River along the western border of Harrison County, Iowa, to place and confine said river within a stabilized channel, which said Corps of Engineers had designed for it. That as partly result of said work by the Corps of Engineers, and partly as result of natural forces, the left bank of the Missouri River

> was moved and pressed back in a northwesterly direction so that accretion land formed in the southerly portion of the former location of said Lot 5, Section 12-78-46, said accretion land being in all that portion of the former location of said Lot 5 which is included within the description of real estate set forth in Exhibit "A" hereto attached." (Ex. P-2718).

The California Bend area, like the Winnebago Bend area, represents an attempt by the State of Iowa to obtain ownership of lands ceded to Iowa by Nebraska to which Iowa would have had no claim but for the Compact. However, the Iowa officials have made no claim to other abandoned channels in that vicinity.

Goose Island and Auldon Bar

On Page 44 of the Missouri River Planning Report, the recommendation is made that the State of Iowa quiet title to Auldon Bar Island. The statement is made that future public access:

> ". . . also will depend on whether or not the state gains title to this land and what use it can make of it once title is gained." (Exhibit P-2609).

The photograph in the Planning Report shows Auldon Bar Island with a great deal of land being cultivated and the Planning Report states that 600 acres are now under cultivation and being used by private interests.

This area is just south of Nottleman Island and appears on Sheet No. 61 of the 1946-47 Corps tri-color maps (Exhibit P-2681). Mr. Brown has identified the area with "#27" which Iowa is claiming. Mr. Brown was referred to the 1937 Project & Index Maps at Sheet

No. 26 (Exhibit P-412) and placed a red line in the designed channel around what is now Auldon Bar. This is designated on the Project & Index Maps as Pin Hook Bend and the lower part of Bartlett Bend. The designed channel is shown going through the lower part of Goose Island and the upper part of an island immediately below Goose Island. Sheet No. 24 of the 1938 Project & Index Maps (Exhibit P-413) shows the designed channel in the same area and, where it went through the lower part of Goose Island structures have been built and there is the notation "Bartlett Bend Dredging". The river then goes downstream through Pin Hook Bend and, where it bisects the island below Goose Island, is another notation "Pin Hook Dredging & Canal". The upper part of that lower island has now been designated as "Auldon Bar". There are notations on Sheet No. 24 showing 40,144 cubic yards of earth removed by government drag line in Bartlett Bend started August 14, 1937 and completed November 29, 1937; 67,174 cubic yards by leased dredge started August 12, 1937 and completed September 2, 1937; and 327,483 cubic yards removed by government dredge *McGregor* started June 1, 1938 and completed June 10, 1938. The total cost of the dredging and drag line in Bartlett Bend was $21,193.50.

Sheet No. 24 also refers to the work in Pin Hook Canal, mile 622.2 and shows removal of 112,221 cubic yards of earth by government drag lines started September 23, 1937 and completed October 16, 1937; 180,234 cubic yards started April 17, 1938 and completed May 4, 1938; 871,697 cubic yards started July 5, 1938 and completed August 12, 1938; and 239,535 cubic yards started

September 26, 1938 with 50% completed on September 30, 1938, all by the Government Dredge McGregor. The cost of the drag line and dredge is shown at $15,167.94.

On the 1938 maps, the river is shown as running through these canals with some water still along the left bank. A 1937 aerial photograph shows Bartlett Bend and Mr. Brown has placed a red line in the canal running through Goose Island and the canal running through the island downstream. (Ex. P-2372). Vegetation can be seen on the cut-off parts of both islands. Mr. Brown also identified these canals on 1938 aerial photographs obtained from the Corps of Engineers (Ex. P-2377 & P-2376) and placed a red line in the canals and the designed channel. He stated that Exhibit P-2377 shows a canal as it cut through the upper island or Goose Island and Exhibit P-2376 shows the canal and area cut off in the lower island. The 1939 Corps of Engineers aerial photograph (Ex. P-1880) shows the river mostly in the designed channel and the lower part of Goose Island and the northern part of the island below now appear to be joined by sand or bar area.

The 1939 Project & Index Maps (Ex. P-414) at Sheet No. 24 show Pin Hook Bend, and Mr. Brown circled in red the south part of Goose Island through which a canal was built and which still appears and the north part of the island downstream through which a canal was built which also still appears. The 1940 Project & Index Maps (Ex. P-415) show Pin Hook Bend at Sheet No. 17 with the river in the designed channel and Auldon Bar has the appearance of being one complete mass of land. The area that was cut off from the south part of Goose Island

and the area cut off from the north part of the island below still appear but they have been joined by a line. The 1941 Project & Index Maps (Ex. P-416), Sheet No. 17 also show the two land masses as having been joined into what appears to be a single land area with the Missouri River in the designed channel to the west.

Mr. Brown identified a ground level photograph obtained from the Corps of Engineers showing Bartlett Bend Canal on October 13, 1937 at mile 624.1 (Ex. P-2509) and a photograph dated 12-1-37 of Bartlett-Van Horn Bends showing a general view at the mouth of the canal from dike 622.2-A right bank (Ex. P-2510).

There is apparent conflict in the testimony of several of the witnesses concerning where the main part of the river was just south of King Hill around Goose Island and the Auldon Bar area. Even the 1883 Annual Report of the Chief of Engineers (Ex. P-2686) indicated that there were two channels in Pin Hook Bend, one closely hugging the bluff down through Van Horn Bend and the other following the Iowa shore. Regardless of where the main channel was prior to the construction of the canals in the Pin Hook Bend and Goose Island area, the effect of the work by the Corps of Engineers was to place the northern part of Goose Island on the right bank and the lower part of Goose Island on the left bank of the designed channel. The northern part of the island below Goose Island was placed on the left bank and the southern part of the island was placed on the right bank of the designed channel by the Corps. Although Auldon Bar presently appears as one island or one land mass, it is a combination of the two separate islands. Portions of

these two islands remained on the right bank and, by the Iowa-Nebraska Boundary Compact of 1943, are now clearly part of the State of Nebraska. They have not been claimed by the State of Iowa.

The mere fact of the location of the canal as dug by the Corps of Engineers rendered the north half of Goose Island immune while the south half of that same body of land is subject to claim by Iowa. On the island below Goose Island, the south half of the property is immune and the north half of that same piece of land is subject to attack by the State of Iowa. This is the result even though Goose Island formed as one piece of land and the island below formed as one piece. Consequently, the determination by the Corps as to which side of the river the tracts should be placed has determined which portions are subject to attack by Iowa. This illustrates the injustice of the situation for, had the Corps reversed the channel in this area, the opposite areas would have been placed in jeopardy and Auldon Bar would have been free from question.

Nebraska City Island

Reference has already been made at pages 18-20, 26-28, and 31 of this Resume' to the early Corps of Engineers reports showing work at Eastport Bend and the abandoned channel running to the east around Nebraska City Island across from Nebraska City. This was another cut-off and, being so near a population center, presumably would have had a great deal more notoriety than cut-offs appearing away from a town. Iowa's Exhibit D-272, a map of Otoe County, showed Nebraska land on the left

bank of the Missouri River in the Nebraska City Island location. Iowa's Exhibit (D-1159 through D-1159-C) and the testimony of Mr. Jauron identified a green cross-hatched area shown on D-1159-B indicating that the State of Iowa purchased some land just below the Nebraska City Bridge on the left bank of the river from a man named Wurtele. Jauron was asked if he knew of any maps that show this area purchased as a part of Nebraska City Island and his answer was he did not. He had seen only one map which he thought was real authentic that showed Nebraska City Island. He was sure he saw it in Fremont County in Sidney.

He testified he would consider a map contained in a report of the Missouri River Commission to be an authentic map and was referred to Exhibit P-2689, a report of the Missouri River Commission of 1898, containing a map of Nebraska City Island and an area designated "River Bed of 1881" which is a feature around the east and south side of Nebraska City Island. The Wurtele purchase is in the area shown on that particular map as river bed of 1881 and is south of the Nebraska City Bridge and runs to the end of the slough which Mr. Jauron called a ditch. An examination of the maps referred to in the Corps of Engineers reports and a comparison of the topographical features indicate that the land purchased by the State of Iowa from Mr. Wurtele was abandoned Missouri River bed on the outside of the curve or bend and, consequently, would have been a part of abandoned river bed in Iowa. However, the State of Iowa has never made any claim to this abandoned river bed and even paid Mr. Wurtele for land located there.

If these abandoned river beds are "trust lands" of the State of Iowa, then why did the Iowa State Conservation Commission buy the Wurtele land?

ADDITIONAL GENERAL INFORMATION

Additional background to the problems existing along the Missouri River prior to the adoption of the Compact was offered by the testimony of Victor M. Petersen, age 63, of Columbus, Nebraska. Mr. Petersen is a licensed engineer and registered land surveyor in the State of Nebraska and has been engaged in surveying or engineering since 1929. He was elected County Surveyor of Sarpy County, Nebraska, in 1938 and served eight years except for a period from 1942 until 1945 when he was in the military service. Sarpy County is between the city limits of Omaha and the Platte River and is bounded on the east by the Missouri River and Pottawattamie County and Mills County, Iowa. He testified that the Sarpy County officials didn't know where the boundary of Iowa was in the vicinity of St. Mary's Bend, " . . . and it was almost impossible to know just where any old land of Mills County happened to be down in there." (Vol. XIV, p. 1874). In the period of 1940 to 1941 there was some discussion among the County officials concerning zoning but it was confusing because no surveys had ever been made to establish any lines of Mills County land and it was impossible to survey that and determine with any reasonably good guess where that land was and how much it was. They proceeded to go ahead with their zoning and proceeded to try to establish a Compact between

Mills County and Sarpy County especially. They didn't particularly care too much about the rest of the river.

The witness had made a study of the area in question and studied the records of Mills County and made a report on his findings. There was a little over a section of land that was on the tax list of Mills County near the area which he marked on Exhibit P-2679 in the vicinity of St. Mary's Bend. It had never been exactly established whether it was Mills County or Sarpy County. There was also an area up at Lake Manawa that was considered part of Nebraska but was on the Iowa side of the river. Meetings were had with the Mills County authorities primarily based on the premise of releasing anything that Sarpy County claimed in Iowa and absorbing property that the Mills County authorities claimed within the limits of Sarpy County.

An attorney from Papillion, Nebraska had asked the witness to make a survey and determine the line between Sarpy and Mills County and the witness tried to get information sufficient to go down there and determine a line but found it practically impossible to do so.

The witness identified a report obtained from the Sarpy County Surveyor's Office (Exhibit P-1057) which he testified was prepared by him and accurately reflects the best of his information at the time it was prepared. This report is as follows:

"REPORT ON
BOUNDARY LINE BETWEEN SARPY COUNTY,
NEBR. and MILLS AND
POTTAWATTAMIE COUNTIES, IOWA

February 18, 1941

The object of this report is:

1. To present facts for the consideration of authorities in Iowa and Nebraska for the immediate harmonizing of opinions and fixing of a satisfactory boundary line between Sarpy County, Nebraska and Pottawattamie and Mills Counties, Iowa.
2. To present facts to show that a state of emergency exists which requires the establishment of the boundary with all possible haste.
3. To present facts to show that the recent activities of the War Department in establishing a navigable channel has placed the river under control and consequently the boundary should be fixed as the center of said channel as it is now.
4. To request immediate consideration.

Enclosed herewith is a map that shows the 1856 original Government survey of Sarpy County, Nebraska, the War Department Survey of 1879 and the War Department survey of 1939, and in the discussion that follows reference will be made to this map, and referred to the Nebraska survey extended.

It will be noted that since the original survey of 1856, the river has been very eratic in its course, moving from side to side entirely out of control, which has consequently

left the Iowa-Nebraska boundary entirely out of control, and practically impossible to coordinate with and survey according to riparian law.

These meanderings and cut-offs have left the following unsatisfactory conditions existing today:

1. The river moved northward following a course known as Lake Manawa and subsequently made a cut-off leaving the Iowa-Nebraska boundary following through the center of Lake Manawa. This left a portion of land between Lake Manawa and the main channel in Sarpy County but on the Iowa side. This portion has never been surveyed or claimed by Sarpy County or added to the tax list of Sarpy County. Naturally, Sarpy County is not interested in this tract of land, and wishes to release any legal rights to this to Pottawattamie County, and the State of Iowa. A deed purporting to cover this tract was filed and recorded in Sarpy County, Deed Record Book No. 56, Page 686 in 1935, and referred to the Iowa Survey being indexed under T. 74, R. 44. However, legal complications were advanced which were settled out of Court and it was not placed on the tax list.

2. About 1879 the river began to sweep to the west of Bellevue Island and swining west into Sections 13 and 24, then gradually washed away Bellevue Island and carrying its main channel southeasterly making a sharp bend in Section 20 and 21 retaining its course through Sections 13 and 24. A sudden cut-off about 1881 left parts of Sections 13, 18, 24, 19 and 20 as a part of Mills County, Iowa on the Nebraska side of the main channel. Of this area to date no survey has ever been made setting forth the boundary. Naturally, confusion exists with a great part of this area untaxed, a part taxed in Mills County and a part taxed in Sarpy County. Being on the Nebraska

side of the river, Sarpy County is vitally interested in having this area quit-claimed by Mills County and the State of Iowa.

An investigation of the records of Sarpy County and Mills County, Iowa shows the following to be true within an area of 6860 acres of this disputed area west of the present Gov. Channel.

Total acres		6860
Assessed in Mills County, Iowa	757	
Assessed in Sarpy County, Nebr.	2783	
Assessed Total	3540	3540
Not Assessed Total		3320
Made Land by War Dept. activities		1160
Good acres not assessed		2160

3. Of recent years the river progressed Eastward far into Sections 21 and 28 and the activities of the War Department placed the river under control around this bend narrowing the stream and allowing the river to deposit a great area here. The War Department then made the cut-off fixing the present channel. This left a large area of land in Sections 20, 21 and 28 of which a majority could be contested as accretions to Sarpy County. But to establish a boundary according to the riparian law would be quite difficult. Being on the Iowa side of the fixed channel this area is not of interest to Sarpy County, Nebraska and it is Sarpy County's desire to relinquish all legal claims to Mills County and the State of Iowa.

4. There are farmers receiving benefits of Sarpy County roads and schools who, due to the 60 years of neglect in fixing a boundary, have not been taxed and are in a "no-man's-land." Some

of these same farmers wish to cooperate and receive benefits under the Sarpy County Agricultural Conservation Association. Such benefits cannot be paid under the present circumstances.

5. There being a Drainage District organized in December, 1939 surrounding this entire disputed are on the Nebr. side, and it being necessary that this are be a plan of protection from the Missouri River, and it being impossible for this district to function under the present circumstances; in the interest of the public good this matter should receive attention immediately.

   It was necessary for this district to begin maintenance and repair breaks in its dike system built prior to its organization which it did spending around $4000.00. Now an assessment was attempted but a lawsuit is pending that may throw out the entire assessment.

6. The existence of tracts of Iowa land on the Nebraska side and Nebraska land on the Iowa side complicates and defeats the purpose of our local law enforcement agencies.

   This is also a critical situation to which I might cite an example that occurred within the past year: A local squatter came to the County Attorney with a bullet in his forehead, desiring to file charges against his neighbor. The Court's jurisdiction was indeterminate and charges could not be filed.

   With a bomber plant now to be built within two miles of this area, we have a perfect haven for the lawless to go to.

No doubt the discussion and example given here applies to the entire Iowa-Nebraska boundary and the Government channel should become the boundary for the entire

length. It is requested, however, that only the boundary between Sarpy County, Nebr., and the State of Iowa be considered and acted upon from this discussion. Any attempt to settle the entire boundary situation would only meet with lengthy investigations and possible failure." (Ex. P-1057).

The report was signed by Victor M. Petersen, Sarpy County Surveyor.

There is attached to the Exhibit a letter from Mr. Petersen when he was County Surveyor to Mr. Woodford R. Byington, County Attorney, Malvern, Iowa, discussing correspondence and conferences between the county officials. The statement is made in that letter dated February 25, 1941:

> "If we cannot arrive at a settlement of this through the channels of our Legislature, it will then become necessary for your surveyor to lay out the area that you claim within our County, in cooperation with me. It is a job that is almost impossible to do, but nevertheless it must be done if our higher officials cannot get together and simplify it for us." (Ex. P-1057).

The witness testified that statement reflected his opinion at the date it was made. This correspondence and testimony points up the problems of certain bordering counties prior to the adoption of the Compact, the difficulties of any authoritative survey to determine the boundary where it might be other than the main channel of the Missouri River, and a recognition of the expense that would be involved. It further substantiates Plaintiff's contention that the States wished to avoid the problem and expense of locating the boundary, resulting in a compro-

mise agreement which would eliminate any such requirement.

Plaintiff took the deposition of Mr. Lawrence Hart, age 61, on December 19 and 20, 1967. Mr. Hart was deceased at the time of trial and had been employed by the Iowa State Conservation Commission to make various surveys along the Missouri River. He retired from the Corps of Engineers in 1965. Mr. Hart identified canals built by the Corps of Engineers along the Missouri River on a series of A. P. maps, Exhibit Hart 1. On Sheet A. P.-2 they dug a canal in 1939 in Winnebago Bend and opened it up in 1940. He staked the canal in December and testified it was done on the Nebraska bank. The ground where they staked the canal was a fairly high bar with fairly high willows and they staked right through the willows. In 1940 the river was thrown into the canal and was in the designed channel in Winnebago Bend in 1943. During the war the dikes at the upper end failed and the river left the canal and then the river was placed back into the d e s i g n e d channel when they went in and dug the same canal back out again. This is shown on the A. P. map to be in the Flower's Island area and Mr. Hart has traced in red the original Nebraska land on the left bank side of the river and identified it with the letter "N" and he has also outlined the remainder of Flower's Island. This is the area where Iowa is claiming an area between the original Nebraska land which was ceded to Iowa and the designed channel to the west where the Winnebago Bend Canal was dug.

Also on Sheet 2, the witness outlined in blue where

some dirt was taken out with a drag line in 1939. He didn't recall the contractor who did it; there were so many jobs in that many years you would have to be a computer to remember each contractor on each job like that or remember everything that happened.

On A. P.-1 Mr. Hart indicated they dug a canal in 1954 or 1955. This is in Omadi Bend.

On A.P-5 the Corps dug a canal in 1939 with two big 5-yard shovels and a walking-type drag line in Peterson Cutoff and opened it in the spring of 1940. He thought the bottom width of the canal when they laid it out was either 80 or 100 feet. He mentioned California Cutoff which was laid out in he thought 1939, which is also on A.P.-5.

Mr. Hart testified that he wasn't familiar with the river below Map A. P.-6 which is above Omaha. On A. P.-1 the witness said they either dug a canal or removed some dirt in Browers Bend but it seemed to him it was more of a dirt removal. That was with both dredging and drag line. On Map A. P.-3 they dug Decatur Cutoff in 1954. This was also marked in green. Before they dug the canal, the river was wandering around to the east and the witness marked this area in red. They also made a cut right under the bridge to place the river under the bridge at Decatur and this is shown on A. P.-3 of Exhibit Hart 1. He called this Decatur Canal Cutoff.

On A. P.-4 they cut a hole through Soldier Bend in 1954. This was marked by the witness in blue. On Maps A. P. 5 and 6, the witness showed DeSoto Cutoff

which overlaps the two maps. He thought this was in 1954 or 1955.

He testified he had no knowledge of canals south of Omaha except he knew of St. Mary's Bend. He was in the Nebraska City area but he left there in 1936.

On A. P. Map 5, the Corps of Engineers dug a canal in California Cutoff. On the second day of the deposition, Mr. Hart recalled two canals which he had forgotten which were in Snyder Bend on Sheet A. P.-2 and Blackbird Bend on Sheet A. P.-3. The Blackbird Bend Canal was dug probably in 1957 and the Snyder Bend Canal around 1961.

Mr. Hart also testified that in June and July of 1943 there was a big flood so at the time of July 12, 1943, the Missouri River was still engaged in flooding. That was a major flood. The major floods were in 1952 and 1950, 1942, 1944, and 1943 which were the largest they ever had, and in about that order.

Plaintiff also offered portions of a deposition of Raymond L. Huber, taken on December 14, 1967. He testified that Major Loper was at the Omaha District at the very beginning of its establishment but Mr. Huber didn't go to Omaha until 1936. Mr. Huber was shown the Alluvial Plain Maps Numbered A. P.-1 through A. P.-13 and stated:

> "A. The alluvial plain maps were prepared to facilitate the employees of the District Office and of the field office in driving to various locations along the river. These maps show the roads and highways and were primarily used for gaining

> access to the various jobs which were under construction along the river." (Vol. X, p. 1445).

He testified these maps were prepared on or about the dates which appear on that series. Mr. Huber said these maps would be similar to a highway map, except in much greater detail in that they show the roads in the vicinity to much greater detail than on a road map.

Mr. Huber recalled having discussions in the period immediately prior to 1943 with officials of the State of Iowa and State of Nebraska in connection with the boundary between Iowa and Nebraska. He did not know who the discussions were with or who the people were present but there were some from both states. He did not recall their titles or their positions and thought the year was about 1940. The nature of the discussions was described by him as follows:

> "We were contacted prior to 1943, really prior to 1941, the states were interested in having a fixed boundary, and the primary points of the discussion concerned what maps were available of the Corps of Engineers which could be used to relate the boundary between the two states." (Vol. X, p. 1447).

This was all that he could recall. There were more than one discussion and they were within a period of one or two years. They were held in the Omaha Office, Corps of Engineers. As a result of these discussions, it was concluded by the States to use the Alluvial Plain Maps as a map for reference for a new boundary between the two states. Mr. Huber stated these discussions were held prior to our entry into World War II.

Mr. Huber described generally the Missouri River prior to our entry into World War II.

> ". . . Prior to the design, the channel was wild and uncontrolled. The channel meandered between numerous sand bars. It constantly changed locations and resulted in erosion of the banks at many locations with resultant loss of land." (Vol. X, p. 1453).

Mr. Huber testified that there has been a policy change in the condemnation of land taken by movement of the river since World War II and now, if there is a movement of the channel which actually requires some high ground, the Corps in most cases would purchase the land.

During World War II, work was suspended and the Corps was permitted to do only a minor amount of maintenance, with a result that many of the structures were severely damaged, and in some cases they had complete loss of the channel. In those instances the channel reverted to a wild state. A few of these instances would be in the vicinity of Onawa, Iowa and the vicinity of Brower's Bend, in the Winnebago Canal area, in the vicinity of the Soldier Bend area, and in the vicinty of California Cut-off, to name a few. Mr. Huber mentioned many areas where there was a change in the design of the channel from the A. P. Maps. All of these changes were above Omaha.

The witness then testified to canals which he recalled being dug along the river and referred to project maps of the Missouri River from Sioux City to Rulo dated June 30, 1937 to refresh his recollection. These canals

were located on Plaintiff's Exhibit H-1 or Huber-1 which is another set of A. P. Maps. A pilot canal was excavated in the Omadi Bend area but he did not recall the date. When asked why it was necessary to dredge a pilot canal in the Omadi Bend area, the witness answered:

> "We were re-aligning the canal some distance to the east of its former location, and the most economical, as well as the fastest method, of getting to its new location would be to construct certain dikes and revetments upstream from the canal, and to excavate a canal in such a location that these dikes would then close off the old channel and redirect the flow into the new pilot channel, which, after the river was directed into it, then widened to the designed width." (Vol. X, p. 1467-1468).

The Corps had maps prepared which showed the location of the pilot channels. *Many of these maps were destroyed. They were destroyed because the Corps had no use for them.*

The Omadi Bend Canal was shown on Map A. P.-1 by the witness and another pilot channel was excavated in the Snyder Bend area which the witness indicated with blue arrows on Plaintiff's Ex. Huber 1. He did not recall the date excavated. It was excavated for the same reason as the one in Omadi Bend.

On Sheet A. P. - 2 blue arrows indicate a canal in Glover's Point Bend and a pilot channel was excavated in Winnebago Bend through the area where a pilot channel had been excavated before World War II. He did not recall the year when the Winnebago Canal was dug. On A. P.-2 a pilot channel was excavated in Monona Bend and another at Blackbird Bend. Some of the Black-

bird Bend Canal shows on A. P. - 3 and the next pilot canal, on that same map, was through the area upstream from Decatur. Mr. Huber was then asked:

"Q. Now, Mr. Huber, going back to Blackbird Bend, do you recall when that canal was constructed?

A. No, sir, I didn't prepare myself to testify to the various dates, I understood that we were going to—were concerned with two areas below Omaha." (Vol. X, p. 1472).

Also, on A. P. 3 a canal was dug in Tieville Bend to realign the river into a better alignment. The witness also mentioned that a high bridge had been constructed at Decatur which contemplated that the new designed channel would be placed under the navigation spans of that bridge. They dredged the canal so the river would then go under the bridge.

The next pilot canal was through Middle Decatur Bend on A. P. 3.

On A. P. - 4, a pilot canal was placed through Soldier Bend and on A. P. - 5, a pilot canal was excavated in Sandy Point Bend. A pilot channel was also excavated through the California Cut-Off and a pilot channel was excavated through the De Soto Bend area. This canal also extends into Sheet A. P. - 6. All of the canals indicated in blue by Mr. Huber on Exhibit H-1 were constructed after 1943. The witness was then asked about canals dredged in connection with the stabilization of the channel of the Missouri River prior to 1943. He identified these in green and testified a pilot canal was excavated through the Narrows in the vicinity of Omaha in 1936. This was the first pilot canal that was excavated on the

Missouri River and was excavated in the year he came to Omaha. It was placed on map A. P.-6 of Exhibit Huber 1. The witness indicated a canal in Winnebago Bend prior to 1943 on Sheet A. P.-2; a canal through Peterson Bend and one through California Cut-Off on Sheet A. P.-5; and a canal in St. Mary's Cut-Off A. P.-8 which was excavated in 1938.

He indicated in green a canal in Bartlett Bend on Sheet A. P.-8 and a pilot canal excavated immediately below Bartlett Bend on A. P. 9. A pilot canal was excavated through Pinhook Bend on A. P.-9 and one in Civil Bend. A pilot canal was excavated in Otoe Bend in 1938 and this was identified in green on A. P.-10 of Plaintiff's Exhibit H-1. A canal was dredged in Upper Hamburg Bend on Sheet A. P.-10. This is right on the Missouri line and just below Otoe Bend. It is part of the long bend which the witness, General Loper, testified was part of a long reach which was cut into three pieces or made into three curves.

All of these canals identified with green arrows, which included all of the canals below Omaha, were dredged prior to 1943.

The witness also testified that Plaintiff's Exhibit H-1 are not to the scale of the A. P. maps as they were originally in the Corps offices but they are reduced. Exhibit H-1 is the same scale as the A. P. Maps which are on file with the Secretary of State of Iowa and Nebraska and upon which Compact is based.

Mr. Huber was handed a typed copy of a letter stamped on the back "Nebraska vs. Iowa, Plaintiff's

Identification No. 1541" which is purportedly a copy of a letter dated 28 February 1963, and has on the signature block H. G. Woodbury, Jr., Col. Corps of Engineers. The letter was addressed to Mr. Jauron, Iowa Conservation Officer, Earling, Iowa. The identification of the letter shows it is identical to Plaintiff's Exhibit P-1539, a letter from the Corps to Mr. Jauron. The contents of this letter are similar to the contents of the letter received by Mr. Willis Brown from the Corps of Engineers dated Jan. 13, 1966 (Ex. P-998) and the letter indicated in the 1965 report of the Iowa Boundary Commission to the Governor of Iowa (See pp. 54-55 of this Resume'). It is also similar to the language in a letter from the Corps of Engineers to Senator George Syas of Omaha, Nebraska (Ex. P-1054). The witness said that letter recalled to mind the statement " . . . which we have made on occasion to the general substance in this letter." The letter was drafted by him (Ex. P-1539). It refers to the fact the present boundary cannot be located throughout by maps in the files of the Corps.

Several maps and photographs were offered during testimony of the Nebraska State Surveyor.

Ground level photographs are in evidence obtained from the Corps of Engineers showing the Omadi Bend Canal at mile 796.2 in April of 1942 (Ex. P-2458 & P-2459) and of the Omadi Bend Canal dated May 13, 1964 (Ex. P-2461). Mr. Brown surveyed the state line on the area shown on Exhibit P-2461 sometime in the 1960's for the Nebraska Game Commission and showed the state line in black on the exhibit. A portion of it was in the water and another portion of it was on the sandbar.

Photographs of a pilot canal in Brower's Bend, mile 788.1 dated 12-29-38 and 12-5-41 are in evidence (Ex. P-2468 and P-2469). On Sheet No. 71 of the 1946-47 tri-color (Ex. P-2664) three ox-bows lakes are apparent, Lake Quinnebaugh, Guard Lake and another unnamed lake in the southeastern portion of the map. Mr. Brown has surveyed in the Quinnebaugh area and has run into descriptions in Burt County, Nebraska which describe that area within Lake Quinnebaugh by Iowa descriptions.

On Sheet 66 of the 1946-47 tri-color (Ex. P-2674) three ox-bows lakes are shown: Old Honey Creek Lake, Nathan Lake and Horseshoe Lake. Mr. Brown identified on Sheet 65 of the 1946-47 tri-color (Ex. P-2675) the starting point of the metes and bounds description referred to in Section 1 of the Iowa-Nebraska Boundary Compact which excepts the Carter Lake area from the Compact. At that point, Mr. Murray stated that the list filed fails to claim that part of the bed of Carter Lake which is in Iowa which they do claim. (Vol. XII, p. 1769).

Sheet No. 64 of the tri-color map (Ex. P-2676) shows Lake Manawa located in Iowa. In 1915, an action was filed in the District Court of Pottawattamie County, Iowa by the *Omaha, Council Bluffs and Suburban Railroad Company vs. J. P. Christensen, County Treasurer of Pottawattamie County.* The Decree was filed September 27, 1917. (Ex. P-2677). The action by the Railroad Company alleged that land in the Lake Manawa area was Nebraska land because of an early cut-off or avulsion and obtained a Decree enjoining the County Treasurer from taxing this land in Pottawattamie County and holding that certain

lands on the left bank were a part of Sarpy County. A deed was then offered from the Omaha and Council Bluffs Railway Bridge Company to the State of Iowa filed January 23, 1932 conveying some of the Lake Manawa land including lake bed, but it contained the statement "No riparian rights are conveyed by this instrument." (Ex. P-2678). This was another instance where the Missouri River was entirely in Nebraska at the time of the Compact.

Mr. Brown was referred to a print of a map obtained from the County Surveyor's Office in Papillion, Nebraska, dated "Revised in 1925". The map was prepared by the County Surveyor and shows Lake Manawa on the Iowa side of the river with a reference "State Line by Decree of the Court 1900 A. D." on the left bank side showing a cut-off of the Missouri River (Ex. P-1774). Mr. Brown testified he had never found that Decree. In the St. Mary's Bend area Ex. P-1774 shows the river of 1913 going through a part of Old St. Mary's and the river of 1909 curved to the east of Old St. Mary's. There are several channels where the Missouri River and the Platte River join.

Sheet No. 63 of Corps of Engineer tri-color maps (Ex. P-2679) includes the St. Mary's Bend area and photographs from the Corps of Engineers showing dredging of St. Mary's Bend Canal in 1938 are in evidence (Ex. P-2473 through P-2477, P-2479, P-2481 & P-2485). Mr. Brown identified aerial photographs of the St. Mary's cut-off dated 1937 (P-1810) and 1938 (P-1812) and 1941 (Ex. P-2392). These show another clear avulsion created by the Corps along the Missouri River. Iowa is claiming

the entire abondoned bed in the St. Mary's Bend area although they did not list this area in the Planning Report.

The Corps of Engineers ground level photographs are in evidence showing Pin Hook Bend Canal, mile 622.1 dated 5 May 1938 (Ex. P-2507) and the same canal as of 10-28-37 (Ex. P-2506). A photograph shows Civil Bend, Digging Canal, dated April 14, 1937 (Ex. P-2514) and another, dated December 29, 1937, shows Van Horn's Bend Canal, mile 621.0 and shows the plug in the canal. (Ex. P-2511). Another photograph showing Civil Bend Canal is dated May 26, 1937 (Ex. P-2517) and photographs of Van Horn's Bend Canal are dated December 29, 1937 (Ex. P-2508) and December 29, 1937 (Ex. P-2512). Mr. Brown identified a photograph of Civil Bend with the caption "Closing navigable gap in 616.8." (Ex. P-2515). This picture depicts some pile drivers on the dike line with dike to the right and left and, from the caption, the witness concluded they are closing that gap in the dike with pile drivers. There was a hole in that dike.

The series of tri-color maps with Mr. Brown's markings of the 1965 channel show many areas above Omaha where the present Missouri River is not in the 1943 designed channel. The witness testified that below Omaha the Missouri River is in the designed channel. From Omaha south the river has been in the designed channel ever since 1943. Mr. Brown identified photographs of Hamburg Bend Pilot Canal, which is just below Otoe Bend, dated in December 1938 and January 1939 (Ex. P-2520 and P-2521). He identified the Hamburg Bend Canal on the 1938 Project & Index maps (Ex. P-413) and testified

this canal is downstream about a mile from Otoe Bend or the Schemmel area. Another photograph of Hamburg Bend Pilot Canal dated January 2, 1939 obtained from the Corps was also offered (Ex. P-2522). On sheet No. 59 of the tri-color (Ex. P-2683) Mr. Brown identified an area Iowa is claiming numbered "30" which is adjacent to the Hamburg-Bend Canal. This is State Line Island and the area through which this canal was cut can be seen at the lower portion of Appendix B.

Mr. Brown testified that there were difficulties encountered in comparing information on the 1946-47 tri-color maps and the Alluvial Plain maps referred to in the Compact. The tri-color maps have been found to be quite accurate but the information on the A. P. maps as to section lines and other information landward from the river is very inaccurate. There were areas where the map information is at least one-quarter mile off. In order to get information in connection with the determination of the present boundary between Iowa and Nebraska, it has been necessary to go to the Corps of Engineers. The purpose of the A. P. Maps was more or less as a glorified road map to show access to the river. Mr. Brown testified the A. P. maps were not intended for any engineering results. When he became State Surveyor in 1960, there was no information on file in his office which would help determine the location of the center of the designed channel as shown on the Alluvial Plain Maps. All of the official surveys of the State are on file with the State Surveyor and there is no other office that carries official land survey records.

Mr. Brown was asked his experience in connection

with the obtaining of information from the Corps of Engineers as concerns their previous projects and the situation of the river at the time of the Alluvial Plain Maps. He testified that, to put it mildly, it is a little frustrating. He would see documents and information in an office at one particular time and come back a year later and try to find that information and it would not be available. It would be destroyed or lost or he was just not able to obtain it. The Corps had been cooperative and they furnished a lot of information and the witness could understand why they were not particularly interested in keeping these real old records. In response to a question from the Court, the witness indicated the Corps is not a record-keeping office primarily. This attempt to obtain information from the Corps has been very time-consuming and a good part of the investigation in this case was spent searching records of the Corps.

The witness made inquiry of the Corps of Engineers to determine whether they have information in their office which would enable them to determine the center of the stabilized channel as it appears on the Alluvial Plain Maps. Exhibit P-999 was a letter from Mr. Brown to the United States Army Corps of Engineers, Omaha, attention Mr. H. H. Sorenson, Chief of Channel Stabilization which stated:

> "In 1943 the States of Iowa and Nebraska entered into a Boundary Compact. In this Compact, with the exception of the area occupied by Carter Lake, Iowa, the state line was described as being the center line of the proposed stabilized channel of the Missouri River as established by the United States Engineers' Office, Omaha, Nebraska, and shown on

the alluvial plain maps of the Missouri River from Sioux City, Iowa, to Rulo, Nebraska, and identified by file numbers AP-1 to 4 inclusive, dated January 30, 1940, and file numbers AP-5 to 10, inclusive, dated March 29, 1940, which maps are now on file in the United States Engineers' Office at Omaha, Nebraska.

"Is it possible to accurately determine the state line between Iowa and Nebraska using only the information available on the alluvial plain maps, as indicated by the Boundary Compact between Iowa and Nebraska?" (Vol. XIII, pp. 1797-1798).

Exhibit P-998 is a reply from Mr. Charles L. Hipp, Chief, Engineering Division, U. S. Army Engineer District, Omaha, dated January 13, 1966, and addressed to Mr. Brown at his office in Lincoln. It states:

"In reply to your letter of 7 January 1966 concerning the state boundary between Iowa and Nebraska, the 1943 state boundary between Nebraska and Iowa cannot be located throughout on the ground from the Alluvial Plain Maps since they are of too small a scale (1" equals 2,640') and do not contain sufficient detail for a surveyor to accurately locate the boundary. At one time it was possible to locate the state boundary from our 1" equals 400' construction maps as a river alignment as shown on these maps conform to the alignment as shown on the Alluvial Plain Maps. Since the present Boundary Compact was ratified, numerous channel realignments have been made and the basic 1" equals 400' tracings have been revised to show these realignments. Copies of 1" equals 400' maps which show the alignment in accordance with the alignment shown on the Alluvial Plain Maps were not retained and it is not possible to locate the boundary on the ground throughout from any maps on file in this office.

If we can be of any further assistance, please feel free to call on us." (Vol. XIII, pp. 1798-1799).

Plaintiff offered for the record Exhibits P-1540 and P-1539 which are copies from the Corps of Engineer files of a letter from Mr. Jerry Jauron to the District Engineer inquiring as concerns that same subject. The reply was dated February 28, 1963 and contains substantially the same information as the letter from Mr. Sorenson to Mr. Brown. A comparison of the identification markings on this letter with the testimony by Mr. Huber in his deposition read into evidence by Plaintiff, identifies this letter as the one which Mr. Huber drafted when he was still with the Corps.

A letter of similar import from the Corps of Engineers to Mr. George Syas, Senator, Nebraska Legislature dated 6 March 1963 is also in evidence (Ex. P-1054).

The report from the Iowa Governor's Advisory Committee on the Iowa-Nebraska Boundary dated December 1, 1964 refers to a letter from the United States Corps of Engineers dated February 28, 1963 quoting language similar to the letter to Jauron. (See page 54 of this Resume'.)

There is also in evidence a complete series of photographic maps dated April, 1964 obtained from the Corps of Engineers of the Nebraska-Iowa stretch of the river. These aerial photographs show numerous ox-bows, areas apparently scoured or affected by the river, and apparent abandoned channels of years past.

Mr. Brown in connection with his study of the Missouri River boundary prepared maps comparing the 1943 designed channel with the original Nebraska Government survey. This comparison appears in Exhibit P-2173 and

is a complete folio of the original Government plats along the Missouri River on file in his office. The sections which are one mile squares are shown on these maps so it is easy to compare, by the length of the sections, about how far it is between the designed channel and the river bank line according to the original government survey. Mr. Brown testified this Exhibit does not reflect all the movements of the river but was only a comparison between 1943 and the original Nebraska Government survey. There are several places on these maps where the Nebraska bank is now several miles from its original location.

Mr. Brown also testified that he made a search to determine whether any record was ever made of the specific lands which were ceded from Nebraska to Iowa or from Iowa to Nebraska pursuant to the Iowa-Nebraska Boundary Compact of 1943. He has been searching for that information since the beginning of this case. He searched through the records in his office and found no information as to land ceded. The former State Surveyor, now deceased, who was in office at the time of the Compact and prior, informed the witness that he knew of no listing of specific lands transferred or ceded from one state to the other.

Iowa was asked about this in interrogatories and the following interrogatory and answer was offered:

> Plaintiff's interrogatory No. 13: "Have there been any determinations made identifying lands along the Missouri River which were ceded by the State of Nebraska to the State of Iowa under the Iowa-Nebraska Boundary Compact of 1943?"

The answer is: "Not by the State of Iowa or that Iowa is aware of." (Vol. XI, p. 1592).

Plaintiff's interrogatory No. 13: "Have there been any determinations made identifying lands along the Missouri River which were ceded by the State of Nebraska to the State of Iowa under the Iowa-Nebraska Boundary Compact of 1943?"

The answer is: "Not by the State of Iowa or that Iowa is aware of." (Vol. XI, p. 1592).

The following paragraphs from Plaintiff's Complaint were admitted by the State of Iowa in its Amended Answer: 1; 2; 3; 4 in the following language: "Admitted as concerns the area involved in Nebraska vs. Iowa No. 4 Original, 143 U. S. 359, 12 Supreme Court 396, 36 Lawyer's Edition 196, 1892." (Vol. XIII, p. 1839); 5 except the last phrase which is "And it became almost impossible to determine the exact boundary between Iowa and Nebraska in many places at any given time in the past," which averment is denied by Iowa (Vol. XIII, p. 1839); 6; 7; 8; 10 except the last sentence of that paragraph which Iowa denies; 11; and 15 except the sentence commencing on the fifth line from the bottom of Page 15 of the Complaint which commences "Plaintiff is informed and believes" (Vol. XIII, p. 1839).

Plaintiff also offered a navigation chart obtained from the Corps of Engineers for the year 1966 as an example to show the navigation channel does not follow the center of the river. (Ex. P-2685). The red line representing the navigation channel tends to the concave sides of the bends except at crossings. It was agreed that the Court take judicial notice of the statutes and case law of both states, Iowa and Nebraska. Plaintiff also specifically

offered certain sections of the Iowa Statutes. Iowa Code Section 9.1 provides that the Secretary of State shall keep all property pertaining to the State Land Office and Section 10.1 of the Iowa Code provides:

> "The books and records of the Land Office shall be so kept as to show and preserve an accurate chain of title from the general government to the purchaser of each smallest subdivision of land, to preserve a permanent record in books suitably indexed of all correspondence with any of the departments of the general government in relation to state lands, to preserve by proper records copies of the original lists furnished by the selecting agents of the state, and all other papers in relation to such lands which are of permanent interest."

The next section, 10.2, provides:

> "Separate tract books shall be kept for the university lands, the saline lands, the half-million acre grant, the sixteenth sections, the swamp lands, and such other lands as the state now owns or may hereafter own, so that each description of state lands shall be kept separate from all others, and each set of tract books shall be a complete record of all the lands to which they relate". (Vol XIII, p. 1862).

Then Section 111.19 of the Iowa Code, which pertains to the Iowa Conservation Commission is as follows:

> "The commission shall at once proceed to establish the boundary lines between the state-owned property under its jurisdiction and privately owned property when said commission deems it feasible and necessary, and shall where deemed advisable mark the same so that the boundaries of such state-owned property may be easily ascertainable to the public." (Vol. XIII, p. 1863).

The statement was also made in the record that it appears this provision has been a provision of the Iowa Code since 1923, and in 1931 the language, "when said commission deems it feasible and necessary," was inserted. (Vol. XIII, p. 1863).

The following Interrogatories of Plaintiff and Answers by the State of Iowa were offered (Vol. XI, pp. 1591-1598, 1602-1604):

> "Plaintiff's interrogatory No. 2. "List all court cases involving title to lands or proceeds of condemnation awards on the condemnation of lands allegedly arising out of the bed of the Missouri River or abandoned channels thereof constituting riparian lands along the Missouri River or abandoned channels thereof in which the State of Iowa has appeared and disclaimed title to such lands or the proceeds of such condemnation awards, identifying such court cases by the date filed, the court where filed, the docket number, and the title of each case.
>
> The answer to interrogatory No. 2: "Case No. 13 above, which is Peterson v. Iowa, et al., filed 10-12-64, Docket No. 17674, District Court of Iowa, Monona County; Lakin v. Iowa, et al., filed 5-7-63, Docket 17400, District Court of Iowa, Monona County; Lakin Fertilizer v. Iowa, et al., filed 7-8-63, Docket 17439, District Court of Iowa, Monona County; Lakin v. Iowa, et al., filed 4-6-65, Docket No. 17737, District Court of Iowa, Monona County; Rand v. Iowa, et al., filed 12-2-63, Docket No. 31075, District Court of Iowa, Harrison County."
>
> Interrogatory No. 65: "With regard to the land involved in Iowa v. Babbitt, (a) what investigation was made regarding title by the State of Iowa prior to the filing of the case on March 18, 1963?"

The answer to (a) is, "The records of Mills County, Iowa, were checked to obtain names of possible parties defendant," and (b), "What investigation was made regarding formation of land prior to the filing of the case on March 18, 1963?" and the answer to (b) is, "Maps plats and photographs at Corps of Engineers office in Omaha, the Secretary of State's office in Des Moines, the Mills County ASC office, and at Mills County Courthouse were studied. Also the area itself was studied from airplane, boat, car, and on foot."

Interrogatory No. 115: "Has the State of Iowa ever had physical possession of the land involved in Iowa v. Schemmel?" Answer to No. 115; "Yes."

Interrogatory No. 116: "If the answer to interrogatory No. 115 is 'yes,' was such possession open and notorious?" and the answer to 116, "Yes."

Interrogatory No. 117: "If the answer to Interrogatory 116 is 'yes,' describe the act by which possession was evidenced and state the name and address of the person or persons who performed such acts and the dates upon which or between which the acts were performed." Answer to interrogatory No. 117: "Before any part of Schemmel Island came into existence as land, it was part of the bed of the Missouri River. During this time that part of the bed which was in Iowa was owned by the State and was in the possession of the State evidenced by the fact that the general public used it for fishing, hunting and boating. After it arose above the ordinary high water mark and attained the status of land, it remained in the possession of the State, such possession being evidenced by various acts by the general public and by the fact that no private individual attempted to take possession of it or to oust the general public from it. Iowa remained in open, peacable and notorious possession in the above manner until 1956 or 1957, at which time Henry E. Schemmel began clearing

and farming a portion of the island and began ousting the general public from it. The state of Iowa is still in possession of all parts of the island and of all river bed in proximity to it which Henry E. Schemmel has not cleared for cultivation at this time. * * * "

Interrogatory 122: "With regard to the land involved in Iowa v. Schemmel, (a) what investigation was made regarding title by the State of Iowa prior to the filing of the case on March 26, 1963?" Answer to (a), "The records of Fremont County, Iowa, were checked to obtain names of possible parties defendant," and (b), "What investigation was made regarding formation of the land prior to the filing of the case on March 26, 1963?" and answer to (b), "Maps, plats and photographs at the Corps of Engineers office in Omaha and the Secretary of State's office in Des Moines, at the Fremont County ASC office, and at the Fremont County Courthouse were studied. Also the area itself was studied from airplane, boat, car, and on foot."

Interrogatory No. 123: "State the names and addresses of all persons who were interviewed by the State of Iowa, its officials or employees prior to March 26, 1963, concerning the formation of the land involved in the case of Iowa v. Schemmel, and state the names and addresses of the officials or employees of the State of Iowa who participated in such interviews."

Answer to No. 123: "None."

No. 124: Prior to March 26, 1963, did the State of Iowa or any of its officials or representatives discuss the formation of the land involved in Iowa v. Schemmel or the basis of claim to said land with any of the defendants named in said action?

Answer to interrogatory No. 124: "No."

Interrogatory No. 126: "With regard to the case of Iowa v. Schemmel, state the names and addresses of all persons having knowledge of the relevant facts concerning the formation of the land described in such case."

Answer to interrogatory No. 126: "Anybody who has studied the maps, plats and photographs of Schemmel Island has knowledge of the relevant facts concerning its formation. We do not know all of the people who made such study. The following named persons have studied these items for the State of Iowa: John M. Creger, Minneapolis, Minn., Michael Murray, Logan, Iowa, Robert B. Scism, State House, Des Moines, Iowa, Sewell E. Allen, Onawa, Iowa, Gerald J. Jauron, Earling, Iowa, Raymond L. Huber, 5255 Military, Omaha, Nebr. There are also some individuals who purport to have some recollection of the Otoe Bend to Schemmel Bend Island area running back to the 30's, but we have not pursued any investigation with any such individuals because it is our opinion relevant facts are all fully, clearly and indisputably established by the available records, maps, plats and photographs and photographs inspected with investigation and study of the area itself. Any other evidence based on human recollection as to the matter would be clearly cumulative, or if in conflict with the documentary proof would be unworthy of belief."

Interrogatory No. 127, "Was any investigation made into the records of the registrar (Register) of deeds of Otoe County, Nebr., or the records of the District Court of Otoe County, Nebr., prior to the filing of Iowa v. Schemmel on March 26, 1963?"

Answer to 127: "No."

Interrogatory No. 164, "In those places where the Missouri River is presently confined to the stabilized channel of the Missouri River as it appears on the alluvial plain maps referred to in the Iowa-Nebraska

Boundary Compact, does the State of Iowa claim ownership to the entire bed of the Missouri River which is on the east side of the middle of the main channel as used in the Iowa-Nebraska Boundary Compact?"

Answer to No. 164: "Yes."

Interrogatory No. 175: "Does the State of Iowa have an official record of State-owned land held or claimed by the State of Iowa on January 1, 1943?"

Answer, "No."

Interrogatory No. 177: "Does the State of Iowa have an official record of State-owned land held or claimed by the State of Iowa on July 12, 1943?"

Answer to No. 177: "No."

Interrogatory No. 179: "Does the State of Iowa claim the ownership of all abandoned channels of the Missouri River presently located in the State of Iowa?"

Answer, "No."

Interrogatory No. 189: * * * "Describe generally the location of all abandoned channels of the Missouri River presently located in Iowa to which the State of Iowa does not claim ownership."

The answer is, "We believe that the entire flood plain of the Missouri River from the hills in Iowa to the hills in Nebraska was once the channel of the Missouri River, hence, the entire flood plain which is not presently occupied by the river may be termed abandoned channel, and this encompasses thousands of acres. There is no practical means of describing even generally the vast portion of the flood plain which Iowa does not claim to own."

Interrogatory No. 213: "State whether the State of Iowa prior to, concurrent with, or subsequent to

the effective date of the 1943 Compact enacted legislation to (a) provide for the identification by survey or otherwise of land ceded to Iowa by the 1943 Compact; (b) provide for the identification by survey or otherwise of land ceded to Nebraska by the 1943 Compact; (c) facilitate by payment of costs or otherwise the recordation in Iowa by Iowans or Nebraskans of titles to lands ceded by Nebraska to Iowa by the 1943 Compact, or (d) quiet title in claimants to riparian lands along the Missouri River."

The answer to each part separately was "No."

The record shows that Iowa did not mark the boundaries of the Schemmel, Nottleman Island, or many other areas which it presently is claiming and there is no record in the offices of the Secretary of State of Iowa, which is the State Land Office, of Iowa's ownership or claim to these lands. There was no such record at the time of the Compact, either.

Plaintiff contends that Iowa paid no attention to this land until it became valuable farm land. Plaintiff's appraiser, Mr. John P. Olson testified that in his opinion the Nottleman Island tracts had a value of $607,900 as of December 29, 1967. Since that time the trend with regard to values of land of this character has been upward. Some of the class 1 or top-grade farm land on the subject property was worth approximately $500 per acre. The Schemmel land was appraised by Mr. Olson at $180,500 as of December 1, 1967 with some of the land valued at $400 per acre. Some of the witnesses also testified to their opinion of the value of the land which was higher than the appraiser's. Mr. Propp talked about $800 per acre land in the area.

Iowa's motives may well be explained by the letter from the Attorney General of Iowa to the Governor of Iowa in 1964 which bears repeating:

> "For many years of Iowa's history, the state did not zealously protect its ownership of these islands, particularly islands forming in the Missouri River, because for many years islands in the Missouri River were considered transitory in nature, subject to excessive flooding, and of little value.
>
> In recent years, U. S. Army Corps of Engineers works in the Missouri River Basin have changed this picture entirely. Channel stabilization work has made it so that the islands are no longer transitory. Upstream impoundments have made it so that they are no longer subject to frequent flooding. These areas now have substantial value to the people of Iowa, both monetary, and in some cases, recreational."
> (Vol. XIII, pp. 1863-1864).

IOWA'S WITNESSES AND EVIDENCE

The Nottleman Island Area

Many of the witnesses called by the Defendant had little acquaintance with the Missouri River. Iowa's witness Ramge, lived two and one-half miles from the Missouri River. In one of the pictures supposedly taken between 1932 and 1934 when he was at King Hill on a picnic, he could not identify the land mass in the background. Although he told the Court the photographs which he took were all supposedly taken the same day from almost the same spot, he could not explain why that land mass looked so much narrower on one photograph than it did on the other photographs. Two of them showed it quite wide and two quite narrow. The

witness said: "I think you could, with trick photography you could make it wider or narrower." (Vol. XIV, p. 1964). He said he hadn't been across the river at that time. The pictures show what appears to be quite calm water since people could stand in the row boat. He didn't have occasion to test the depth of the channel, couldn't say whether there was more than one channel of the river, didn't wade out into it or anything, didn't own a boat until about 1956 and only hunted along the river along the bank. He hadn't been out in a boat and he had not been along the Iowa shore. On cross-examination, it was brought out that he was positive the pictures were taken about 1932 or 1934 but, in his deposition taken on February 22, 1968 he testified that he was " . . . pretty sure it was 1931. In our photo album it was marked 1931." During the trial, however, he testified his wife had written down the dates of the pictures in the book they came out of which were 1932 or 1934. On direct examination he testified his earliest recollection of the river was about 1925 when he drove down there with a horse and buggy, but on cross-examination it was again brought out that he had testified in his deposition that he did not have occasion to go over to the Missouri River in the vicinity of Rock Bluff until in the 30's. He also testified on one of the photographs (Ex. D-739 and D-740) that out on the water there appeared to be a shadow which he thought was cast by some tall trees up on the bluff. He said the trees would probably be six or seven hundred feet away. He refused to admit that what he called the shadow in the water was a sandbar and finally stated he didn't truthfully know. He also admitted there might be water

going around on the east side of the wooded area, but, again, he wouldn't know because he had never been over there. He didn't remember any sandbars there and said when he was there on that particular day, the Missouri River was "all water." He was asked if he ever stood up in a boat in the main channel of the Missouri River and said he wouldn't get out there in a row boat. However, he was standing up in a boat in one of the pictures (Ex. D-739).

Will Mindford who lives at Murray which is five miles from the old town of Rock Bluff had some photographs taken in 1916 when he would have been about ten years old. He went down there on a picnic when his parents were trying to sell an automobile. He believed it was late spring or early summer since he didn't believe there were very many leaves out and he thought they had coats on at that time because it was chilly. Mr. Mindford was quite eager to interject that one of the photographs was taken of the main channel of the river. Picture D-737 didn't appear to depict any part of the river as presented in the evidence. He couldn't tell whether the dark lines which he would say were small willow trees across on the east bank were on bars or whether it was the main bank. The witness had no idea of the kind of camera which was used by the man taking the pictures, Mr. Baxter, or of the kind of lens or film used. He had not been out on the water before that occasion, he was ten years old at the time, and yet he had an opinion of the width of the "channel" between Queen Hill and those willows in the picture. He has never crossed the Missouri River in a boat. Upon ques-

tioning by the Court, he stated he did not have a boat. The last time he hunted on the river was probably five years ago. and in the 1930's he was on the river probably "half a dozen times". The witness' testimony concerning the 1916 period was an isolated statement of a ten year old witness who had not had sufficient observation and knowledge of the river except a casual look at it. The picture is not inconsistent with the testimony of Captain Neuheuser and other witnesses, and there might have been wide but shallow water at times near Queen Hill and Rock Bluff on the west side. In flood time the river might inundate the area from bluff to bluff. On cross-examination, the witness didn't know where the originals of the photographs were. They were delivered to Mr. Clark Wiles and had not been returned. This is the same Clark Wiles, defendant in a law suit brought by Mr. Babbitt and the witness has known the Wileses all his life and they are old friends of his.

Mr. Roy O. Cole was another casual witness who only picnicked at King Hill. He had some pictures taken supposedly in 1918 of the river. He testified there were some sandbars in the river. When asked by the Court how many so-called channels he saw, his answer was "I can see the one main channel." This was another witness eager to identify the main channel. He didn't do any boating on the river except at one occasion on a picnic. He wasn't on the river very much. The witness was asked to identify where the main channel was on a photograph (Ex. D-730) which showed more than one channel and the two channels appear approximately equally wide. Mr. Cole identified another picture taken about 1908 or

1910 between Rock Bluff and Queen Hill which shows water which he called "a little back water" and "It wasn't so very deep." There was a sandbar in the back of the picture with willows on it and Mr. Cole testified that there was no current in the back wash (Ex. D-732). He couldn't testify to the size of this channel on the other side of that sandbar because he couldn't see it from where he was standing. This bayou or back wash was also shown on Exhibit D-733 taken in 1908 or 1910. Mr. Cole was also quite willing to identify the "main channel" from some of the other photographs but it is submitted that none of the photographs is inconsistent with the testimony that, at some times, there was shallow or wide water on the west side in the Queen Hill vicinity. The pictures certainly seem to show a substantial island or bar area and equally substantiate the fact that an island or bar was there which was on the west side of the main channel. His home was six or seven miles from Queen Hill. In the years 1908 or 1910 there wasn't any river action cutting into the Nebraska side in the vicinity of the photographs to his knowledge. This witness is related to Glenn Wiles by marriage. His sister married a Wiles. The witness did not ever know Harvey Shipley, Ernie Shipley, or the Wattses. He also didn't know John Nottleman although he had heard of him. On redirect, when asked what was in the area depicted in the photographs today he said "I really haven't been over that territory."

Mr. Glenn Wiles also testified how he was at King Hill for a picnic in about 1910 and 1912. On cross-examination, the witness said he met Harvey Shipley once but he didn't know anybody who lived on Nottleman's Island.

His son farmed on Nottleman's Island and, when asked who owned the land his son farms, the witness said "They said the State of Iowa at the sale." His son was farming the land by permission of Babbitt and he recognized Babbitt as the owner of part of it. He owns land adjoining Babbitt's land. Presently, his son and D. M. Babbitt are engaged in two legal disputes, one over the land his son claims under a quit claim deed from the Federal Government and the other under a contract for clearing the Babbitt land. He bought some land next to Babbitt and turned it over to his son. Mr. Babbitt sued his son for $20,000 in the District Court of Cass County, Nebraska. The witness and his son, Clark, have been engaged in assisting the State of Iowa in preparing this litigation in talking to witnesses and getting photographs. The State of Iowa has never made any attempt to claim any land owned or claimed by the Wileses. The witness was just helping the State of Iowa although he said he didn't have any financial interest in the outcome of this litigation. Mr. Wiles testified that in 1923 from the top of Queen Hill he saw no islands in the river looking south, none looking southeast and in the river itself there were no islands and no bars. Looking east in 1923 there were no islands but there might have been some sand bars on the east side. Looking north up towards Plattsmouth from King Hill, he could see no islands or bars. The witness was referred to the Seth Dean map of August, 1922 and testified he never heard of "Calumet Point" which is King Hill. He didn't recall any islands in that location in 1923 although he finally admitted there might have been a sandbar. He didn't think it had any timber on it at all. He then supposed the sandbar with

willows on it out from Calumet Point did exist in 1923, but he never saw it there. If it was grown up to willows, you couldn't see what was on the east side of it from the west bank. He didn't even know Nottleman's Island existed until someone came over and told him about the property for sale in the vicinity and that was around 1960 or 1962. Mr. Babbitt told him about it and that was when the United States Government sold some Schroeder land for taxes to satisfy an income tax lien. From 1908 to the present, he expected that he stood at the base of Queen Hill and looked straight east across the river ten times and, all those times, he did not see an island straight east from Queen Hill. All you could see were trees from the west bank. He said that is about all you can see yet. On redirect examination, he testified there was an island over there prior to 1962. The Shipley Estate had a sale and they said Shipley used to go back and forth to farm across the river. That sale was at Rock Bluff.

Defendant then called Clayton Pierce, who hunted on the north end of the Duvall Bar in about 1926. This was north of Queen Hill and they went across the east channel right at the south end of the Duvall property. The Duvall Bar was on the east side of the east channel and had nothing to do with the island. It was bare sand west of his farm ground. When he went hunting he was between the two channels and could see the river split. He estimated the east channel was in the neighborhood of 800 feet wide. In 1932 or 1933 he hunted coyotes on the island. He worked sounding for the Corps of Engineers from King Hill south and said there were places where

a thirty foot line would not reach the bottom south of King Hill about 600 feet from where they put in the rock dam. The two channels came in just a little north of King Hill and then they split again right south of that and made another island down west of Bartlett. This witness testified the main channel ran on the west side south of King Hill. On cross-examination the witness seemed quite confused in identifying Haynie Slough, Keg Creek and Watkins Ditch. On examination by the Court, he testified there was probably half a mile of timber on the island (Nottleman Island) in 1926. There was some land in there cleared at that time. In fact, there was a shack out there. He didn't know who put the shack up or who it belonged to but he was over on that island with his hounds running coyotes. In 1926 he was working around the edge there which is where the coyotes generally ran and he didn't pay any attention to the crops or anything, but he noticed one shack out there. He also said:

> "We weren't in there only a couple of times running coyotes." (Vol. XXI, p. 3026).

On further cross-examination, he testified that Woods Brothers Construction Company weren't working at all at that time and had not done any work on that part of the river in 1926. Forney Brothers and Patton Tully were working that in 1932 and 1933. This witness didn't cross any bank work at all when he was there in 1926. There were willow roots along where the bank had been caving where he had his boat tied. He said the bank had been caving and the bank always caves along a place like that. It was the Iowa bank that was caving in.

Clarence H. Chambers, 61, has been employed as an Equipment Inspector for the Iowa State Highway Commissions for 18 years. He was a service manager for an automobile dealership in Glenwood, Iowa since the fall of 1938 except from 1942 to 1945 when he was in the service. From November of 1922 until 1930, he lived in California. He was born in 1907. He testified concerning fishing in 1919 or 1920 when he was twelve or thirteen years old, but also stated:

> "... oh, of course that is a long time ago and a small boy's memory might not be exactly accurate, ..." (Vol. XVI, p. 2235).

He was on the shore at all times where he was fishing and his father in those days did not have a boat. They couldn't see what was on the other side of Nottleman Island except for when they were near the ends. He said he had no way of knowing how deep the water was other than in the area where they were fishing and he would say, based upon the fact his father liked to put his bobber about six feet above the hook, that it must have been approximately six feet. This witness only got a glance at the channel at the end of the island and was really in no position to make any comparison of the water on the east and west side. The witness was in California between 1922 and 1930. Then he lived nine miles east and a mile north of Sidney. This was a considerable distance from the Missouri River. He supposedly hunted in this same place and he said they would put their decoys as far as they could put them with a long willow pole and there was some curvature there that invariably would wash them to the east shore. Until he owned a boat of his own in

1950, he could not see what the nature of the channel was west of the island. As he recalled, the nature of the current in the "island chute" in 1930 was the same as back when he was fishing as a boy.

In 1920 the witness lived in Fremont County north and east of Sidney which was quite a ways from the river. His only familiarity with the river was occasional fishing and hunting trips. He first said that, two years ago when he hunted there, he got permission from Mr. Bill Watts, but then he stated that he believed Sargent was farming some of that land. When he hunted on the island he believed the farm was being farmed by a man by the name of Sargent who's on the east side of the chute and Sargent gave him permission to go in across where he was farming to hunt. When asked if at any time from 1930 or even before that clear up to the present day, he had ever seen any property in that vicinity posted he said, "Yes, very much so." But it was never posted by the State of Iowa that he knew of. In the early days he didn't get as far north as Keg Creek or Pony Creek. Where the waters came together at the south end of the island, he said the flow went approximately south. He never really paid that close attention. When asked if the appearance had changed when he came back in 1930, he said some appearance changed. He didn't recall ever seeing any work done along the river on the Iowa side in 1920, 21 and 22. On redirect examination, he again referred to "a small boy's memory". This was when he saw boats supposedly start up the west side of the island but he could not testify whether the boat made it or got stuck.

Mr. Claude R. Hutchinson, 74, lived at the west edge of Rock Bluff and, when asked what his earliest recollection of the Missouri River was with regard to the King Hill and Queen Hill area, answered: "Well, I was never much interested in the river and I never got around to take any interest in it." (Vol. XVI, p. 2258). On cross-examination, he was asked if there were islands or sandbars in the river in those days and his answer was there must have been but he didn't recollect it. This witness obviously had little knowledge of the river.

Iowa offered the testimony of Philander Chase Patterson who lived in the heart of the town of Rock Bluff. Mr. Patterson was born on February 24, 1890, and testified on direct examination:

"Q. Have you ever seen the Nebraska bank of the river any farther east at Queen Hill than about where it is now?

A. Oh, yes.

Q. How far?

A. Well, I don't know. We walked out there quite a ways across there. It could have been a quarter of a mile. It could have been three-quarters of a mile. I never paid too much attention to distance, although we walked a ways to the flat bar to get out to the river.

Q. And when was this?

A. That was about 12, 13.

Q. 12 or 13?

A. Uh huh. We swam across to the island and played around over there.

Q. And what kind of a bar was it that you walked

across in 12 or 13?

A. It was a sand bar mixed with sand and gumbo and everything.

Q. And when did the river come back closer to Queen Hill?

A. Let's see. I just don't—I don't know just—I don't remember just when it did come back in there.

Q. Did it ever come back closer to Queen Hill before the Corps of Engineers went to work in the early 30's?

A. No. I think it was out past there when they worked there, as near as I remember it at the time.

Q. Did they push it back to where it is now?

A. They pushed it back some, yes." (Vol. XVI, pp. 2275-2276).

Mr. Joe E. Bulin, when first called by the State of Iowa, testified on cross-examination that at King Hill there was an island out in the river which at that time always went by the name Nottleman. He testified the main river was on the east side of that island and that was the island which he knew they called Nottleman Island. After some discussion between the Court and Iowa Counsel concerning Mr. Bulin's testimony that the main channel was on the east side of Nottleman's Island, Iowa recalled this witness after the noon hour but there still was some confusion in his testimony. He talked about Gochenour Island and Tobacco Island and stated that Tobacco Island was north and east a little bit, but mostly north, of Gochenour Island. He did acknowledge that, in the 20's that it was a fact that there was considerable

river cutting on that east bank a little bit south and a little more east and the river was doing the cutting.

Also, on cross-examination following Mr. Bulin's second session of testimony, he testified he did not recognize the scene in photograph 730 which was taken by Mr. Cole.

Mr. Percy Wheeler was another casual witness called by the Plaintiff. He testified to one occurrence which supposedly happened in 1908 when he was out getting some sand on a bar east of Queen Hill but he said:

> "I never paid much attention to the river, only just that one time, that sand, that time we bought that critter there." (Vol. XVI, p. 2305).

He said they bought a bull from Chase Patterson's father who "had a pasture run out quite a ways from the bank. There was water out beyond that, small streams, wasn't a big hard current or anything like that." (Vol. XVI, p. 2304). This was evidently with reference to Queen Hill and King Hill. Looking out from Queen Hill, he imagined the river was about a block wide or something like that, and maybe a little less. When asked if there were any other channels opposite Queen Hill back in 1908 which you could see as you stood at Queen Hill, he said "You might clear over across there, yes. They had a boat up to the end, just a fishing boat that was parked there. They were fishing at that time over there, pretty well over to the—clear over to the other side of that bar there. They were on the bar. That's the other bar that's struck down in there, you know. I don't know what happened, how that is; I didn't pay any attention to the river for quite a while." (Vol. XVI, p. 2306). This

fishing boat was out to the edge of the bank. That was about a half a mile pretty near, a little bit north and east of Queen Hill.

The Schemmel Area

Iowa called two witnesses whose testimony was taken by deposition concerning the very early location of the river in the Schemmel area. Both of these witnesses were casual witnesses and did not live close to the area of the Iowa Chute. Oscar L. Hays, of Farragut, Iowa, testified he was 81 years old and he moved to the northwest corner of Missouri when he was eleven. This was in the year 1897. He lived there eight years. On direct examination he testified he had occasion to go to Payne Junction and they would go about a mile east from where he lived and then north up to what was called the Hamburg Road and then take the "river dike road from there on to Mose Givenses corner." This old dike road was probably just five rods west of Albert Propp's house and goes right through the barn yard. Although the witness talked about the trip to Payne Junction, on cross-examination he testified that he didn't make the trip up to Payne very frequently, he supposed maybe a couple of times a year or something like that. He didn't make it every year from 1897 to 1905 and he can't remember going up to Payne until he was a "pretty good-sized boy". That was when he was "fifteen maybe". It could have been 1901. This indicates he certainly wasn't as familiar with the area as those who were living in the immediate vicinity of the Iowa Chute. This witness did testify that he left this farm in northwest Missouri in approximately 1905 and, when he returned in 1913, the

river was within a half mile or closer to the buildings. The river had moved east maybe a quarter of a mile. The witness also testified to cutting right where the Hamburg Road came to the river. He said the river took the west end of that road. It cut farther south and eventually took the whole bend out there, "cut it straight off". It just kept cutting away into the east side. He also remembered some work done in the vicinity of Hamburg Landing by Woods Brothers who were the first ones who tried any riprapping in there. He stated this was somewhere around 1905 up to '10 approximately. The Corps of Engineer Annual Reports show Woods Brothers did work in the vicinity of Hamburg Landing in 1919 and the 1923 Corps of Engineer map shows retards so the witness may have been as much as ten years or more off in his recollection.

Lon Baker of Hamburg, Iowa, born 1879, testified his father had a farm about three miles straight north of Payne Junction and a little west. This is considerably north of the Propp place. When first asked when he first recalled hunting in the area west of the Propp farm, he answered around 1900. He then changed this to ". . . 1985 —or 1895, I mean." He didn't recall any branch of the stream which Mr. Garrison (in a deposition taken by the State of Iowa the same day) referred to as the Schwake Chute. When asked if he ever had occasion to hunt in the Iowa Chute his answer was: "Not very much, no. No one ever hunted very much . . . I never hunted much on the Iowa Chute." (Vol. XXII, p. 3199-3200). The witness said he hunted mostly at White Lake, north of Payne Junction. He purportedly remembered a flood of '81 when he would have been two years old. He was married in '98. He was

asked if he remembered the river cutting over towards the east during those years and answered that he did. When asked where, he said that must have been up along the Mose Givens place. He was lying a little behind the dike, probably five or six feet wide, and the river was cutting pretty bad there. This was on Mose Givens place. He was pretty sure. He remembered

> " . . . laying there against that dike. After that dike went in when I was laying there against it, four feet wide, I would of went in the river. Boy, I moved from there right now." (Vol. XXII, p. 3202)

He testified this dike was south and west from Mose Givens' buildings but he couldn't tell approximately how far. He said he was eighteen or nineteen years old, so this must have been in '98 or '99. He said he thought it was the Payne Dike which was the one washing into the river. He said he didn't hunt around Mose Givens place when he started to hunt but he hunted around there in about '98 or '99, something like that, a little earlier than that. The witness's testimony appears to be very confusing. Plaintiff would also point out that the testimony of Mr. Cockerham and Mr. Garrison, both of whom lived right in the vicinity of the Propp place, was that there were no other levees in the area so, if Mr. Baker was in fact on a levee in 1898 or 1899 and the river was cutting it, this would have had to be along the Iowa Chute.

Otto Hinze, born 1900, of Hamburg, who testified for Defendant didn't start fishing on the Missouri River until about 1915. He testified that anywhere from 1915 on up to the present date there was an island there which was Schemmel Island and was then asked on direct examination:

"Q. Were there two main channels around the island, one on the west and one on the east?

A That is the way I had it." (Vol. XXI, p. 3088)

He wasn't up to the north end of the island until a little later on and, about 1915 to 1920, he was never over to the west channel at that time. The witness didn't own a boat of his own until 1936 although he fished with some people who did in the early 30's. He testified you couldn't see the channel around the other side of the island. He testified there was quite an island in there but it filled more after the Government did that work. There were a few small willows, it looked like, which grew up over there before the Government did the work. It was back in the 20's. He then talked about work which the Government did on the bank and when asked if that would be on the east bank of the Givens Chute, his answer was "On the east bank, yes, of that river." (Vol. XXI, p. 3092). They did some river work to keep it from cutting. They put trees in there, and cabled them to the bank and threw them in. The river cut quite a bit there in '21. That would be a little south of the island.

The witness did commercial fishing since 1936 and he thought the Army Corps of Engineers started work in the area around 1935. He testified he was never over to the west channel until after the Corps did some work because he bought his boat and motor in 1936. The witness thereby disqualified himself from describing the west channel until that time. He also testified that the east channel, when the river was up, was quite a channel through there, quite a river. He didn't know that any other commercial fishermen fished down there by Hamburg. He didn't testify as to how much time he

spent on the river fishing. He did see the Government work boats go up the Givens Chute.

On cross-examination, he testified that the farm which he was farming by Hamburg Landing was cut almost to pieces in 1921. He was renting there. It cut better than a quarter of a mile up that bank to the north of Hamburg Landing. Woods Brothers went up a quarter of a mile or so from the boat landing with their work. He imagined that they put in a thousand or more trees all up and down the bank above and below Hamburg Landing on the Iowa side. He testified that the old Iowa Chute was probably four feet deep, the bottom of it, and then you had to go down a bank and then back up again. He went down a bank on the east side and then up a bank on the west side. He also knew of some buildings south of Hamburg Landing about a mile and a half which had to be moved back to get them away from the river. The river just kept cutting down there and that has been years ago. It has been cut back there for half a mile from the road south. The bottoms of the banks of the Iowa Chute were probably a hundred feet or a little better apart. He said at the top, of course, "you know how banks slope". The witness has seen water in the Iowa Chute and he has fished in it. There was water there when the river was real high, until they got dikes over there to keep it out. Mr. Hinze's testimony in response to questions from the Court that the old people at one time claimed that was the Missouri River, has previously been referred to. He also testified that the west bank or inside bank eventually filled in and the chute stayed open for a few years after the rest of it filled in.

Mr. Hinze did not have much familiarity with the

river until after 1936 and this was following the commencement of the work by the Corps of Engineers.

Albert Propp, 62, testified that he moved to what has been referred to in this case as the Propp place in 1912 from Kansas. He was seven years old at the time. His buildings are east varying from a hundred feet to between six and seven hundred feet from the Iowa Chute. When he moved there, the land west of the Iowa Chute was in small timber and brush. Most of it was quite small timber. He also mentioned the Schwake Chute which was better than a half mile from the river. There used to be a chute go on both sides of the island (Schemmel Island), but since the Government work, they have shut the one on the east side of the island off so that makes it pretty close to a mile now from the main channel of the river. He also referred to a levee which made a circle around the outside of the Iowa Chute which ran north of his place about a half a mile to about three miles south and he marked this levee on Exhibit P-1036 (Appendix B). The levee was about six feet high and probably that wide on top or a little wider. He testified he had seen the Iowa Chute full and running over and, in fact, he has seen pretty near all that land over west of the Iowa Chute under water. In 1952 the whole bottom was under water and in 1947 the water got up to that farmer-made dike. Mr. Propp testified that the area that is now Schemmel Island began to form as an island in the 20's and it seemed as though every time they had a flood the island would get a little bigger. He also testified that, when the river was up, there was always water in the Iowa Chute. It was good fishing. That was before there was any obstruction to the water going through there. He never got over to the channel west of the island. The first people

that he knew of on the island were a couple of fellows who built a shack over there. It was back in about 1918 or along in there. There was John Hilger and Walt Williams who built a shack over there.

The first time there was any farming was when Mr. Schemmel cleared it and started farming it along about 1953. They did some clearing first and it was two or three years later before they did any farming to amount to anything. The witness also marked the Schwake Chute in green upon Exhibit P-1036 (Appendix B). He had never heard that old levee called anything but farmers levee. He testified that levee was put there during high water times to keep the overflow from going back over to Hamburg. He testified about some low land which had been opened up by bulldozers where they had made a water way which goes down to where the Iowa Chute empties. The Schwake Chute is still there but is filled in from previous overflows. The Iowa Chute connects with the present Missouri River both north and south of his place. It just makes a circle out of the river and back into it.

The witness did not know of any dikes or levees which were built between the old farmer levee and the present levee. He testified they got most of the dirt for the present agricultural levee from the river side of the levee. They used scrapers and some of the ground they pumped out of the river and the rest of it was hauled in with heavy equipment. There were no levees between the old farmer levee and the river between 1912 and 1948. Mr. Propp testified that he leveled the old farmer levee across his farm and discarded it. He now farms across it. He

has made some ditches and has filled in a few low spots in the field and kind of helped level it a little for drainage. Some of this was to the west of the old farmer levee. He was asked about the value of his farm land and indicated he didn't know what his was worth but some of them are selling as high as $800 per acre.

The witness or his father never got a deed or document from the State of Iowa indicating that Iowa didn't claim or own the land to the west of the Iowa Chute. They never had any transactions with the State of Iowa. Woods Brothers Construction Company did a lot of riprapping along the river to the south of him where the river was cutting back and forth and it got to cutting pretty bad on the east side at one time. That was back in the 20's. It was about a mile south of his place just north of the Hamburg Landing. He stated you used to hear all kinds of stories and you still hear them that the river was cutting toward Hamburg. There were no farmsteads west of the Iowa Chute in 1912.

This witness could well be an interested party since a great deal of the land he presently claims and farms could be abandoned channel subject to claim by the State of Iowa, should they so desire. He also was not on the river except casually and was primarily a farmer. His house is now approximately two miles straight east of the present designed channel of the Missouri River.

Iowa called another witness, James Givens, who also could be interested in the activities in the State of Iowa since his family has farmed land riverward from the Iowa Chute. On examination by the Court, the witness

admitted that he hasn't been over Schemmel Island but he knew where the north end is. His earliest recollection of it was along 1935 or 1936. It was forming as an island as of 1936 with willows on it. Then there were places out there with some pretty good sized trees, too. These were cottonwoods. He was asked about his recollection of that mass of land when he was speaking of being eight or nine years old and he said he was never over that part of it. He remembered a bar being out there, but he has no firm recollection. He said it was just a willow patch and it looked like a pretty good place out there at that time. It doesn't look quite so big now, but it sure did then. Gude's Island was right straight west from their north line. The witness testified that the river was a single main channel in those early days when he was six or seven years old right out from the Givens land with just a few chutes. He has never seen any canals dug by the Corps of Engineers in that vicinity. He has never been at the south end of Schemmel Island, not when the river work was on.

On cross-examination, the witness testified he is the brother of Ben Givens and that Sally D. Givens is Ben's wife. Helen Givens is the witness' wife and Frances Givens Taylor is his oldest sister. When asked if some of the land that presently is on the home place was old river bed, he stated that he supposed that most of the bottom at one time was old river bed. Specifically, the western portion or part of the Givens home place is old river bed. This land had title acquired to it before his time. He didn't remember it. The witness then was referred to the chute running up and down between

Schemmel Island and the bank and testified that there was never a claim to his knowledge made by the Givenses for some land on the river side of that old chute. He said he, himself, never claimed that land. It is possible there are Givenses which claim that land, but not the witness. When asked if the State of Iowa ever claimed that land, he said he couldn't say. He supposed they probably have but he didn't know for sure. He didn't know of any fence line agreement with the State of Iowa with regard to that land, although the witness Jauron testified he negotiated a fence line agreement with the Givenses.

The witness settled up and got rid of his interest in the home place in September of 1964 and this included his wife's interest. The witness was referred to the 1960 aerial photograph (Ex. P-256) and the witness marked an area which the Givens family claims. He then denied that he knew what the family claimed and said he was referring to the way the deed and abstract reads as he remembered them. One calendar year after the water quits running through "this little trickle down through here" that would be their accretion. As far as the State and Givens trust, he had nothing to do with it and didn't know a thing about it. The witness marked the "little trickle" and, on Exhibit P-256, he marked in green with a dashed line the south boundary of the Givens place extended to the river. He has marked to the north of that two chutes or trickles which flowed to the north of the dashed line. He testified this would definitely in his opinion belong to the State of Iowa or Givens Trust, one of the two. He didn't know which.

When asked if the State of Iowa ever claimed it, he said to his knowledge, no.

The witness testified he was sometimes known as Jim M. Givens. He was then referred to the action in the District Court of the State of Iowa in and for Fremont County entitled "*Ben E. Givens, Jim M. Givens, et. al. vs. Moses Payne, et. al.* (Ex. P-2698). He didn't remember for sure what land was involved but, when asked if it involved old river bed, answered:

> "If it involves the Iowa Chute, it would be the old river bed." (Vol. XXII, p. 3161).

He denied that this a law suit, but said it was "just a quiet title action." He said there was no law suit; it didn't go to court.

The witness also testified on cross-examination that he is sometimes known as James M. Givens. He is the James M. Givens also known as Jim M. Givens who was one of the plaintiffs in an action in the District Court of the State of Iowa in and for Fremont County, captioned *James M. Givens, also known as Jim M. Givens, et. al. versus Henry E. Schemmel and Lucile Schemmel.* That involved land north of the dashed line which he put on Exhibit P-256 which is at the north end of Schemmel Island. In about 1963 he was in dispute with the Schemmels over the land enclosed by the green line which he placed on Exhibit P-256. North and south of that green dashed line on Exhibit P-256, both pieces of land are a part of what is known as Schemmel Island or Otoe Bend Island. He was asked if the whole island was accretion to the bank and answered: "I suppose

at one time, yes." (Vol. XXII, p. 3164). Mr. Givens then marked on Exhibit P-256 an area north of the green line to the river and wrote the word "Givens" and drew what appeared to be four black lines running from the river eastward designating the Givens claim. The witness hasn't heard anything about the State of Iowa claiming that land which he designated on Exhibit P-256 and he said it would be reasonable to expect that, if the State of Iowa came in and claimed that land, he would find out about it. In response to a question from the Court, he said he knew of no claim made by the State of Iowa prior to 1964 when he sold out.

An examination of Exhibit P-256 shows that some of this land the Givenses claim is north of the Windenburg traverse but of the same character as the Schemmel land.

Mr. Givens couldn't say whether the State of Iowa claimed anything north of that trickle or tendril of water.

This witness and his family obviously have an interest in this entire situation, both by the fact that the home place is partly abandoned channel and because they have a law suit pending against Henry Schemmel which would involve some land to which the State of Iowa might have a claim if it should ever desire to assert it.

Iowa called another witness, Frank Starr, age 56, who was a State Conservation Officer for the Iowa State Conservation Commission. This witness was so obviously prejudiced that his testimony should be discounted. He apparently was not listening to the questions as in his answers he kept putting in "main channel" and "west side" when he hadn't been asked questions calling for

such answers. The witness seemed well indoctrinated on the west side. He also testified he continued to hunt in that locality until he left the area in 1938 and he saw in 1938 where the Corps had stabilized the channel. He testified they stabilized the channel in the same place as where the main channel was as he had described it. This is in obvious conflict with all of the evidence concerning the Otoe Bend Canal which was dug in Nebraska and where the stabilized channel is located.

Iowa's Professional Witnesses

Iowa called Mr. Raymond L. Huber, age 61, who worked with the Corps of Engineers from 1926 until 1963 when he retired. This witness has testified for the State of Iowa on several occasions in connection with their quiet title actions or claims to condemnation awards for lands along the Missouri River.

In the early part of Mr. Huber's testimony, he was asked by the Court:

> "The Court: And when was the planning, the design of that work undertaken?
>
> The Witness: The design in about 1930 to 1932.
>
> The Court: What kind of channel did you have before that?
>
> The Witness: The river was completely wild, choked with many, many sandbars, 18 inches deep, 2 feet deep. In the bends, the constant caving of the banks. The river was switching from side to side. It was completely wild and uncontrolled.
>
> The Court: Did you have a navigation channel anywhere at that time?

The Witness: There was no navigation channel. * * *

The Court: We are talking about the 20's?

The Witness: We are talking about the 20's, yes, sir, and actually prior to the completion of the channel and getting it into this designed trace it was wild in the areas where we had not performed any construction.

The Court: As I understand it, there wasn't any navigation channel until you made one by the structures you put in the river to control it?

The Witness: That is correct, sir"

(Vol. XXIII, p. 3268-3269).

However, when handed a 1931 map of the Missouri River of Otoe Bend (Ex. D-291-A) the witness testified it showed where the main channel of the Missouri River was when the map was made in 1931. The court then questioned the witness in light of his earlier statement that there was no navigable channel at that time and the witness first defined the channel as "the deepest area of the water where steamboats or any boats could navigate, sir." (Vol. XXIII). He then said there wasn't any commercial navigation and he was just talking about the deepest channel, not necessarily navigable. On direct examination, he placed a green line on Ex. D-291-A to show the deepest thread of the stream in the Otoe Bend vicinity on the date of the map, July 16 to July 23, 1931. This was a hydrographic survey and, on cross-examination, the witness testified it was easy to draw the main thread of the stream from a hydrographic survey and, if he made an error in drawing that main thread on the hydrographic survey, it would be fair to say it would

probably be far more likely that greater errors might be made on aerial photographs or the maps that show no soundings whatsoever. The witness testified in the case of *State of Iowa vs. Henry E. Schemmel* in the District Court of the State of Iowa In and For Fremont County on or about July 30, 1964. He was called as a witness for the State of Iowa, Plaintiff in that case, and that case had to do with the formation of this same Schemmel Island which was referred to in the present case. He was under oath in that case and drew the deepest thread of the channel on several maps. The witness was handed an Exhibit marked "Exhibit No. 120" from the court file of that case and he recalled the exhibit. This was a map similar to Exhibit D-291-A. It had a line in blue with a "T" at the top and a "T" at the bottom. The witness drew that line and it purported to be the "thalweg". The line on Exhibit No. 120 in the Schemmel case which he testified to in 1964 went to the west and on Exhibit D-291-A in this case was drawn by the witness to the east. The witness placed this "1964 thalweg" on Exhibit D-291-A in red and testified that the maximum distance between the red line and the green line on Exhibit D-291-A was 1,100 feet.

The witness testified that there were no reconnaissance maps made at Otoe Bend prior to the start of construction. He readily stated that the reconnaissance map of April 3, 1934 indicated where the thread of the stream, the deepest thread of the stream, was on that date, even though they were made two years before he was in the area. It was pointed out that Iowa had criticized these same reconnaissance maps in

their brief in another case. The maps don't use the word "thread".

The witness didn't see the Otoe Bend area until 1936, and by that time the work had been going on there for two years. He testified there were bars on both sides of that channel. The dikes were in which prevented them from going to the left. They made many, many pilot channels to move the river over into the designed channel and they used a type of dredging in Otoe Bend in 1938.

The witness was asked to point out the deepest thread of the stream on a 1930 map (Ex. D-1132) and 1930 aerial photograph (Ex. D-1092). The following exchange then occurred:

> "Mr. Moldenhauer: Mr. Huber, you testified in other lawsuits, have you not, concerning the constant (reconnaissance) sketches and aerial photographs?
>
> The Witness: I beg your pardon, sir?
>
> Mr. Moldenhauer: You have testified in other lawsuits, have you not, concerning constant (reconnaissance) sketches and aerial photographs?
>
> The Witness: Yes, sir.
>
> Mr. Moldenhauer: Do you recall testifying in the case of the United States of America, plaintiff, v. 242.83 Acres of Land, More or Less, in Harrison County, Ned Tyson, et. al., at the United States Courthouse in Council Bluffs in 1959 before Judge Edwin R. Hicklin?
>
> The Witness: Yes; I did, in that case.
>
> Mr. Moldenhauer: Do you recall being asked these questions and giving these answers: — I be-

lieve this is by Mr. Murray. Yes; by Mr. Murray on cross-examination.

"Q. Now, Mr. Huber, I wish you would describe — You have testified at length this day on the basis of these reconnaissance maps, you call them. Is that what you call them?

A. That's right; yes, sir.

Q. I wish you would describe for the Court how those maps are made.

A. A reconnaissance map is a sketch, and it is made from a boat proceeding downstream with the current, and as the mapping party proceeds downstream the bank lines and bars are sketched on the map, and at the same time soundings are taken and the boat endeavors to run in the deepest part of the stream, deepest part of the channel, and soundings taken in that tread of this channel are recorded on the map.

Q. Now, about how fast does this boat travel?

A. Somewhere about 8 miles an hour.

Q. Would that be including current of the river, or plus the current of the river?

A. No; that is faster than the river current. Your river current will average about 4 to 5 miles an hour when it's not in flood stage. Then it would be about twice the velocity of the current. About 8 miles an hour.

Q. Well, then, you mean water-wise the boat travels about 4 miles an hour?

A. Faster than the water is moving, or a total of 8 miles per hour.

Q. And you, or somebody from your office sits in this boat with these charts in front of you and

then as you go down the river you simply sketch in what you see? Is that right?

A. That is correct; yes, sir.

The Court: So that actually would you say as an engineer that a photograph of what is seen below, an aerial photograph, would be likely to divulge more information as to the exact lay of the land than might be expected to appear upon a map that was man-made afterwards?

The Witness: Yes, sir.

The Court: In fact, it's kind of an old-fashioned way of establishing a record, is it not?

The Witness: Yes sir, but we get certain soundings which are of interest to us, which we can't get from the other.

The Court: That would be true.

Q. (By Mr. Murray) The depth of the water you get this way, and you couldn't get that from an airplane, is what you mean?

A. Yes, sir.

Do you remember being asked those questions and giving those answers?

The Witness: I did testify in that case. I don't remember the specific questions now in that particular light, but I'm sure I must have from what you have read.

Mr. Moldenhauer: Are those answers accurate?

The Witness: Yes; they must have been my answers.

Mr. Moldenhauer: You can't determine the depth of water from an aerial photograph, right?

The Witness: That is correct.

Mr. Moldenhauer: And the reconnaissance maps are just sketches which are not — don't even get topography as accurate as an aerial photograph, is that correct?

The Witness: That is correct."

(Vol. XXIII, pp. 3315-3318).

The witness then claimed he could take a section of the river such as Otoe Bend, where you find a number of bars and channels and it was his opinion he was qualified to say which one of these channels is the deepest because he has studied this river for years, knows how the channel acts, how it comes off one bank, goes through a reach, how it shapes the bars. Upon examination by the Court as to whether he was qualified to go back to the year 1930 and put his mind back to 1930 and use these instruments and say where the main thread is, he said "No question about it." (Vol. XXIII, p. 3322). The witness then marked in green the "deepest thread of the stream" on Exhibit D-1123, the 1930 map made from the aerial photographs taken on September 17, 1930. When asked by the Court when he first saw trees growing out on that Island or vegetation, he first asked to refer to the reconnaissance maps. He couldn't point out the year from his independent recollection. The witness was then handed Exhibit D-1092, an aerial photograph taken in 1930, and stated that, although it was much more difficult to draw the deepest thread to show accurately the location of the channel, in his opinion, he could still do it from the shape of the bars and banks upon that photograph. He placed his initials at each end of the line which he drew in green. On cross-examination, Mr. Huber testified that he drew the so-called thalweg on the river on the 1930 Corps of Engineers

photograph in the Schemmel Island area and was handed what was marked "Exhibit 1-30" from the Schemmel Court file and he recognized that Exhibit. This was the aerial photograph dated 9-17-30 and was the same date and depicted the same area as Exhibit D-1092. The two thalwegs or main channels differed as drawn on the two exhibits. In this case, the witness drew it to the west of a number of sandbars down toward the lower end of a photograph and in the Schemmel case he drew it to the east. He placed the "thalweg" as he had drawn it on Exhibit 1-30 in the Schemmel case on Exhibit P-1092 in black. Here, again, his 1964 thalweg differs from his 1969 one just as it did on the 1931 hydrographic survey.

The witness also did not hesitate to express an opinion as to where the main thread of the Missouri River was at various dates on the maps of the Nottleman Island area. He placed the "deepest thread of the Missouri River" in 1890 on a print of the 1890 Missouri River Commission Map (Ex. D-605-A). On cross-examination, Mr. Huber identified the 1890 thalweg which appears on the 1946-47 tri-color maps and testified his understanding of the thalweg is: "The thalweg is the deepest tread (sic) of the stream as show on the 1890 survey." (Vol. XXIV, p. 3407). The thalweg appears on other Corps of Engineer maps and he testified that is the same line that he placed on Exhibit D-605-A in green in the Nottleman Island area. There was a small island on that map between the letters "nd" in the world "Island" on Tobacco Island and the word "McDonald" on the Iowa side of the river and Mr. Huber's green line went to the right or Nebraska side of the island on Exhibit D-605-A. He was asked what there is at that location which would cause him to place that thalweg on the west side of that little island just

above No. 627.9 in the river and answered that it was the general curvature of the bend upstream which led him to place it in that direction. He said there was a concave bank and it was his opinion water followed this concave bank and continued generally in a straight line off that concave bank. The witness was then handed Exhibit P-718, an overlay of the 1890 survey in the vicinity of Tobacco Island and Exhibit P-728 which is an overlay of the 1928 survey of the same area. The overlays were placed together and the witness identified the 1890 thalweg as drawn on the 1928 Corps of Engineers map (Ex. P-728). He was then asked to compare the thalweg as matched on the overlays of the 1928 and 1890 maps with where he put the thalweg on Exhibit D-605-A. The thalweg as shown on the 1928 Corps map is to the east of the small island as shown on the 1890 survey and at that point, the thalweg is right along the eastern bank. Mr. Huber's "thalweg" went to the west or right bank side of that same island.

The inconsistencies of the testimony of this witness in behalf of the State of Iowa in its various cases leads to the nearly inescapable inference that the testimony is constructed to fit the needs of the hour at hand. His willingness to set out in directions indicated by the skilled examination of Iowa counsel is further evidence of the disadvantage experienced by the individual land owner in resisting the claims of Iowa.

On cross examination, the witness testified that he was a member of the team that worked on the layout of the designed channel in the Otoe Bend area. The design was made by others in the Kansas City District and the channel alignment and structures in the vicinity of Otoe Bend were designed in Kansas City. He did not specifi-

cally lay out the structures but, after the lay-out was prepared he took the lay-out and was responsible for its transfer over to maps for reproduction and for sending to the Omaha district. In the Schemmel case, Mr. Huber had testified:

"Q. When was that channel for the river designed by the Corps?

A. In 1934.

Q. Did you have anything to do with the designing of it at that time?

A. No, sir.

Q. Was it designed at Kansas City or Omaha, or do you even know that ?

A. I am not sure which location it was designed in. If it was designed in Omaha, it would have been approved by the division office in Kansas City. I do not know for sure." (Vol. XXIII, P. 3375).

With regard to the reconnaissance trips, Mr. Huber testified they sounded from Sioux City to Onawa in one day, from Onawa to Florence in one day, from Florence to Nebraska City in one day, and Nebraska City to Rulo in one day. So at least some of these reconnaissance trips covered 63 or 65 miles in one day.

Mr. Huber was first asked if, looking at the reconnaissance maps, it wasn't true that they only show the situation supposedly as of the date of the map and might not be reliable to show it at any other time. His answer was he wouldn't say they were not reliable at any time. "They do show the situation of that date. By comparing that with the later reconnaissance you can see whether any changes occur between the two." (Vol. XXIII, p. 3387-

3388). It is possible that there are times when you do assume it is the same bar from an examination of the maps; it would depend on the construction that has been accomplished upstream and at that particular location, the location of the bar to which you referred, whether it is in behind the designed channel, and whether it is in behind the dike construction. The witness then admitted that he testified in the case of *State of Iowa v. Raymond,* the Deer Island case, that you couldn't tell what happened between dates on the reconnaisance maps, but that they only showed as to what happened as of the date of the map.

The witness testified they used land drivers as they drove the dikes out in the Otoe Bend area. Land drivers were used as you proceeded down into the dike system because there was a system or number of sandbars already in existence so that it was necessary to use a floating pile driver across any left bank channels, and rather than scour out the bars which were in the path of the dike, a mattress was placed on top of the bar and a land pile driver used to drive the piling across the bar. They didn't wash everything away in front of the dikes as they drove the dikes out. He also admitted that they liked to get the river over as easily as possible, and where there were bars in the path of the structures they retained them rather than washing them out. It was one of their avowed purposes to accomplish their work as expeditiously, economically, and as quickly as possible.

On direct examination Mr. Huber had been referred to several maps which showed soundings around the west side of Nottleman Island. On cross-examination, he was shown a reconnaissance map dated July 31, 1934 showing the soundings to the east of Nottleman Island with no

soundings to the west. When asked the deepest sounding shown on the east of Nottleman Island he first responded that 12 feet seems to be the deepest but is was then pointed out that the deepest was 15 feet. He had not examined that map. He was then referred to a reconnaissance map of August 31, 1934 which shows the east and west channels having been sounded around Nottleman Island. The east channel was sounded on a sounding map of September 17, 1934. Construction work had been done at the north end of Nottleman Island at that time. A figure of 15 feet of water in one or two places was shown on the east side of Nottleman Island.

The east side was sounded on October 1, 1934 when three dikes and a part of a trail dike had been completed or partially completed at the north end of Nottleman Island. The witness was asked if they were effective in transferring the main water over toward the west side of Nottleman Island and he answered "No, sir." The deepest water on the east side of Nottleman Island on the October 1, 1934 reconnaissance map was 14 feet. A reconnaissance map on October 15, 1934 sounded the east side of Nottleman Island and not the west side. Both channels were sounded on November 16, 1934. The east channel was sounded April 3, 1935 but they couldn't get through the upper end because the dike construction blocked off the progress of the reconnaissance party. It was the purpose of the dike construction to block that water. A reconnaissance of May 1, 1935 also sounded the east channel but sounding stopped at the upper dike, 629,9 because the party could not get through the dike. The first depth sounded immediately below dike 629.9 which was constructed across the north end of Nottleman Island was

12 feet and below that the soundings list 15, 12, 13, 15, 17, 12, and 8 feet.

Mr. Huber was asked if he ever had situations where there was more water going through the dike system than there was around the ends of the dikes and he said that happened in the Otoe area. Mr. Huber testified that the concave bend is the outside of the curve and, as the river flows in the concave bend, the main force of the water is generally toward the concave side of the curve or the outside of the curve. If the river was in a pronounced bend such as that before the stabilization work, it could erode the bank on the concave side.

The witness recognized that, where the river had been in a pronounced bend and all of a sudden cut through the neck of that bend leaving an abandoned channel in the pronounced bend, it would leave an area of two banks, both a right and left bank of the abandoned channel. It could fill in and in some cases they do and in other cases they do not fill. The abandoned channel could get narrower as it filled in.

Mr. Huber also testified that they started their work at hard points or bluffs such as the Nebraska City bridge and the Plattsmouth bridge and worked downstream in a series of curves and reverse curves in designing the channel. It is the design of the curves that determines where they put the river from that point downstream.

In the Schemmel case in Fremont Count, Iowa, in 1964, Mr. Huber testified on cross examination that he had no personal knowledge of which was the most used channel or the usually used channel for navigation prior to coming to Omaha in 1936.

He was asked on cross examination in the present case:

"Q. Is it fair to say you made a thoroughly extensive study of the Otoe Bend-Schemmel Island area in connection with your testimony in this case?

A. Yes, sir.

Q. Does the entrance of the Platte River have any significance in the Schemmel case, the entrance of the Platte River into the Missouri River?

A. It affected the channel downstream for some miles. It could have had some bearing on the channel downstream from the Platte River as far as this location.

Q. Are you stating it did have some bearing in the Schemmel Island area?

A. I am saying that the flow from the Platte River influenced the stream downstream, and I believe as far as the Schemmel area.

Q. Do you recall in the Schemmel case, again in District Court in Fremont County, Mr. Huber, being asked the following questions on redirect examination by Mr. Murray:

'Q. Mr. Huber, at the outset of Mr. Redd's cross-examination of you there was considerable discussion about the effect of the Platte River mouth where it empties into the Missouri River. Where is that?

A. The mouth of the Platte is a few miles upstream from Plattsmouth, Nebraska, and a few miles downstream from Bellevue, Nebraska.

Q. How many miles above the area involved in this case?

A. 25, 30 miles, in that range.

Q. Does the Platte River outlet into the Missouri have any significance in this case that you can see?

A. No, sir.'

Do you recall being asked those questions and giving those answers?

A. Yes, sir." (Vol. XXIV, pp. 3413-3414).

Mr. Huber stated he had testified for the State of Iowa as concerns formation of lands along the Missouri River in *Iowa vs. Raymond, Dartmouth College vs. Rose, Iowa vs. Tyson* and the *Schemmel* case in Fremont County.

On redirect examination, Mr. Huber was asked if, when the Missouri River Commission men were making what we call the 1890 survey, they took soundings of the river. His answer was:

> "Soundings were taken and they do not appear on the scale of these one-inch-to-one-mile charts, but there are some very large rolls of the original 1890 survey in the Kansas City District office and these are a reduction from the large rolls which are on a large scale, and they did have the soundings on them." (Vol. XXIV, p. 3420).

Although the Missouri River has been notorious for its many changes over the years, certainly testimony concerning the river should not be as changeable or as variable as the river itself. No man's title should be determined by testimony of such a transitory nature as that submitted by this witness.

The reconnaissance maps and soundings referred to by Stewart Smith, General Loper, and Mr. Huber have also been commented upon by the State of Iowa in briefs

in two cases involving lands along the Missouri River. Plaintiff offered the following language from the brief of the State of Iowa before the United States Court of Appeals for the Eighth Circuit in Civil No. 16460, *Tyson, et al., versus State of Iowa:*

> "The Tyson-Anderson appellants base much of their claim and argument upon the accuracy of the so-called 'reconnaissance maps.' (Government Exhibits 4-A through 4-X.) R. L. Huber, the Corps of Engineers witness, described how the so-called maps were made. He states that these exhibits are merely sketches drawn by a man riding down the river in a boat at eight miles an hour. The inaccuracy of these sketches is demonstrated by comparing Government Exhibit 4-N (reconnaissance map made July 7, 1949) with Government Exhibit 3-N (aerial photo taken July 3, 1949); Exhibit 4-N purports to show that the designed channel between the island and the Nebraska shore had filled up and was not running water, whereas 3-N clearly showed a stream of water throughout the length of the designed channel. If the trial court gave little or no weight to the reconnaissance map in reaching his conclusions, the entire record discloses that he was justified in so doing." (Vol. XVIII, p. 2663).

This brief was signed by Norman A. Erbe, Attorney General of Iowa, James H. Gritton, Assistant Attorney General of Iowa, and Michael M. Murray, of Logan, Iowa, attorney for the Appellant, State of Iowa. Mr. Murray indicated at the trial that he wrote the brief and made the arguments.

Plaintiff also offered the following statement from a brief of the State of Iowa in the case of *State of Iowa, Plaintiff, versus Frank Raymond, et al.,* in the Supreme Court of Iowa:

"These pictures (referring to aerial photographs) serve a collateral purpose of demonstrating the unreliability of reconnaissance sketches relied upon by appellants to prove that the east channel was closed in 1939 to 1943." (Vol. XVIII, p. 2666).

Although Iowa has offered some reconnaissance maps in evidence, it is submitted that the testimony and Iowa's previous statements substantiate the position that these maps are not probative of the location of the boundary between Iowa and Nebraska. If they are unreliable when in conflict with the State of Iowa's position, it would seem they would be equally unreliable if used in support of Iowa's position.

The State of Iowa called two witnesses, Dr. Bensend and Dr. McGinnis, in an attempt to contradict Mr. Weakly's testimony concerning the age of the trees on Nottleman Island and in the Schemmel area. Neither of these witnesses proved knowledgeable in the science of dendrochronology and they admitted they could not accurately "bridge" or chart the ages from trees. This automatically disqualifies them in determining the age of trees which may have been pushed over the bank as in the Schemmel area or slabs taken from a stump. Both witnesses spent little time on each piece of wood and much of the preparation was done by students. They counted along a single radius where areas of difficulty could well be found and rings missed. Although a great deal of time was spent on discussing "false rings" their testimony failed to point out the relevance of the discussion to the particular tree samples analyzed. Mr. Weakly touched on the subject of false rings and indicated they

were not too difficult to find if you knew what you were doing.

Iowa's witness Bensend was more concerned with the area of gluing of wood, mechanical properties of wood, and adhesives. Although his students worked with cottonwoods, there is some element of doubt concerning the amount of work by the witness with the subject. When asked about the field of ring counting, the witness testified:

"Q. Are there in the field of ring counting any publications that are recognized in your business as authoritative?

A. Well, there has been a great deal of work done down in southwestern United States in relating climate to ring count.

Q. Is there a text on the subject?

A. I haven't followed this very closely. I suspect there are numerous publications, but I can't name any one because they aren't associated—" (Vol. XVII, p. 2412).

In counting, this witness said "We select a radius that would give us a complete ring count from the pith to the bark." In a few cases where there was some decay and it was a little difficult to reach the pith, by moving around the tree a ways, they were able to get very close to the pith. On tree No. 230, the witness said he had two other persons make independent counts "using this same radius on the same sample, but a different side of the sample." (Vol. XVII, p. 2426). Consequently, they were merely following the same path as the witness and not really making any independent study.

On foundational questions by Plaintiff's counsel, Dr. Bensend testified about the primary purpose of his work with cottonwood and environmental factors and agreed that basically his concern was with the production of cottonwood for pulp purposes. They were interested in studying the changes in the properties of wood and the length of fibers. He was interested in tracing a ring from the bottom of the tree up as far as it goes and admitted that you can trace these rings without any relationship to the age of the tree at all. He agreed that what he has been most concerned with in his work at Iowa State was with ring counting and not ring chronology. He said they used ring count only to establish the position of a specimen within the tree. In answer to a question from the Court, Bensend said there were some numbers on some of the specimens which he received and he disagreed with most of them. However, even on tree number 230 in the Schemmel area, Dr. Bensend's determination was that it started its growth in 1903. This was still prior to the 1905 map showing the river had moved back to the west in the Schemmel area. Bensend also testified when asked about the subject of "bridging", that they were usually not directly concerned with this. Only indirectly did they have anything to do with the relationship of growth rate of one tree to another. He had seen a few articles concerning the work done at the tree ring laboratory in, he believed, Flagstaff. He was not sure about the location. He also made it clear that he had not done a great deal of bridging and was not an expert in it. He was unable to bridge any of the samples which he had.

On cross-examination, Dr. Bensend stated he was told of Mr. Weakly's ring count in connection with the slabs other than number 230 in a letter from Mr. Murray somewhat before he received the samples so he had Mr. Weakly's findings and it was also written on the specimens. There was a penciled number on the tags, but the witness said he paid no attention to that. The witness was asked about the two terms "ring count" and "ring chronology" and didn't know what they were referring to. He didn't run into those terms in the type of work he did. He also did not have definite information on how high his slab of tree No. 230 was taken from the ground. On Tree 1220, he had no information as to what the remainder of that slab was before this particular section delivered to him was cut. He didn't know how representative this slab was for the rest of the tree. He also recalled that he didn't find any slabs to which he found equal or more rings than Mr. Weakly. He had a boy prepare the cuts and then the witness didn't spend "on some of them more than an hour, or in some cases a little less and in some cases more. If I had some uncertainties, we might spend a couple of hours trying to trace down—" (Vol. XVII, p. 2469).

The back-up witness for Dr. Bensend was Dr. McGinnis who was also educated in wood technology. He stated:

> ". . . but I have done no research myself as an individual on cottonwood." (Vol. XVII, p. 2478).

He was also asked on direct examination:

"Q. What is the difference between your business and I think the term has been mentioned here this

morning, a wood chronologist? In the first place, have you ever heard of the term 'wood chronologist'?

A. Yes, although I must confess I don't pretend to be an authority on that subject . . ." (Vol. XVII, p. 2480).

When asked if he was generally acquainted with the method used by people who call themselves wood chronologists or dendrochronologists, his answer was "Vaguely, I am not a student of the field . . ." (Vol. XVIII, p. 2481). He did not know of any work being done here in the midwest in the field of dendrochronology. He made a ring count on samples which Dr. Bensend had in Ames. When they were given to him he said he did not know the result of Dr. Weakly's work on the samples. Mr. Murray explained to him in the morning what he was involved in and he spent most of the day except for lunch counting them. The witness was asked about the accuracy of bridging cottonwood trees and, when asked by the Court if he had done much of that work, he answered that he had not. He did not know how long the cottonwood had been growing in this country and said the universities have had an opportunity since World War II with a lot of Federal research money to undertake studies on a lot of things they couldn't do before, and cottonwood was one area and tree genetics was a new field that has come along in this concept of how they are going to grow them better to have a better product. The business of getting soft wood for paper has become very important lately. This witness, as Bensend, was apparently more involved with the pulp and paper industry than in actual date chronology.

When asked on cross-examination if it wasn't quite unusual, as difficult as he testified it is to count cottonwood rings, that two different foresters can take 15 slabs and come up with about the same count, the witness answered it would depend. Both McGinnis and Bensend counted the rings on the same smooth surface and on the same radii. Dr. McGinnis went along with the same patterns which Dr. Bensend had. Consequently, it was not an independent investigation. The slabs or samples were marked as they were in the court room when he studied them and somebody now could pick up those same slabs and retrace what he and Bensend did because the path they followed is apparent on the slabs.

Iowa had two witnesses from Iowa State University, Dr. Robert V. Ruhe and Dr. Thomas Fenton, who did a study of the Otoe Bend area. They supposedly identified features on the ground and placed them on a map. However, they had no licensed land surveyors assisting them in identifying these features and placing them in relation to the section corners. Ruhe testified concerning scarps, old chutes, and land forms. He attempted to identify scarps with banks of the Missouri River in times past. The witness testified that the scarps all faced right. The high side is always on the left, the low side always to the right. He claimed that they all faced generally toward Nebraska. These scarps have a slope. They would be like the tread on a stairs, the riser on a stair. If you were walking across these things, you go up stairs a little bit and you go up another step. Ruhe made a map showing some of these scarps (Exhibit D-1221). Ruhe said all of the scarps face westward or southwestward and they represent left bank positions. He testified the river moved to the west gradu-

ally during a fifteen year period but he didn't know the number of years. He also reached conclusions as to the effect of the Corp work starting in 1934, using transparencies constructed from aerial photographs. However, it was pointed out that the 1936 aerial photographs show a hole in a dike which does not appear on his transparency because, he said, the transparency just shows the position of the dike. Two parallel lines on the aerial photograph appear to be curved on the transparencies. The witness testified that you adjust your aerial photograph and then plot it. Apparently what are two parallel lines become two non-parallel lines because of the adjustment. The witness also did not hesitate to show the Court the 1936 "main channel" on the exhibits. There was absolutely no foundation for the witness' expertise in this regard.

Plaintiff contends that an examination of Ruhe's overlays in comparison with the aerial photographs establishes that the overlays do not accurately depict everything which shows on the aerial photographs. There has been some selectivity.

The witness did state that he selected certain structures. He has only used the same structures in all of the overlays. The witness' attention was called to the apparent width of the Otoe Canal in the 1938 aerial photograph and the overlay as compared with the area of land immediately to the east of it and he justified the differences on the basis that the canal was on the edge of the photograph which is the most distorted. Plaintiff would point out that the distortion is not uniform in the overlay although the two features are adjacent to each other in the same portion of the photograph.

Ruhe purportedly, from a summary of his overlays prepared from the aerial photographs, found that there were four little pieces of land that came through the whole history of the east side of the Schemmel area and these would be dated from 1930. Ruhe had an opinon as to how the island formed, although it was only based on aerial photographs with a gap betweent 1930 and 1936 and the river work of the Corps started in 1934.

Ruhe testified that the scarp which was generally the left bank of the Iowa Chute was the farthest east left bank which he found in this area. He testified concerning a John Gregg map of 1895 which is not of record in the Fremont County Courthouse. This map concerns an area in the southern part of Iowa Section 3 to the north of the Schemmel land which supposedly shows a left bank and a slough between the left bank and the river. He compared the supposed left bank by Gregg and the right bank of the Pierce 1895 survey which is of record in Otoe County and concluded that the Pierce survey was inaccurate because the channel would have become almost obliterated and would not exist at the site of Sidney Landing as it appears on the 1890 map. It would be a matter of a few hundred feet at the most in width. Ruhe also concluded that the left bank of the river created the scarp which runs along the left side of the Iowa Chute between the years 1879 and 1890. He said there was a bank position shown on the 1890 map which corresponds with that scarp.

On cross-examination, Ruhe testified that the scarp roughly parallels the Iowa Chute on its east side. He was then asked:

"Q. —the 1879-90 scarp and the Iowa Chute are in the same position, is that correct?

A. Yes; the bank is right up against the scarp.

Q. And again, you identify the scarp as being what point? As being related to the river as of what date?

A. 1879 to 1890.

Q. If you should be mistaken in that assumption, what would that do to the rest of your thesis which you have espoused here today?

A. I am not mistaken in that assumption.

Q. That isn't my question. If you are mistaken, I take it about everything else you have said today would be also in error, is that correct?

A. Yes." (Vol. XIX, p. 2804).

The testimony then brought out that, by measuring from the Section corner common to Sections 13, 19, 18 and 24 directly west to the scarp along the Iowa Chute it was only 4,800 feet to the scarp which is within 300 feet of the Iowa Chute. This was his supposed left bank of the Missouri River between 1879 and 1890. However, measuring along that same line on the 1890 map to the bank of the river, the measurement is 6,700 feet. Consequently, the 1890 bank is at least 1,600 feet to the west of his scarp which he identified as the 1879-90 bank. Ruhe testified that the line that is shown on the 1890 map is the chute line. However, the measurements show that this is not the chute line and there is no feature on the 1890 map shown in the location of the Iowa Chute on the Section line. Iowa Sections 13 and 24 appear on Appendix B and Section 18 is immediately to the east of Section 13 and Section 19

is immediately east of Section 24. That section corner common to those four sections can be identified on Appendix B.

Ruhe testified he could only do this type of study with authorization from headquarters in Washington, D. C. and he could do it for a State but he would not do it for a farmer because it would conflict with his Federal duties. He relied only on the maps which had been offered in evidence and those which he was able to dig up such as the 1895 Gregg map, the 1903 maps, and the air photos of the 60's. He placed very little reliance on the 1903 map. He did not know of any surveys of 1882, 1884, 1886, or 1888 of the east bank. Such surveys are in evidence in this case.

Dr. Ruhe had some trees marked on the Schemmel area on his map and was asked if he found in his report that when the Corps of Engineers moved the river they did so without destroying those trees. In his report he admitted he made the statement:

> "The sites of the trees survived as the parcels of land identified as 30M on plate 3."

He was not changing his testimony and it was still his finding and conclusion that the river could have moved across that area where the trees exist on Schemmel Island without destroying that land. He also was referred to where he marked the 1895 tree in Section 14 and, in his report, found that *the river could have moved across that area without destroying a tree located at that place.*

Ruhe testified that there are no scarps from the Iowa Chute towards the Missouri River at the present time which slope toward the left or toward the Iowa shore. He

also testified they mapped every scarp they found in the time they were able to do their work. *If there were any scarps in that entire area which faced toward the east, it would show a right bank position. It might change his conclusions.*

Dr. Ruhe testified that his chute No. 7 was a chute formed by the river at some time in the past. This is a long chute which parallels the levee on the riverward side. He was then asked if he knew when the levee was constructed which was immediately left of chute No. 7 but he didn't know for sure and admitted that borrow could have come from the area shown as chute No. 7 but he didn't know that for a fact. If it did, he would have a distorted picture as to whether or not chute No. 7 was ever a channel of the Missouri River or formed by the Missouri River.

Ruhe testified that Dr. Fenton took the measurements as to elevations. If it should turn out that those elevations are in error by a wide magnitude, it would affect his conclusions but a slight error would not. A slight error out there would be a foot or two. Locally, a foot or two would be very significant because some of these scarps are only 1.3 feet high, so an error there of one or two feet would be bad.

The Gregg survey was approximately a mile north of the current north end of the area known as Schemmel Island. The witness also found no evidence of construction prior to the time that the Corps of Engineers did its work. He found no evidence of river construction by man-made means in the 1920's in that area. He apparantly did not have knowledge of the river work on the east bank by

Woods Brothers Construction Company in the early 1920's.

Plaintiff in rebuttal called Mr. Hiley J. Barrett, Jr., of Nebraska City whose occupation is earth moving and construction. He identified the levee just to the east of the Schemmel land and testified he did clearing ahead for the borrow area. The borrow area is known as the area where you borrowed the dirt to build the levee. He started in August 1948 and they were frozen out on December 4, 1948. A crew went ahead and cleared for the base of the levee and then the dirt machines came behind and it was the witness' job to go ahead and clear the area so the dirt rigs could haul out of that area. They would strip the trees or brush or any debris and put in areas in windrows and then put dirt on top, using that as a haul road from the borrow area to the levee. There was no levee there when he commenced work because a crew had gone ahead and cleared for the levee base. He pointed out on the 1960 agricultural aerial photograph (P-256) where they scooped the dirt to construct the levee. This was to the west side of the levee. He also pointed out some of the haul roads which still appeared on the aerial photograph. He marked some arrows pointing out these haul roads and others are visible along the levee in the photograph. He also circled a portion of the borrow area riverward from the levee. It would vary because some places they had to go wider because they couldn't go deep enough.

They were constructing the levee from south to north and they went as far north as Payne Junction. From ground level the height of the levee would vary because of

depressions in the land but it would probably be from 15 to 21 feet high. The levee was completed in 1949. After the 1952 flood, the witness testified that they capped that levee and put approximately two feet of dirt on the levee. This dirt came from the same general area to the west all the way along the levee, starting north of Plum Creek and going down to Hamburg Landing. The borrow area left a low wide ditch. The depth would vary and in some areas it could be from 80 to 150 feet wide and maybe 8 to 10 feet deep. In other spots you couldn't get four feet deep. This borrow area identified by Mr. Barrett can be seen to be the same topographic feature which Ruhe called Chute No. 7 which he first testified was formed by the Missouri River.

The Nebraska State Surveyor also testified in rebuttal for the Plaintiff that he ran a profile in the Schemmel Island area starting at the levee and running eastward to the Schwake Chute. He started his profile approximately at the buildings in the northwest corner of Iowa Section 14, 200 feet east of the levee on the Section line between Sections 10 and 15. They started the measurement at the levee and started their profile or elevations about 200 feet east of there. They took a level shot at each 50-foot interval until they hit a break in the topography and then they took it at 10-foot intervals. The profile was taken 50 feet south of the road to get away from any influence of the road. He had a survey crew with him and they used a transit and rod and checked those instruments for accuracy before they commenced. They checked it both at the State House before they started and again in the field, which was a standard method. They checked

their traverse into a benchmark at the completion of the survey, also. They started from a benchmark and ended at a benchmark.

Mr. Brown identified a profile which he took on June 27, 1969 (Exhibit P-2704) and explained the relationship between this profile and Exhibit D-1221, the map prepared by Ruhe. The first sheet goes as far east as 1,600 feet following along and immediately south of the Section line between Iowa Sections 10 and 15 and 11 and 14. The witness testified in the area shown on that profile it does not show a slope in any particular direction. It is slightly undulating. The witness then identified a second sheet of the same profile (Exhibit P-2705) beginning at the termination of the first sheet, or 1,600 feet east of the levee and continuing on to 3,100 feet. The termination of this profile is in the Schwake Chute. This is in the area of the "C" on Ruhe's traverse. The witness got to the center of that chute which Ruhe's C traverse went across. Mr. Ruhe has a scarp identified as "Red 10" (there is an error in transcription and the Court Reporter identified scarp red ten as "red pen" in several places.) The witness was asked if he found anything in the location of Ruhe's scarp mark identified as "Red 10" on D-1221 and said he did not. That would appear on approximately the western portion of the first sheet of his profile. It is around Station 15 which appears in the lower righthand portion of his profile, Exhibit P-2704, and possibly it is to the west of that station 15.

There is an area on Exhibit P-2705 of the profile where Mr. Brown took elevations at a much closer interval between the numbers 19 and 20. That was where he found

a break in the profile of the ground and he took 10-foot interval shots there to better portray the slope of it, the east and west banks, and the bottom. The highest elevation he found on the west side of that break was 911.7 feet and the lowest elevation was 910.1 feet and on the eastern side of that break the highest elevation was 911.1 feet and that is the highest from there clear through to the Schwake Chute. *This feature comes within Ruhe's definition of a scarp, but it faces east, and by his own admission, this would change his conclusions.* This break was approximately 450 feet east of the Ruhe "Red 10" scarp on Exhibit D-1221 and appears on Exhibit P-2705 between Stations 19 and 20. The highest bank of this drop-off is on the west and the east bank is somewhat lower than the west bank. He took photographs at the location of that drop-off. This scarp ran in a northwesterly-southeasterly direction. It was standing full of water when Mr. Brown was there. Exhibit P-2706 is a photograph the witness took standing on the roadway at that Station 19, looking southeasterly, and portrays the west bank of that feature. The witness also identified Exhibit P-2707, another photograph of the same feature but also showing the transit. Another photograph was introduced taken from that same Station 19 on the road but facing northwest showing the depression (Exhibit P-2708). The witness said that from the road you could see the depression run about a quarter of a mile north and, sometime earlier than this, he walked up this depression clear to the levee that runs on up to the north.

Mr. Brown found nothing where his profile crossed the location of Ruhe's red 10 scarp.

Mr. Brown was then referred to Exhibit P-212 which is a photographic reproduction of a portion of the 1890 map, brought to the scale of one inch to 2,000 feet. This is the same as the scale on Exhibit P-1036, Sheet 59 of the 1946-47 Corps of Enginners tri-color map. He placed the 1890 overlay on the 1946-47 tri-color map so they were in the same location on the ground in the Schemmel Island area. The 1890 thalweg which appears on the tri-color fits in the channel on the 1890 map. Mr. Brown measured from the Iowa Chute to the left bank of the 1890 Corps of Engineers map on the road into Schemmel Island and testified it was 600 feet. A little bit to the north, at right angles to the bank where the road meets the Iowa Chute about one quarter mile south of the Givens place the bank of the Iowa Chute is 1,100 feet northeast of the left bank as shown on the 1890 map. To the south, measured along the section line between Iowa Sections 14 and 23 and 13 and 14, the Iowa Chute is 1,600 feet east of the east bank of the 1890 Missouri River. Consequently, the bank feature on the 1890 map which Ruhe stated was his easternmost scarp was west of the Iowa Chute in 1890 and the Iowa Chute was created by the river *after* 1890.

Mr. Brown then examined Exhibit D-1232 which was an overlay prepared by Dr. Ruhe of the Gregg map of 1895 which has the Pierce Survey 1895 bank line shown on it. He was not able to identify anything as the Iowa bank and the furthest riverward indication shown on the Gregg Survey were the lines of the slough. He measured between the furthest right bank of the slough as shown on the Gregg map and the 1895 Pierce Survey right bank

and found it measured 22 chains or 1,450 feet. He then pointed out several areas on the 1890 Missouri River Commission survey which show the Missouri River as narrower than 1,000 feet. There are several such areas. At Mile Marker 615, the entire channel is approximately 500 feet wide. At Mile Marker 610, again it is approximately 500 feet wide and this is immediately above Nebraska City. At Nebraska City it is 700 feet wide approximately. All these places measured just show a single channel. In making these measurements, he intentionally avoided the split channels. At Otoe City or Minersville the river is approximately 600 feet wide on the 1890 map. Immediately upstream from Mile 590 it is about 700 feet wide. Immediately below Peru or to the right of Peru, it is approximately 400 feet wide. The witness only picked the narrowest places. There are many of them that are under 1,000 feet. Consequently, there are many places where the river was narrower than it would be if confined between the 1895 right bank of the Pierce survey and the bank of the slough on the Iowa side as shown by the Gregg map. The witness, Ruhe, had compared the positions of the 1895 Pierce right bank and the Gregg map and commented that " . . . the channel would become very, very narrow." Ruhe was quick to discount the Pierce map and tried to show that the channel would have become almost obliterated and wouldn't exist at the site Sidney Landing. It would be a matter of a few hundred feet at the most. However, in addition to the measurements by Mr. Brown on the 1890 map, plaintiff would refer to the remarks by S. H. Younge appearing in Exhibit P-1619 referred to on Pages 29 and 30 of this Resume', in which Mr. Younge mentioned that the width

of the river below Kansas City between its high water banks varied from 900 to 7,000 feet with the low water widths varying from 400 to 2,000 feet. This is considerably downstream below the discharge of waters of additional tributaries and streams into the Missouri River.

Iowa also called Dr. Fenton who assisted Ruhe in his study of the Otoe Bend area. Dr. Fenton took soil samples and testified the soils in materials on the island are similar in kind to those that occur west of the Iowa Chute and over to the river. He discussed the soil pattern of distribution but testified that this did not mean anything as to how the island formed. There isn't necessarily any correlation between where land first appeared and present-day soil patterns. On cross-examination, the witness testified that he found some soils on the present Nebraska or western side of the river similar in kind to those on Schemmel Island. He determined that all of the land which is presently in Iowa but which is now west of the Iowa Chute is former bed of the Missouri River. The witness took the measurements from which Exhibit D-1221 was prepared and he took the elevations. However, he did not draft the map.

The witness testified that scarp 3 which was identified by Dr. Ruhe as being within 300 feet of the Iowa Chute intersected the section line common to Iowa Sections 13 and 24. The Iowa Chute also intersects that section line common to Section 13 and 24. However, he testified that the east bank of the Missouri River on the 1890 Corps of Engineers map intersects the section line common to Sections 14 and 23. This comparison shows that

scarp 3 is in the section to the east of the section in which the 1890 bank line was located and is not the same feature.

During his testimony, the witness referred to Exhibit D-1221 which is the Ruhe Map showing the scarps and traverses. His testimony brought out that there was a 3,200 foot error in the length of traverse N to M as shown on Exhibit D-1221 but he denied any responsibility for the drafting of the map. (Ex. D-1221). He used the same methods in surveying the lines and elevations on the traverses on the Iowa side of the river as he did in surveying M to N.

Iowa also called Dr. Lucien M. Brush apparently in an attempt to show that the Missouri River below the mouth of the Platte River is not a typical meandering stream. He had been contacted within two months prior to testifying, to study the Missouri River for Defendant. As a part of his study he read the Ruhe-Fenton preliminary report and relied upon it. The testimony of both Ruhe and Fenton indicates their findings were based upon assumptions which are not true in fact. The witness had been taken to the area by Ruhe and Fenton and they showed him what was going on. The witness then testified that Leopold and Wolman defined a meandering stream as one which should have a sinuosity ratio of 1.5 or more. He was referred to the Ruhe report which stated the sinuosity ratio for 1895 was 1.73 and for 1903 was 1.75. This was in excess of that minimum required for a meander. The witness then was read the following statement from a report to the Committee on Rivers and Harbors, February 5, 1934 which he agreed with:

"Cutoffs in the Missouri River are most frequent in the broad sections of the alluvial valley while in the narrow sections the changes consist of the bodily downstream movements of series of bends with less frequent cutoffs. Cutoffs therefore have been very common in the middle river from Sioux City, Iowa, to Kansas City, Missouri. Numerous horseshoe lakes in this part of the river valley are the remains of old river beds." (Vol. XX, p. 2947).

The witness then was read the statement by Mr. Huber in the case of *State of Iowa v. Henry E. Schemmel, et al.* in Fremont County in which Mr. Huber testified the Platte River outlet into the Missouri had no significance in that case. He disagreed with that statement. The witness agreed one of the characteristics of a meandering stream is that it has the ability to have cutoffs. He was then shown Defendant's Exhibit 261, the 1890 Missouri River Commission map and admitted that between 1879 and 1890 the channel made quite a shift from Eastport Bend over towards Nebraska City leaving Nebraska City Island. That probably was an avulsion. McKissock Island to the south was also pointed out to the witness. The witness then admitted that Nebraska City Island looked like a cutoff but he really couldn't say about McKissock Island. He did not study that. He was then handed Sheet 58 of the tri-color maps and found the McKissock Island area and saw a line running around it which says "Nebraska". The witness then agreed there was an easterly developed bend which was cut off at Nebraska City Island, an easterly developed bend which cut off leaving McKissock Island and, in the vicinity of Otoe Bend or Frazer Island, there was an easterly developed bend.

Testimony By Iowa Conservation Commission Officials or Employees

Lloyd Bailey, Superintendent of Land Acquisition for the State Conservation Commission of Iowa, testified on behalf of Defendant. His duties were to supervise land acquisition projects for the State Conservation Commission, negotiate and acquire the land, and act as closing officer. Mr. Bailey directed Mr. Hart to make certain surveys and, when the Court asked where Mr. Bailey got the information to tell Mr. Hart what to survey, the witness answered the preliminary investigation was made by local Conservation Commission employees and the Attorney General's Office. He stated there were islands formed in the beds of the river and nobody paid any attention to them until the channel became stabilized. Then riparian owners started moving out onto these islands. Notice came to his department that people were occupying these lands in some instances and the decision was made to find out what and where the public did own lands. They first started to consider this proposition back in the late 50's when reports were made and the department first showed an interest in it. Then they received a legislative appropriation earmarked for surveys along the river to determine whether the State had any rights over there. He wasn't sure of the year of that appropriation. For 10 or 12 years or more following the Compact the State wasn't interested and no official action had been taken.

The witness was asked if a survey (Ex. D-1205) by Mr. Hart had ever been filed as a public document in any office that he knew of and the witness couldn't say. De-

fendant offered several surveys by Mr. Hart in which he purported to plot the state line and used uniform chords of 500 feet in length. Plaintiff contends that, where the bank line is a series of straight lines or 500 foot chords set at angles to establish a curve, any series of chords parallel to the 500 foot chords would necessarily have to be of different lengths. Consequently, many of Mr. Hart's plottings of the state line would be in error.

The witness, Bailey, testified that their Code says that all surveys should be filed with the Secretary of the Conservation Commission.

In one area where Mr. Hart surveyed the same area which Mr. Brown had surveyed, Mr. Hart did not use the uniform 500 foot chords (Ex. D-1209). The witness testified that the division line between state-owned land and privately owned land in the Tyson Bend area was negotiated by Mr. Jauron and Mr. Murray in regard to the line between the state and private individual owners. There was also some consideration paid Raymond G. Peterson and Ed McFerrin in the way of money for high ground constituting more land than just enough to put a fence on.

The witness testified that the bed of the river belongs to the State of Iowa no matter where the river is if it is within Iowa. Plaintiff contends that this position of the Iowa officials disregards the Compact.

Many of Mr. Hart's surveys for the Conservation Commission were not certified or completed and several were made following the commencement of this litigation. On cross-examination, Mr. Bailey testified he has worked

for the Iowa Conservation Commission since April 15, 1936 and became Chief of the Land Acquisition Section in 1958. When he took over his duties as head of that section he had been familiar with their record keeping prior to that time. The Secretary of State is the State Land Officer or Commissioner in Iowa and the deeds and abstracts of title are filed with the State Land Office. The list of lands up and down the Missouri River claimed by the State of Iowa were not on file in the Office of the Secretary of State. The State Conservation Commission did not file plats there. Until just recent years, they weren't required to file plats even in the county. They were to be filed with the Secretary of the State Conservation Commission.

He thought generally all the activity up and down the Missouri River started about 1958. Only California Bend was posted as State-claimed land prior to that time. With regard to the land along the Missouri River and the activity commencing in 1958, the documentation and the quieting of title in the State of Iowa was handled by the Attorney General's Office. The study of lands up and down the Missouri River to be selected for acquisition by the State of Iowa was made by L. F. Faber and the witness believed Jerry Jauron. Faber was superintendent of Federal Aid for the Conservation Commission and became Assistant Director prior to his resignation. After an area had been selected, there were investigations to determine whether the state had a claim or not and the result of this investigation was reported back to the Conservation Commission. The decision to attempt to acquire title was made in the Conservation Commission. The witness did not

know whether people who claimed or occupied or lived on any of these lands were given any notice by the Conservation Commission of the intention of the State of Iowa to attempt to acquire that land and if it had been done, he thought he would have known about it. These people weren't given an opportunity to be heard in any official hearing.

The contracts between the Commission and Mr. Larry Hart directed him to survey various areas. The witness testified that the areas shown in green on the series of maps and overlays offered by Defendant portray all of the areas claimed by the State of Iowa along the banks of the Missouri River. Mr. Bailey testified that the underlying maps on this series, which are Alluvial Plain maps from the Corps, were obtained by Mr. Hart. The negatives from which they were made were delivered to the Commission by Mr. Hart and the witness believed they were dated May, 1942.

There was an agreement between Petersons and the State of Iowa in California Bend (Ex. D-1218) and it was the Attorney General's Office which negotiated that agreement. Mr. Bailey testified he knew of no abandoned channel of the Missouri River to the east of the Peterson agreement line. The witness also testified that the State of Iowa claims the bed of the river in Iowa to the ordinary high water line and, if the river would eat into the Iowa bank over night, the State of Iowa would claim it as a portion of the bed of the river. They would claim the old bed if it were on the west side of the present channel but still east of the Compact line.

He was referred to Ex. P-2667, which is Sheet 88 of the tri-color map and shows the California Bend area and testified that he saw east of the area marked "# 22" an area which looks like old river bed. Although he testified his department now claims former abandoned river channels more than just a year or two old if the evidence is still available, they weren't making any claim to it. He stated:

> "They possibly would have a claim to it, sir, but they aren't claiming it." (Vol. XIX, p. 2712).

The 1890 thalweg of the river was considerably east of area # 22 in California Bend. The witness testified that Horseshoe Lake somewhat north and east of California Cutoff looked like an old oxbow lake but the State of Iowa was not claiming it. South and somewhat east of Horseshoe Lake is a swampy area which looks like a configuration of an old river bed and the State of Iowa doesn't claim any land in that area. This is the area referred to in the 1890 Missouri River Commission Report as the cutoff of 1881 (Pp. 28-29 of this Resume').

As to the areas on the map which might appear to be abandoned river channels or oxbow lakes, final decision as to whether or not the State Conservation Commission will claim those areas would be with the Attorney General's Office.

Mr. Bailey testified that the determination of the Iowa high water mark or the ordinary high water mark is based on the location of the ordinary high water mark just prior to the diversion of the waters into the new channels by the Corps of Engineers. For their present

purposes, they make no investigation going back of that. Mr. Bailey was asked what records were kept of State-claimed lands just before he went into office as Chief of the Land Acquisition Section and answered:

> "They were very poor along the Missouri River. There was very little record of anything there in my office." (Vol. XIX, p. 2715).

The records they had were kept in files in separate folders for each area and there were very few on the Missouri River. He estimated approximately five. There was no other office where an outsider could go to determine what lands were claimed by the State that the witness was aware of. There would be some records or should be some records in the State Land Office, if there had been any controversies or claims made. The witness said there was a folder for an area at Sioux City and he believed they had some information on California Bend. Although he had said there were approximately five, he couldn't name any more than those two areas. It was sometime after he took office that the big investigation started to turn up lands that could be included in the 1961 Missouri Planning Report.

The witness was then asked about the Decatur Bridge and admitted that the Missouri River escaped from the designed channel sometime in the 40's which allowed the bridge to be built over dry land. The Conservation Commission did not claim any of that Iowa half of the channel that was under the Decatur Bridge when the bridge was built. Now that the river has been placed back in the designed channel under the Decatur Bridge, the State of Iowa Conservation Commission claims land there. How-

ever, Mr. Bailey testified that no claim is being made to the bridge itself. He knew that there were pipelines in that vicinity but he didn't know whether any used the bridge. The State of Iowa claims no tribute for the privilege of crossing the Iowa land in that vicinity.

In the litigation between the State of Iowa and the private owners up and down the river, Iowa's share of the cost comes from State funds.

Mr. Jerry Jauron testified on behalf of the State of Iowa that he became a conservation officer in July of 1936. He was given a special duty by the Conservation Commission as Missouri River coordinator in 1958. He has been on this special duty since 1958. In 1958 he was assigned the task of making a survey and investigation of the entire stretch of the Missouri River which constitutes the western boundary of Iowa for the purpose of determining existence or non-existence of "state-owned lands." He first studied the river by airplane and studied the alluvial plain maps and the tri-colors. He took pictures of the Missouri River of the areas he thought would need some investigation in about 1959, 1960, and 1961. They were in the process of making the Missouri River Preliminary Planning Report dated January 1961 prior to his taking some of the pictures of the river. The witness would find areas, pick them out, research them primarily at the Corps of Engineers from their maps, pictures and photos. Then he would give this information to Mr. Faber in company with Mr. Gritton, Assistant Attorney General under Attorney General Erbe. Faber was Assistant Director of the Conservation Commission and

was the man Jauron was directly assigned to. Then Gritton, Faber and Jauron would have a small conference to go over what he found. The points that Mr. Gritton decided should be investigated would be investigated from the air and the ground. That effort culminated in the published Planning Report. Then there have been some other areas added to this list since 1961.

The witness testified that, in the Tyson Bend case, the State of Iowa was not made a party to the suit by the Federal Government which was condemning a right-of-way for a canal, and the witness personally visited the Corps of Engineer real estate section and requested that Iowa be made a party to the condemnation proceedings. Iowa was made a party and the witness did the investigation enabling the State of Iowa to present its evidence. He also made the investigation in the Deer Island case of *State vs. Raymond* and in the Brower's Bend area which was the *Dartmouth College* case. He did the part of the work at Otoe Bend in order to enable the State of Iowa to start presenting its case in the case of *Iowa vs. Schemmel.* He also did the investigation of the Nottleman Island case.

Mr. Jauron testified that since this case of *Nebraska vs. Iowa* was commenced, a point was reached where the State of Iowa determined and wanted to make a listing of the areas up and down the river which it claims to own. He did some of the investigative work on the compilation of that list.

Between Omadi and Brower's Bend the river escaped from its design after 1943 and eroded away 60 or 70 acres

of Iowa land and then the Corps redesigned the channel and pushed the river back and Iowa claimed the abandoned river channel.

In Winnebago Bend (Flowers Island) the witness pointed out the river on a picture taken 6-9-61 and testified the Corps was doing new channel work to put it back in its 1938 or 1943 design. This was shown by two parallel curving lines on his photograph (Ex. D-1241). Since that time, the Corps put the river back between those two curving banks which were being built when the picture was taken. He then describes some land that the State of Iowa purchased from a Grosvenor which the State claims by purchase and the witness then testified:

> "The State of Iowa claims the water area as an abandoned river channel left abandoned when the Corps of Engineers placed the river in its original design, which was placed there before the 1943 Compact. They put it back. We claim this as accretion to the bed of the river." (Vol. XXIV, p. 3463).

This is the Flowers Island area where the Missouri River prior to the Compact was entirely in Nebraska and when it escaped following 1943 it did not wash away the original Nebraska land ceded to Iowa. Had it not been for the Compact, the entire river bed would have remained in Nebraska and Iowa would have no claim to any of this area as abandoned river channel.

The witness testified to several areas Iowa claimed, most of them resulting from work done on the river by the Corps of Engineers. The witness also indicated there was an error in the Planning Report identifying the land Iowa claims in Monona Bend.

Mr. Jauron had no picture of Iowa's Area No. 8, Upper Monona Bend because it came into existence lately. He testified that the Corps just put the river out to its redesigned channel in 1966 or 1967 so that area has just come into existence as "state-owned land" as they pushed the river out. It is abandoned river channel.

The witness also testified that the state line as shown on the left hand picture on page 25 of the Missouri River Planning Report is incorrect.

In Upper Decatur Bend, the river escaped from its 1943 design and stayed there until the Corps put it back under the famous dry land bridge with a man-made canal in about 1955 or '56. The witness testified this left an abandoned river channel which was 100% in Iowa. The state claims the area, between the present channel and the channel to which it escaped, as abandoned channel and part of it is an island which the witness stated was accreted to the bottom of the river as the river moved east within the State of Iowa. The Corps put the river back under the bridge without destroying that island. This is another situation where, if the boundary had been movable as prior to the Compact, the Nebraska riparian owner would have become entitled to that island or bed accretion. Iowa is claiming this land in an action presently pending in Monona County captioned *State of Iowa vs. Gingles, et al.* This area appears on page 29 of Planning Report.

In some cases, Iowa claimed the one-half of the 1943 river bed when the Corps constructed a canal for the river some place else. On cross-examination it came out

that some of the information which the witness was testifying to concerning the dates and times that the river was out of its designed channel came from the Corps of Engineers from notes which the witness had made four days before testifying. He hadn't said he obtained the information from Corps records, however, prior to that point. In Bullard Bend, the witness testified the Corps made a new canal making a cutoff there in 1961 and the Corps later diverted the river into that canal. The loop of the former river became slack water and the Corps of Engineers put an emergency levee on the upper end so that it wouldn't silt and the State claims the abandoned channel.

In Soldier Bend, the state claimed a part of an abandoned 350 foot channel but not all of it because some was traded off for other land and considerations.

Mr. Jauron's investigation in the California Bend area disclosed that the Corps had built California cutoff or a canal back in the 1930's. The witness testified that in 1949 the river broke out of the upper end. This started erosion and it continued to erode from 1949 until it was put back into the same channel in 1957. In 1956 and 1957 the Corps dug another canal in exactly the same place as the first one, placing the river back in the 1943 designed channel. The area which the river had occupied during its escape from the channel became slack water covered with bars and is the area claimed by the State of Iowa as abandoned river bed. It is about 500 acres. This has been referred to elsewhere in this Resume' and was land which was ceded by Nebraska to Iowa by the Compact.

At Rand Bar the witness testified Iowa acquired land by a trade. This was old river bed and when asked why Iowa didn't just take it the witness answered that it was accretion to the riparian land owner. There was no water area between her ground and the river bed. This is another situation where there was an obvious judgment made and, as a result, the land owner received some consideration for the property.

The witness did not have a photograph of St. Mary's Bend because it was too far from the river. He didn't get over that far when taking pictures.

At Nottleman Island, his investigation and research was mainly in the Corps offices and S. C. S. and A. S. C. It was mainly researching maps and pictures. The only thing he recalled beyond that was one photo which he found in Kansas City. When asked if he examined county records his answer was "Very little. None at all." (Vol. XXIV, pp. 3549-3550).

In response to a question from the Court, the witness indicated he was not personally on this part of the river before 1947. Then in a response to a question from Mr. Murray, he admitted that he wasn't on it much after 1947 until some later time either.

On cross-examination, the witness indicated that he could not look at a map and say this is where the main channel was. During his time on the river patrolling he quite often had difficulty navigating the Missouri River in the old days and had difficulty in keeping in water that was sufficiently deep to float a boat.

The witness testified that the project of finding the so-called state lands started out because of the Corps of Engineers redesigning the Missouri River from pretty near Council Bluffs to Sioux City. Mr. Stiles asked him in about February, 1956 and the witness supplied Stiles with nearly as much information as he could on what the Corps of Engineers intended to do on their realignment and changing places from the Boundary Compact. The first that he got out of his own territory was when Mr. Stiles asked him in about 1956. Then he went down south on orders of the new director, Mr. Powers, in late 1958 or early 1959. Jauron was the field man. He was the one who did the research and who went to the scene with the Attorney Generals. He was not the one that went to the courthouses or anything like that. After he had picked out certain areas and taken that information back to Des Moines he met with Mr. Faber and someone from the Attorney General's office. At that time he already had a rough list of the areas selected. So any area that he might have rejected never came to the attention of the others. They rejected 3 or 4 areas out of the original 25. The witness also testified that if he would have gone to Des Moines and said "we don't want this area" for some reason or other that it would not have gotten any consideration. When asked if some areas were not included on his list such as Goose Island the witness testified:

> "At the time that this was started—You understand we changed Attorney Generals three or four times so I am going to have to change my story three or four times. At the time it was started, the Attorney General at that time in charge said, 'No lands on the other side of the Boundary Compact.'" (Vol. XXIV, p. 3571).

The witness testified that this policy was changed when Mr. Scism started investigating the Krimlofski case in connection with the litigation presently before this Court. This could have been in 1965.

The witness was looking at all of the Corps records but he wasn't looking up all the A. S. C. and S. C. S. things. Some of the local officers in the territory assigned and some out of Des Moines were doing that. He basically started with the 1930 aerials. Then he would look at the other Corps maps. When asked of his idea of an abandoned channel or an abandoned river bed, the witness said it did make a difference if he found an abandoned river bed whether that river bed was wet or dry. He didn't believe that he picked out any "dry river beds the year around." The State of Iowa does not claim all river beds in the Missouri Valley. He could not tell why some of them are ignored and some of them are claimed.

This witness testified in the Deer Island, Browers Bend, and *Tyson* cases and attended the trial of the *Schemmel* case but did not testify. The State of Iowa only called Mr. Huber and Mr. Windenberg in the *Schemmel* case before resting.

The main experience of the witness on the Missouri River was primarily opposite Harrison County until December 1962 but in 1958 he started the big investigation of lands. Before that, he really wasn't familiar with the river below Council Bluffs.

With regard to Rand Bar, which Iowa traded land for, the witness testified that if it had been under water at

the time he first saw it, he would have claimed it for the State of Iowa.

The witness didn't know of a lawsuit between Fannie Rand and the State of Iowa and plaintiff offered Exhibit P-2700 being a copy of a Petition in Equity in the District Court of Iowa in and for Harrison County captioned *Fannie Rand and others versus the State of Iowa and unknown heirs, devisees, and so forth.* In that same action there was an Appearance (Ex. P-2701) and a Disclaimer of Interest on behalf of the State of Iowa signed by Evan Hultman, Attorney General, and William J. Yost, Assistant Attorney General filed January 30, 1964 (Exhibit P-2702). Mr. Jauron had not seen those documents and was not aware of the lawsuit.

The witness recalled that he had testified on direct examination that the earliest date Nottleman Island could have formed was 1918. This was based on his experience on the river and his study of the maps and photographs and that sort of thing. On a previous occasion as a witness at Glenwood, Iowa he had testified that Nottleman Island formed sometime in the early 30's. He said his testimony which he gave in Glenwood was based upon his knowledge at that time. This was in 1962 or 1963. When asked if his testimony in Glenwood was based on his observation of the age of the vegetation on Nottleman Island he said it could have been but he couldn't answer. He was then asked:

"Q. Would you like to hear what you said at that time to refresh your recollection?

'Q. Well, do you—have you been able to determine to your satisfaction from the in-

vestigation that you have made of these maps, and otherwise, as to the date of the origin of this particular island?

A. I tried to assume the time of the origin of the island by the growth of the trees on the island.'

Were you asked that question and did you give that answer?

A. If that is what the court reporter got, then that's—

Q. Well, it is a fact that that's what you testified, isn't it?

A. Yes.

Q. Then later on when your deposition was taken, you admitted that you had made no estimation of the vegetation on Nottleman's Island?

A. I said that I had discovered another aerial picture, I believe.

Q. Well, let me ask you if your deposition was taken in the office of the Iowa State Conservation Commission, commencing at 10:00 a. m., Monday, July 18, 1966?

A. Yes, sir.

Q. And at that time were you asked these questions and did you give these answers? This is referring to Nottleman Island.

'Q. During these observations were you able to determine anything about the age of the trees and the vegetation which was on the island?

A. I have made no attempt to age the trees. I have measured some. I have pictures of the measurements of some, but I have

made no attempt myself to—Now, we're talking about Nottleman Island?

Q. Yes.

A. I have made no attempt whatever to age any trees.

Q. Did you develop an opinion from your observation of the vegetation as to when the island first came into existence?

A. From my observation, I could ascertain the oldest part of the island, but I made no attempt by observation to estimate up to this time when it came into existence, by observation.'

Were you asked those questions and did you give those answers?

A. I suppose I did.

Q. Well, the fact is you did?

A. Yes." (Vol. XXV, pp. 3597-3599).

The witness was then asked if he investigated abandoned river channels other than the ones he had previously mentioned and said he investigated Badger Lake west of Whiting, Iowa, which was an old oxbow, but he could find nothing to tie it down. He researched Horshoe Lake west of Modale which he thought was an old river oxbow but he could find no exhibits in his investigation which said it was and it was made so long ago that he could find no witnesses. He had every reason to believe that at one time the river was there as it was in Crystal Lake up by South Sioux City and like it was in Lake Quinnebaugh. The witness used the tri-color maps but he didn't place much consideration in them. He used aerial photos. The

tri-colors show the 1890 thalweg but he used them only very little. He admitted that they show the old oxbows pretty good. He was referred to Brown's Lake and stated it was there at the time of the 1890 survey. He investigated it "very minutely." When asked if that was as far back as he went, he said, "There is no place else to go except the 1879. There's no witnesses alive that can remember that." (Vol. XXV, p. 3602). He did not look at the original government surveys on that particular lake. When asked about the Winnebago Bend area and if there was an apparent bank line "way east" of the Area No. 5-A on Exhibit P-2654 which is Winnebago Bend, the witness answered, yes. He was then asked if the 1890 thalweg was way east of that and stated that he was not going to contradict the Court in what they said in the Flower's Island case. He has testified that same way before.

West of Brown's Lake there was a slough area which was a continuation of the oxbow. This occurred before 1890. He was asked about the Clyde Kirk area and stated that Sybil Jauron was involved in some of that litigation. She is his aunt by marriage. This is the case of *Wilcox v. Pinney* referred to previously.

The witness was referred to Exhibit P-2662, a tri-color which shows several oxbows and said he could obtain very little material on them. The abandoned channel west of Badger Lake was before 1890. He didn't go any further than that.

He did not investigate for the State of Iowa in the case of *Kirk v. Wilcox.* He believed the attorneys researched the law suit.

Exhibit P-2663 shows Blue Lake and northwest of Blue Lake an area that appears to be abandoned river channel. This was like some of the other oxbows. Referring to P-2663, northwest of Blue Lake there is a westward curving bend marked Blackbird Bend. East of that area appears an area with considerable green bounded on the east by a slough area, and through that appear to be some old channels; and the 1890 thalweg runs right through that large, greenish area. That is Kirk Bar which the witness always called Peterson-Lakin. The witness testified there were no records whatsoever that that area was ever an island in the Missouri River. He was then asked if he heard testimony that an old channel of the Missouri River had to be crossed to get to Kirk Bar in the early days and said "I believe that I could have by a witness." (Vol. XXV, p. 3609). Mr. Jauron admitted that the 1890 thalweg runs quite deeply into that Peterson-Lakin land. There is an old slough east of the thalweg. When asked if there wasn't a bank ten or twelve feet high over east of that 1890 thalweg he answered that there was not. Photographs of this bank taken by Mr. Willis Brown showing his son holding a 9 foot pole are in evidence. These show the height of the bank to be considerably in excess of the 9 foot ple.

Exhibit P-2664, Sheet No. 71 of the tri-color maps shows Louisville Bend and Guard Lake which is an old oxbow. The witness said it was way east of the Boundary Compact, and he didn't believe he paid any attention to it at all. He didn't investigate it. It was an apparent river bed, though. He made an investigation only to the point that it was east, way east of the 1890

line. He didn't find much on what is designated Crow Island on the map. It appeared to him as accretion land. He would say there was a bank feature from the east side of Crow Island which goes up into Guard Lake. Part of Crow Island was east of the 1890 thalweg. The witness then admitted that the thalweg runs right through Crow Island. He also found that the 1890 thalweg ran right through Nottleman Island. After considerable cross-examination, the witness stated that Crow Island was on his list forwarded for consideration. He also put Lake Quinnebaugh on the list but at that time they had an attorney that wasn't too sure whether he wanted to come across the river. Lake Quinnebaugh is on the Nebraska side but Crow Island is on the Iowa side.

Sheet No. 68 of the tri-color (Ex. P-2667) shows a lot of sloughs and one lake. The witness said that in his mind there was absolutely no doubt that they are old river beds, but to find any exhibits which say they are or any witnesses who say they are do not exist.

The witness was asked how much of California Bend the State claims and identified the area marked # 22. He didn't think any investigation could enlighten a person as to how the river got from the location of the 1890 thalweg at its easternmost point to the river at its present location. The basis of Iowa's claim to Area # 22 is abandoned river bed. The witness then identified a boundary agreed upon with Peterson in that area and testified there is a law suit pending of *State of Iowa vs. Simmons.*

There was a trade with Peterson for some high bank

for the privilege of putting Iowa's fence on the high bank. Mr. Jauron was shown Myrland Exhibit No. 1 which is the Kirk Bar Map and could not answer whether on the road into the area marked "Cabin" there was a high bank. He couldn't answer whether there was water on both sides of that road. He testified he had not been down over that road over two or three times to his knowledge in his life. He also did not make any investigation to find out whether any of the subject properties were or were not on the Iowa tax rolls. The team of Mr. Faber and the Attorney General's representative and the witness met at least once a week during a short period while they were working on the project and witness didn't know of any discussions about whether or not the land was on the tax rolls. Concerning these meetings, the witness was asked by the Court:

> "The Court: Let me ask you this, Mr. Jauron. Those meetings during the time you were giving this matter consideration, did the question—did the fact come up or the supposition come up that there might be individuals who were occupying these lands and, nevertheless, Iowa claimed it under their constitutional right, and so on?
>
> The Witness: Your Honor, I don't—as far as I know, no attempt was ever made to find out—This is only as far as I know.
>
> The Court: I'm talking about the discussions.
>
> The Witness: Right.—where the individual lived or where they didn't live or who they were or who they might not have been.
>
> The Court: Well, was it discussed that some of these lands might be occupied by trespassers?

The Witness: That was the assumption on most of them, that they were encroaching, yes.

The Court: If anybody was on there, they had to be trespassers?

The Witness: Yes, sir.

The Court: That was discussed?

The Witness: Yes, sir, not so much with me.

The Court: That would come up at the meetings?

The Witness: Yes, sir." (Vol. XXV, pp. 3628-3629).

Mr. Jauron was then asked about Sheet No. 63 of the tri-color, which is St. Mary's Cutoff on Exhibit P-2679 and testified the State of Iowa claimed some land in that area. He did not investigate that area between 1958 and 1961 because,

> "The simple reason is that there was no water in the area. Folsom Lake had been there since my time clear over against the tract . . . " (Vol. XXV, p. 3629).

This was in spite of the fact that the 1890 thalweg is shown east of the river. The witness then testified that he would say that the State of Iowa always claimed this area but he did not investigate it in '58 and '61 and they have never posted any signs in that area. In September of 1965, after the commencement of this law suit, he discovered that a Mr. Sieck had attempted to purchase some of that area # 25 on Exhibit P-2679 from the Conservation Commission in 1953 and he found that the case of *Sarpy County vs. Leinemann* had been discovered by Mr. Scism when he was with the Attorney General's Office and was researching all the court cases on the Ne-

braska side of the river. Mr Scism was with the Attorney General's office from about January 1, 1965 to somewhere in January, 1967.

Concerning the Upper Decatur Bend area of the dry land bridge, the witness testified that Iowa is claiming to the center of the present channel of the river as it flows under the bridge but Iowa does not claim any part of the bridge. There is a pipeline crossing that bridge but the witness could not answer whether Iowa exacts any tribute from the pipeline company for crossing Iowa land.

The abandoned bend in the Soldier Bend area (Ex. D-1252) to the northwest is not presently claimed by the State of Iowa. It was traded to Mr. Peterson.

Mr. Jauron then testified that, in his investigation of these areas up and down the river, he made no attempt whatever to find out whether anybody was claiming the land involved. His only attempt to find out whether land was under cultivation was from what he could see from the air. He did not attempt to find out who had it under cultivation.

In the Auldon Bar area he testified he was aware of the canal which separated Goose Island from land on Auldon Bar leaving Auldon Bar on the east side of the river and Goose Island on the west side. He then did not pursue the question of where the main channel of the river had been with regard to Goose Island and Auldon Bar before the Corps did its work. He ignored everything west of the 1943 Compact line because his primary orders in '58 were nothing to the west of the 1943 boundary line.

In the Otoe Bend or Schemmel Island area he testified he noticed by some of the exhibits he looked at that a canal was dug at the south end of Schemmel Island. He believed there was a '38 aerial that showed the Corps digging the canal. Once again, they didn't claim any of that land south of the Otoe Canal which wound up on the Nebraska side of the river. They never did claim it and the lawyer who thought they should is no longer with them. The witness found out about the Otoe Bend Canal, he supposed, pretty early in his investigation. He first noticed Schemmel Island the first trip he made which was in 1959. At that time some of the land was cleared and some was under cultivation.

The witness was then referred to Exhibit P-2683, being Sheet 59 of the '46-'47 tri-color which shows an island on the Iowa side of the river in the vicinity of Frazer's Bend. He investigated that island but Iowa does not claim it. This is one of the islands which the lawyer threw out or abandoned. He had no idea why the lawyer did that. Mr. Jauron was referred to this area on an aerial photograph (Pl. Id. No. 2201, Ex. P-2182) and marked the area in red. This was a 1964 aerial. At the time he investigated the area in 1958 and following years, there was no water on the east side of that island. The witness didn't examine this area in the aerial photographs for 1938. When the attorney threw the area out "that was it." At the trial, he located this area on the 1938 aerial of Frazier's Island (Ex. P-2703) and marked it in red. The witness was shown a 1930 aerial photograph (Ex. P-246) and at first did not recognize the area. He was then referred to the index map and recognized Frazer

Island on the right bank. Adjacent to Frazer Island was the bar area which appeared to be an emerging island in the river and the witness circled the bar area in the river in the vicinity of Frazer Island in red on Exhibit P-246. It was in the same location as the area marked on Exhibits P-246 and P-2703.

On redirect examination, the witness called the area a sandbar which he had outlined in red somewhat north of the north end of Schemmel Island and approximately east of Frazer's Island on Exhibit P-246. There were channels of water flowing both to the east and west of it, and he had an opinion as to which of those channels was the main channel when the picture was taken. On recross-examination, the witness testified he looked at the 1931 map of the Corps of Engineers to form a positive conclusion as to which was the main channel around that sandbar. He did not look at the '36 aerial to check his opinion. He then said he used the island in the aerial photo of 1930 to see if it was in the same position as on the 1931 Corps of Engineer map which was a hydrographic survey. He said, "Certainly, the soundings should be accurate and should I have not seen the soundings, I would have still said that the thread of the stream in this particular area runs on the concave side to the east of the island." (Vol. XXV, p. 3666).

Mr. Jauron also testified on cross-examination that, when he was making his investigation of the Corps records, he did not use the Project & Index maps from the Corps and, after examining them, he said he never did use them.

He was then referred to the name "Givens" (referred to as Gibbons by the Court Reporter at various places) written on Exhibit P-256, the 1960 aerial photograph of the Schemmel area. He was asked about some land north of the Schemmel area claimed by the State of Iowa and said he knew that Mr. Givens some way settled with the State of Iowa through his attorney. The line was surveyed but the witness couldn't answer whether deeds were given or not. He was asked if he made an agreement as to where the fence would be and at first testified he did not make any agreement; that was made in the office by the Attorney General. He was then referred to a deposition in which he was asked the following questions and gave the following answers:

"Q. Does the State of Iowa, to your knowledge, or the Conservation Commission, to your knowledge, have any understanding with a Sally Givens . . . or anyone of the Givens family as to what land in that area Iowa will claim or will not claim?

A. Our surveyors were there and I personally made a fence line agreement between the Givenses and the State of Iowa.

Q. What was the nature of that agreement?

A. That they would come to a certain point and claim no further to the east. We would come to a certain point west and we would come to a certain point and claim no further to the west. We established a boundary between the Givens property and the State of Iowa."

Do you recall being asked those questions and giving those answers?

A. Apparently I did.

Q. And that was this property on Exhibit P-256 that we were talking about, wasn't it?

A. I made the agreement, what was carried out. I answered it and I answered it honestly. I don't know what the lawyers did.

Q. But you made the deal with the Givenses?

A. I made an agreement that I went and related to the Attorney General, right." (Vol. XXV, pp. 3645-3646).

The witness then testified that he would say that the Attorney General or Mr. Murray, or whoever was the attorney told the surveyors, Mr. Weaver and Mr. Windenburg, what to survey.

With reference to Exhibit P-2667 which shows the California Bend area and is marked # 22, that is approximately what Iowa claims and Iowa does not claim any other abandoned river beds in that area. He was then referred to Exhibit P-1625 showing the river at Sandy Point Bend and the so-called Pegg Land. The witness was pretty familiar with that area and he has hunted there. He has also hunted within the area enclosed by the red line marked "Nebraska". He testified there is a high bank line to the east of the 1943 Compact line approximately 350 feet. Iowa does not claim any land between that high bank and the Compact line.

Defendant offered several maps and aerial photographs which purportedly had the locations of Schemmel or Nottleman Island placed upon them. These were done by Mr. Larry Bartleman, a draftsman for the Iowa Conservation Commission. There were several errors pointed out in the location of the areas. For instance, on Ex-

hibit D-1092-A, he placed Schemmel Island about 500 feet to the east of where it would have been located. In the Nottleman area, on a 1928 map (Exhibit D-1036-A) the northern portion of the Island is about 400 feet south of Mile 630 (of the 1890 thalweg) whereas on the 1931 map (Exhibit D-371-A) the north end of the Island is about 800 feet north of that Mile number 630. Consequently, the north end of Nottleman Island as located by Mr. Bartleman varied 1200 feet between the two exhibits. In the 1930 map (Exhibit D-1041-A) the north end of Nottleman Island is located between where it appears on the two other exhibits. A comparison of these various locations of Nottleman Island can also be made with the location of King Hill or Calumet Point.

While the witness was on the stand at one stage of the proceedings, he discovered that he mis-located the Windenburg traverse on a map and an aerial mosaic and these exhibits were not offered at that time. The witness then relocated the traverse of Nottleman Island on a 1926 mosaic of aerial photographs. He had destroyed the original exhibit so it was impossible to make a direct comparison but he testified that he was quite a bit north and it was up river too far but he didn't know the distance. When asked how he happened to make that mistake he said, "I suppose it was just in the mad rush of things, I just mis-located it is all." (Vol. XXIV, p. 3506). He also reworked the 1926 map showing Nottleman Island (Exhibit D-1035-A). Plaintiff submits that there is serious question concerning foundation as to the location of all of the Nottleman and Schemmel areas on the various exhibits prepared by this witness.

The accuracy of Mr. Brown's measurements were verified by Iowa's witness, Mr. Frances W. Mann, a professional engineer and land surveyor from Council Bluffs, Iowa. He was given the Nebraska State Surveyor's field notes with regard to tree number 230, and using Mr. Brown's coordinates, Mr. Mann's survey came within the circumference of the tree stump.

Respectfully submitted,

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PROOF OF SERVICE

I, Howard H. Moldenhauer, Special Assistant Attorney General of the State of Nebraska, and a member of the Bar of the Supreme Court of the United States, hereby certify that on....., 19....., I served a copy of the foregoing Plaintiff's Resume' of Evidence Before The Special Master Honorable Joseph P. Willson by depositing same in a United States Post Office, with first class postage prepaid, addressed to:

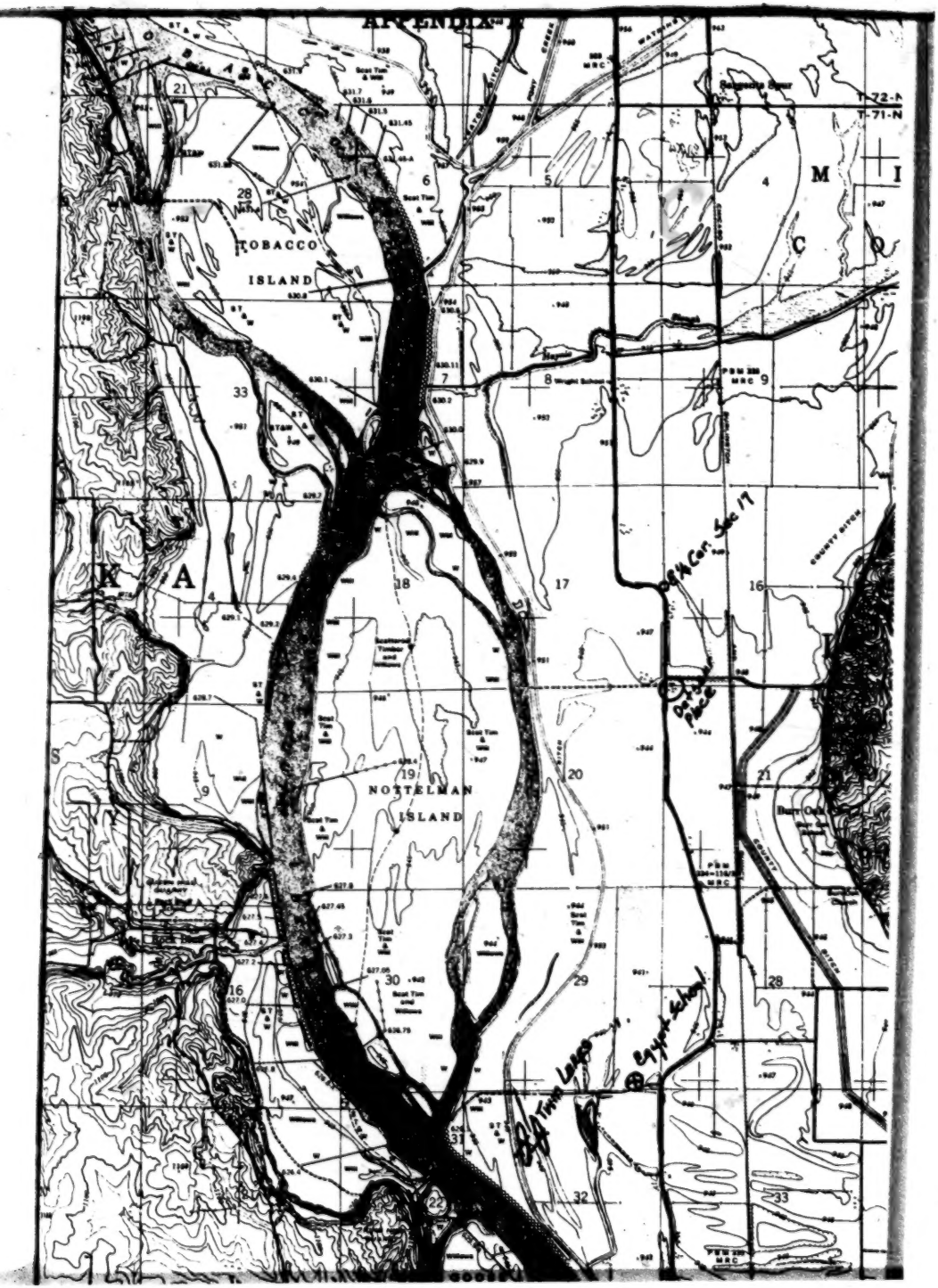
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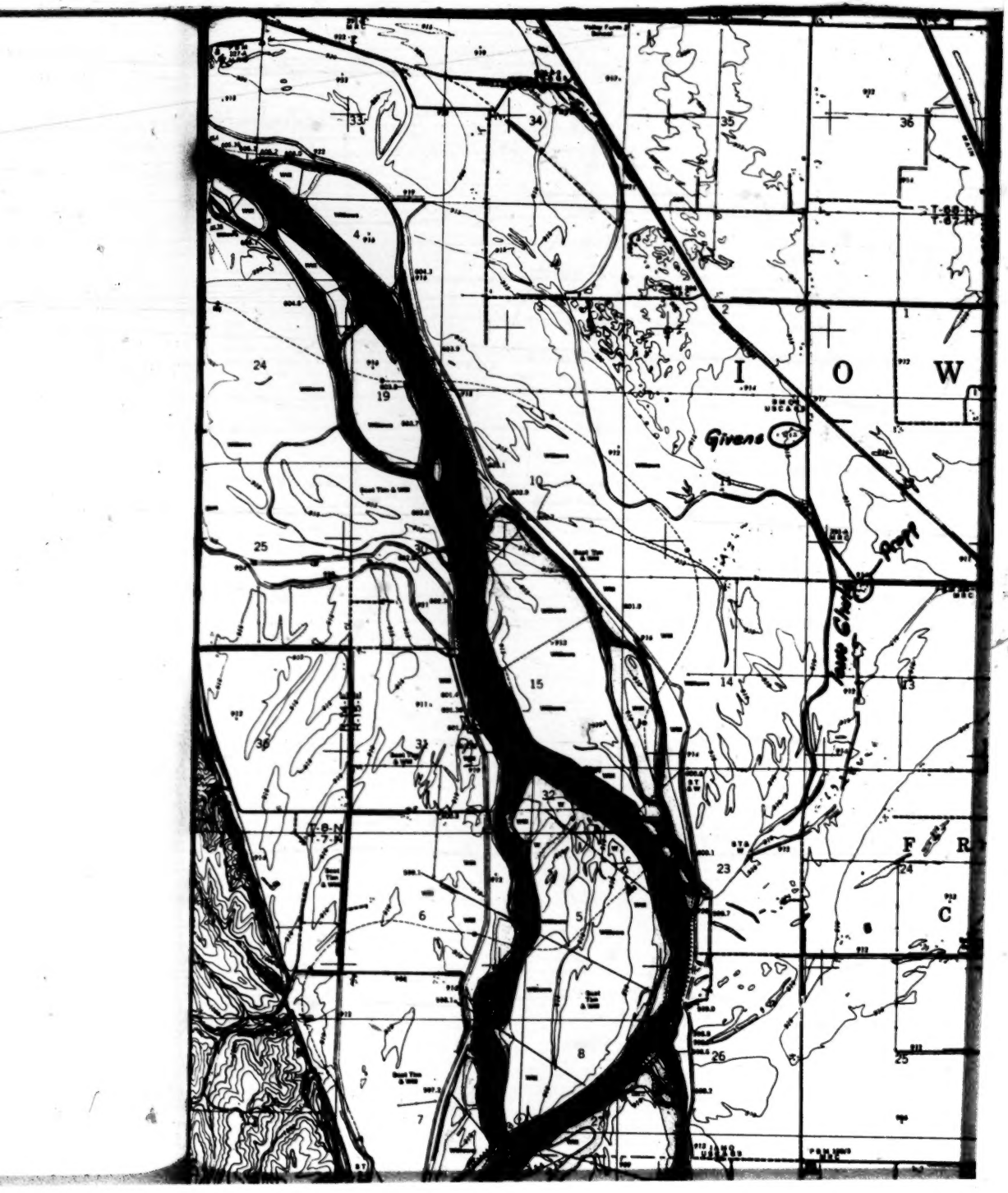
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APPENDIX
TOBACCO
ISLAND
NOTTELMAN
ISLAND
Egypt School
Twin Lakes


I O W
Givens
Pratt
Cane Creek
F R
C

In The

Supreme Court of the United States

October Term, 1964

No. 17, Original

STATE OF NEBRASKA, PLAINTIFF,

VS.

STATE OF IOWA, DEFENDANT.

PROPOSED FINDINGS SUBMITTED BY THE STATE OF NEBRASKA BEFORE THE SPECIAL MASTER HONORABLE JOSEPH P. WILLSON

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VS.

STATE OF IOWA, DEFENDANT.

PROPOSED FINDINGS SUBMITTED BY THE STATE OF NEBRASKA BEFORE THE SPECIAL MASTER HONORABLE JOSEPH P. WILLSON

JURISDICTION

This is an action by the State of Nebraska to enforce the Iowa-Nebraska Boundary Compact of 1943 and constitutes a controversy between the two states within the jurisdiction of the Supreme Court of the United States under Article III, Section 2, Clause 2 of the Constitution of the United States and 28 U. S. C. Sec. 1251(a) (1).

EARLY HISTORY

The State of Iowa was admitted into the Union in 1846 with its westerly boundary as the "middle of the main channel of the Missouri River" and the State of Ne-

braska was admitted into the Union in 1867 with its easterly boundary described as "the middle of the channel of the said Missouri River, and following the meanderings thereof." Consequently, the original boundary between Iowa and Nebraska was a movable boundary which was the thalweg or middle of the main channel of the Missouri River.

In 1890 the State of Nebraska brought an original action in the Supreme Court of the United States against the State of Iowa to determine the boundary in the Carter Lake area adjacent to Omaha, Nebraska on the western, or right bank side of the Missouri River. The right and left banks of the Missouri River are determined by facing downstream.

Over the years, the Missouri River has been notorious for the many natural changes and periodic flooding which has occurred on numerous occasions. In its natural state, there were usually two annual floods, an April rise or flood and a June rise or flood. The result has been the creation of an alluvial plain between the bluffs on the Iowa side and the bluffs on the Nebraska side several miles in width, all of which has been part of the bed of the Missouri River from time to time.

Because of the rapidity of the current of the Missouri River, the soft soil through which it flows, and its circuitous course, it was generally recognized in the 19th century that the river had frequently cut through the necks of bends, entirely forsaking its former channel and changing its course, leaving intervening land far removed from the new bed of the stream.

In *Nebraska v. Iowa,* 143 U. S. 186, decree at 145 U. S. 519, the Supreme Court found an avulsion leaving Carter Lake, Iowa on the right bank of the Missouri River adjacent to Omaha and this boundary was fixed in the abandoned channel by metes and bounds in the decree. The Court also held that the usual principles concerning the laws of accretion and avulsion were applicable to the Missouri River, notwithstanding the rapidity of the changes of the course of the channel. This was true not only in respect to the rights of individual landowners, but also in respect to the boundary lines between the states. The boundary between Iowa and Nebraska remained a varying line, so far as affected by these changes of diminution and accretion in the mere washing of the waters of the stream except in such places where the stream suddenly abandoned its old and sought a new bed as an avulsion.

A comparison of the designed channel of the Missouri River of 1943 with the right bank as located in the original Nebraska survey of 1856-1857 is in evidence illustrating the fact that the Missouri River in many places is presently located several miles from its location when Nebraska was admitted into the Union. Such a comparison does not exclude the obviously many additional movements of the river in the interim. Examination of maps and aerial photographs of the Missouri River Valley between Iowa and Nebraska also shows many obvious cut-off lakes, areas scoured by the river, and abandoned channels throughout the flood plain on both sides of the river.

The historical evidence recognized these many changes and the fact that there were numerous areas stranded by these cut-offs on the opposite side of the river from the

state within whose jurisdiction they belonged. These many changes also created individual title problems as a clear chain of record title would have been almost impossible because of those many natural movements of the river. There was considerable testimony describing the cutting of the river and the huge chunks of land which were eaten away by its erosive action.

The total impact of these movements was aptly described in the TRANSACTIONS OF THE AMERICAN SOCIETY OF CIVIL ENGINEERS, Volume 107, 1942 in an article entitled MISSOURI RIVER SLOPE AND SEDIMENT as follows:

> "The shifts of the river channel have been so numerous and intricate that at many points land known originally to have been in Iowa now lies on the Nebraska bank, and vice versa; and for practically all land adjacent to the river no conclusive determination of either state or private boundaries has been possible."

Articles in newspapers and periodicals, including the *Iowa Journal of History and Politics* are in evidence dating from 1923 up until the time of the Iowa-Nebraska Boundary Compact indicating that it was generally recognized that the people who lived along the Missouri River were sometimes uncertain whether they were inhabitants of Iowa or Nebraska and so were the tax assessors. Border disputes were common and many sections of land were cut off from their rightful political jurisdiction. There were tax problems, school problems, and law enforcement problems resulting from the fact that it was generally believed that all up and down the river there were tracts on one side which were in the jurisdiction of the state on the other side.

What legislative history in Nebraska and Iowa is available indicates legislative concern and activity by boundary commissions of the two states between 1901 and 1943. In Nebraska there are references in the legislative journals to attempts to settle the boundary problems in the years 1901, 1903, 1905, 1913, 1915, 1919 and 1941. In Iowa there is legislative reference to the boundary problems or boundary commissions in 1902, 1913, 1923, 1927, 1937 and 1939. Additional activity of boundary commissions for other years is indicated by the various newspaper articles and statements in periodicals of the times. This general recognition and acceptance of the problems and uncertainty of the location of the boundary between Nebraska and Iowa is essential toward an understanding of the Iowa-Nebraska Boundary Compact of 1943 and what the states intended to accomplish by the Compact.

Extracts from Annual Reports of the Chief of Engineers of the United States Army commencing with the year 1877 were introduced and these reports also recognized many cut-offs of the Missouri River.

WORK BY THE CORPS OF ENGINEERS

Superimposed upon the already confusing picture created by the natural changes of the Missouri River, is the activity of the United States Army Corps of Engineers in channelizing the river. The first regulation works on the Missouri River by the Corps of Engineers along the Iowa-Nebraska border were constructed at Nebraska City,

Nebraska under the provisions of the River and Harbor Act of August 14, 1876.

Originally, in addition to snag boat activities, the Corps engaged in construction along the river at selected places to prevent erosion of the banks and form good navigable waterfronts.

The 1912 River and Harbor Act authorized the Missouri River Stabilization and Navigation Project from the mouth to Kansas City to provide a channel not less than six feet deep. The 1927 River and Harbor Act extended the six foot channel project from Kansas City to Sioux City, Iowa.

Commencing in approximately 1934 the Corps of Engineers embarked upon a program to stabilize the entire length of the Missouri River along the Iowa-Nebraska boundary and confine it to a designed channel of 700 foot controlled width with a six foot deep navigable channel of 200 feet wide. The original design was prepared in Kansas City, Missouri in the Kansas City District. The Omaha District office was created in 1933 and its primary function was to install the regulating works on the Missouri River from Sioux City, Iowa to Rulo, Nebraska. The general condition of the Missouri River at that time was in its uncontrolled and natural state of a meandering river in an alluvial bed.

The Corps' proposed stabilized channel was originally designed by the Corps of Engineers without any reference to the boundary line between the two states. The design of the original channel below Omaha was completed in 1933 or 1934. The Corps commenced their work from stable

points of the bank where they would not expect bank erosion to cut behind the system such as at bluff contacts and the river had to be designed to go under certain bridges such as the Plattsmouth Bridge and the Nebraska City Bridge. The location of the designed channel below those points was all more or less dictated by the fact that the river had to be at a certain place up above.

The basic objective was to train the river into a series of easy, gentle, reverse curves or bends, utilizing centrifugal force to cause the water to flow smoothly along the outer or concave bank of the curve. At the crossings between successive curves, the objective was to prevent spreading, with consequent bar formation, and to concentrate the flow to provide and maintain desired depth over the crossing. Two general steps were usually involved in accomplishing the basic objective: first, to shape the river into the designed alignment; and second, to hold it in place.

Initially, the Corps attempted to control the river through dikes and revetments but commencing in 1936 they also utilized the dredging of pilot channels or canals. At times during the work there were numerous occasions where it was impossible to navigate the river until the channel had washed around the end of the dikes or the Corps had pulled piling so that navigation could travel through the dikes in many places. The Corps attempted to use the most economical as well as the fastest method of getting the river to its new location and dredged numerous canals along the Iowa-Nebraska border in order to place the river into the designed channel.

In the course of this construction, islands, bars, and bank areas were arbitrarily placed upon either side of the

river without regard to which state the areas had previously been in. In some cases islands or areas were bisected with part of the island left on the right bank and part on the left bank of the designed channel. The Annual Report of the Chief of the Corps of Engineers listed 11 pilot canals dredged during the year 1938 alone and the record is replete with testimony concerning canals and photographs taken by the Corps of many of these canals. There were at least 14 canals or cut-offs dredged by the Corps prior to 1943. These appear to be cases of true avulsions as in most instances the canals were dredged through land area with vegetation on both sides.

Initially, the Corps of Engineers did not condemn land taken by movement of the river but there has been a policy change and now if there is movement of the channel which actually requires some high ground, the Corps in most cases would purchase or condemn the land. In some instances the Corps has condemned an easement for the new channel and in a few instances they actually took the fee title to the land.

Many of the maps showing where these canals were actually dredged were destroyed because the Corps had no use for them. The Corps of Engineers is not primarily a record keeping organization and had no reason to keep such records.

There is substantial evidence in this case that the Corps' records do not give an adequate history of the movement of the Missouri River during the work by the Corps in placing the river into the designed channel for the purpose of determining the boundary between the states prior to commencement of this work. Many of the records have

been lost or destroyed, or are apparently inconsistent. These records such as reconnaissance surveys were not made for the purpose of determining the boundary and, when taken out of context, can be deceptive. This is illustrated by the evidence that the State of Iowa has asserted in some cases that the reconnaissance surveys were entitled to little or no weight whereas in other cases Iowa has relied upon these reconnaissance maps as showing the thalweg or boundary. The first navigation charts for the Missouri River were not made until after the Compact.

Iowa has also attempted to show that their expert witness, Mr. Huber, can place the thalweg on aerial photographs of various dates but the evidence has demonstrated that this is an impossibility and it is outside the expertise of anyone claiming familiarity with the Missouri River to place the thalweg on aerial photographs, reconnaissance surveys, and other maps of the Missouri River as the thalweg may have existed on dates in the past.

The court is satisfied from the evidence that no one knew where the boundary was located between Iowa and Nebraska in 1943 except at Carter Lake and that it is now impossible or almost impossible to actually make that determination without the expenditure of tremendous effort in time and money to attempt to reconstruct the past history. This is made all the more difficult by the great deal of time which has elapsed since the date of the Iowa-Nebraska Boundary Compact of 1943 and the fact that documents have been destroyed and witnesses have died. The evidence further established that neither state really cared in 1943 where the prior boundary had been and both states recognized that there were numerous places where the flowing

Missouri River no longer constituted the boundary between Iowa and Nebraska.

THE COMPACT: SITUATION AT THE TIME NEGOTIATED

An understanding of all of this history is essential if the Iowa-Nebraska Boundary Compact is to have any meaning. According to the 1943 Annual Report of the Chief of Engineers, the work between Rulo, Nebraska and Omaha, Nebraska was approximately 99% completed in 1943 and the work between Omaha, Nebraska and Sioux City, Iowa was approximately 78% completed.

Under the assumption that the channel of the Missouri River was then under control, the two states entered into the Iowa-Nebraska Boundary Compact of 1943. The original bill in the Iowa Legislature was passed by the Iowa House and Senate and sent to the governor of Iowa on April 8, 1943. It was approved by the Governor of Iowa on April 15, 1943 and then transmitted to the Clerk of the Nebraska Legislature and passed by the Legislature and signed by the governor of Nebraska on May 7, 1943.

The reported legislative history is very sketchy in the Journals of both states. From the evidence offered I find the following:

1. At the time the states negotiated the Iowa-Nebraska Boundary Compact of 1943 each state recognized that the shifts of the river channel, both in its natural state and as a result of the work of the Corps of Engineers, had

been so numerous and intricate that for practically all land adjacent to the Missouri River, no conclusive determination of either state or private boundaries was considered possible. This is applicable to the entire river boundary except for the boundary around Carter Lake, Iowa which had been definitely fixed by decree of the United States Supreme Court.

2. Both states recognized that the boundary was not located in the Missouri River at many places and that the boundary line in those places had not been determined and was almost impossible of determination.

3. Correspondence between certain county officials at the time establishes that, if a compromise could not be worked out, the determination of the fixed boundary where the river had moved by avulsion in any particular area would be extremely complicated and expensive.

4. The states intended by the Compact to settle all problems along the boundary arising from the indefinite nature of the boundary and the actions of the Missouri River and the Corps of Engineers in channelizing the Missouri River.

5. At and immediately prior to the adoption of the Compact, the State of Iowa was making no claim to abandoned river beds or islands arising in the Missouri River under the state's common law claim of title to beds and abandoned beds of the Missouri River. South of Omaha the river had been almost completely confined to its designed channel and all land area or so-called islands remaining on the Iowa side were in existence during the negotiations for and adoption of the Compact. Iowa was making no claim to such islands at those times.

6. There were abandoned Missouri River channels and cut-off lakes or ox-bow remnants all along the Missouri River Valley and the State of Iowa had made no claim to these abandoned channels.

7. Although Iowa now claims that abandoned beds of the Missouri River and islands arising in Iowa's portion of the bed of the Missouri River have always belonged to the State of Iowa under her common law, Iowa in fact was not applying this doctrine along the Missouri River and the evidence is not persuasive that Iowa ever considered that she owned the specific islands and abandoned channels which are identified today. Any application of the principle by the State of Iowa at or prior to the time of the Compact amounted to nothing more than lip service to a principle without any application to the specific factual situations which existed. In this context, there is nothing in the history or negotiations leading up to the Compact indicating that Iowa ever intended to protect herself in the making of future claims of common law ownership to islands or abandoned beds of the Missouri River then in existence as against private title claimants.

8. The States of Iowa and Nebraska could have determined through action in the Supreme Court of the United States where the boundary was located in all disputed areas along the river but the states intended to avoid the necessity of such a determination by entering into a Compact which avoided that requirement, recognizing the existing situation along the Missouri River, and intending to settle all of the states' problems.

9. The Compact was adopted in general terms to accomplish a general purpose of settling and laying to rest

all boundary and jurisdictional problems which existed between the states. It was done in a context in which the State of Iowa was making no claims of any kind to abandoned river beds or islands in the Missouri River of the character now claimed and the express conditions of the Compact were to recognize and provide protection to the individual landowners in spite of the many uncertainties concerning the actual location of the prior boundary. The States recognized these many problems and attempted to avoid the requirement of making a determination of where the actual boundary was and the attendant expense. At this late date, neither State should now be able to require someone else to make this determination of where the boundary was located prior to the Compact in order to preserve a claim of title.

10. The Iowa Code required the Secretary of State to keep records of all property pertaining to the State Land Office and that separate tract books be kept for all such lands as the State "now owns or may hereafter own, so that each description of state lands shall be kept separate from all others, and each set of tract books shall be a complete record of all the lands to which they relate." However, Iowa had no official record of "state-owned land" held or claimed by the State of Iowa on January 1, 1943 or on July 12, 1943, the date of approval of the Compact, which showed the islands or abandoned channels which Iowa was to claim at the present time and which are described in Part 1 of the Missouri River Planning Report of January, 1961.

11. The Iowa Code pertaining to the Iowa Conservation Commission has provided since 1923 that "The com-

mission shall at once proceed to establish the boundary lines between the state-owned property under its jurisdiction and privately owned property" and in 1931 the language "when said commission deems it feasible and necessary" was added. However, the Iowa State Conservation Commission had not marked any of the island areas or abandoned channels described in Part 1 of the Missouri River Planning Report of January, 1961 at the time of the Compact and has not marked the boundaries on many of the areas claimed even to the present time. Consequently, at the time of the Compact, the State of Iowa was not making any claim to these lands and there was no record of any such claim in spite of the statutory requirements which would have required a record and the marking of such lands. Anyone inquiring of the State Land Office or the Iowa Conservation Commission in 1943 would have failed to find any claim of record to these so-called islands or abandoned channels along the Missouri River.

12. Both states agree that there is no record of lands ceded or actually transferred from one state to the other by the Compact. The States did not provide for the identification by survey or otherwise of land ceded. They did not make any provision to facilitate by payment of costs or otherwise the recordation of title of lands ceded by the Compact.

13. The testimony of the Iowa Conservation Commission officials made it clear that no one from the State was paying any attention to the islands and abandoned channels of the Missouri River at the time of the Compact and for more than a decade thereafter. The first interest expressed in these lands by the Iowa Conservation Com-

mission was not until the latter part of the 1950's. Prior to that time, the State was not interested in these areas and no official action had been taken. The first public record of Iowa's interest was not until after January 1, 1961 when the Iowa Conservation Commission published Part 1 of the Missouri River Planning Report which shall be hereinafter referred to and when newspaper articles then related some of the contents of the Report.

14. The Compact did not consider areas separately and the only boundary area specifically referred to in the Compact was that around Carter Lake, Iowa which had been fixed by decree of the United States Supreme Court. All areas were treated generally with recognition to private titles to be given general application.

15. The states did not know where the boundary was located and they really did not care. They were not concerned about whether they were going to lose or gain anything. However, they did state that titles, liens, or mortgages good in one state would be good in the state in which the land was to lie following the Compact. This is a classic situation where the following language by Mr. Chief Justice Marshall in the case of *Handly's Lessee v. Anthony*, 5 Wheat. 374 is applicable:

> ". . . in great questions which concern the boundaries of states, where great natural boundaries are established in general terms, with a view to public convenience, and the avoidance of controversy, we think the great object, where it can be distinctly perceived, ought not to be defeated by those technical perplexities which may sometimes influence contracts between individuals."

16. The states clearly evidenced the fact that they did not care where the boundary was, but if an individual had what was then considered a good title, lien or mortgage, then the states must recognize and could not attack it. The states relinquished by the Compact the right to question any title, lien or mortgage on the grounds that the land to which it applied was not within the jurisdiction of the state through which such title, lien or mortgage arose.

17. The states made no attempt to determine what private title claims existed along the Missouri River but intended to recognize all private claims as against the states without further investigation.

18. At and immediately prior to the time the states entered into the Compact, there were land areas on the left bank side of the Compact line which were taxed in Nebraska. It was generally recognized by the local officials of each state and individuals in the vicinity that such areas were originally in Nebraska and were transferred to Iowa by the Compact, whether or not in fact such was possible of proof in a court of law.

19. Under Nebraska law a person may obtain title by ten years open, notorious and adverse possession under claim of right without any requirement of a record title. Under Iowa law a person must claim under "color of title" which requires some type of record title to commence the period of adverse possession. Consequently, at the time of the Compact, there may have been titles to lands East of the designed channel which were in Nebraska or considered as a part of Nebraska to which the individual owner did not have a record title but could have had title at the time

of the Compact under the Nebraska law of adverse possession.

20. The states by entering into the Compact, recognized that there was no presumption that prior movements of the Missouri River had been gradual and imperceptible and that there were many places where land would be ceded from one state to the other. This agreement, insofar as the position of the two states was concerned, negated any presumption at common law that prior movements had been gradual and imperceptible. The Compact recognized that in fact this was not the case.

———o———

THE COMPACT

The Iowa-Nebraska Boundary Compact as enacted by the State of Iowa provides:

IOWA-NEBRASKA BOUNDARY COMPACT

Ratification by Iowa Legislature

AN ACT

To Establish the Boundary Line Between Iowa and Nebraska by Agreement; to Cede to Nebraska and to Relinquish Jurisdiction Over Lands Now in Iowa but Lying Westerly of Said Boundary Line and Contiguous to Lands in Nebraska; to Provide that the Provisions of this Act Become Effective Upon the Enactment of a Similar and Reciprocal Law by Nebraska and the Approval of and Consent to the Compact Thereby Effected by the Congress of the United States of America and to Declare an Emergency.

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF IOWA:

Section 1. That on and after the enactment of a similar and reciprocal law by the State of Nebraska, and the approval and consent of the Congress of the United States of America, as hereinafter provided, the boundary line between the States of Iowa and Nebraska shall be described as follows:

Commencing at a point on the south line of section 20, in township 75 N., range 44 W. of the fifth principal meridian, produced 861½ feet west of the S. E. corner of said section, and running thence northwesterly to a point on the south line of lot 4 of section 10, in township 15 N., of range 13 E. of the sixth principal meridian 2,275 feet east of the S. W. corner of the N. W. ¼ of the S. E. ¼ of said section 10, thence northerly, to a point on the north line of lot 4 aforesaid, 2,068 feet east of the center line of said section 10; thence north, to a point on the north line of section 10, 2,068 feet east of the quarter section corner on the north line of said section 10; thence northerly, to a point 312 feet west of the S. E. corner of lot 1, in section 3, township 15 N., range 13 E., aforesaid; thence northerly, to a point on the section line between sections 2 and 3, 358 feet south of the quarter section corner on said line; thence northeasterly, to the center of the S. E. ¼ of the N. W. ¼ of section 2 aforesaid; thence east, to the center of the W. ½ of lot 5, otherwise described as the S. W. ¼ of the N. W. ¼ of section 1, in township 15, range 13, aforesaid; thence southeasterly, to a point on the south line of lot 5 aforesaid, 1,540 feet west of the center of section 1, last aforesaid; thence south 2,050 feet, to a point 1,540 feet west of the north and south open line through said section 1; thence southwesterly, to the S. W. corner of the N. E. ¼ of the S. W. ¼ of section 21, in township 75 N., range 44 W. of the fifth principal meridian; thence southeasterly, to a point 660 feet south of the N. E. corner of the N. W. ¼ of the N. E. ¼ of section 28, in township 75 N., range 44 W., aforesaid; and said line produced to the center of the channel of the Missouri river; thence up the middle of the

main channel of the Missouri river to a point opposite the middle of the main channel of the Big Sioux river.

Commencing again at the point of beginning first named, namely, a point on the south line of section 20, in township 75 N., range 44 W. of the fifth principal meridian, produced 861½ feet west of S. E. corner of said section, and running thence southeasterly to a point 660 feet east of the S. W. corner of the N. W. ¼ of the N. W. ¼ of section 28, in township 75 N., range 44 W. of the fifth principal meridian, and said line produced to the center of the channel of the Missouri river; thence down the middle of the main channel of the Missouri river to the northern boundary of the State of Missouri.

The said middle of the main channel of the Missouri river referred to in this act shall be the center line of the proposed stabilized channel of the Missouri river as established by the United States engineers' office, Omaha, Nebraska, and shown on the alluvial plain maps of the Missouri river from Sioux City, Iowa, to Rulo, Nebraska, and identified by file numbers AP-1 to 4 inclusive, dated January 30, 1940, and file numbers AP-5 to 10 inclusive, dated March 29, 1940, which maps are now on file in the United States engineers' office at Omaha, Nebraska, and copies of which maps are now on file with the secretary of state of the State of Iowa and with the secretary of state of the State of Nebraska.

Sec. 2. The State of Iowa hereby cedes to the State of Nebraska and relinquishes jurisdiction over all lands now in Iowa but lying westerly of said boundary line and contiguous to lands in Nebraska.

Sec. 3. Titles, mortgages, and other liens good in Nebraska shall be good in Iowa as to any lands Nebraska may cede to Iowa and any pending suits or actions concerning said lands may be prosecuted to final judgment in Nebraska and such judgments shall be accorded full force and effect in Iowa.

Sec. 4. Taxes for the current year may be levied and collected by Nebraska or its authorized governmental subdivisions and agencies on lands ceded to Iowa and any liens or other rights accrued or accruing, including the right of collection, shall be fully recognized and the county treasurers of the counties affected shall act as agents in carrying out the provisions of this section: *Provided,* that all liens or other rights accrued or accruing, as aforesaid, shall be claimed or asserted within five years after this act becomes effective, and if not so claimed or asserted, shall be forever barred.

Sec. 5. The provisions of this act shall become effective only upon the enactment of a similar and reciprocal law by the State of Nebraska and the approval of and consent to the compact thereby effected by the Congress of the United States of America. Said similar and reciprocal law shall contain provisions identical with those contained herein for the cession to Iowa of all lands now in Nebraska but lying easterly of said boundary line described in section 1 of this act and contiguous to lands in Iowa and also contain provisions identical with those contained in sections 3 and 4 of this act but applying to lands ceded to Nebraska.

Sec. 6. Whereas an emergency exists, this act shall be in full force and effect, subject to conditions as hereinabove expressed from and after its publication in the Sioux City Journal, a newspaper published at Sioux City, Iowa, and in the Nonpareil, a newspaper published at Council Bluffs, Iowa.

(Signed) Henry W. Burma
Speaker of the House.

(Signed) Robert D. Blue
President of the Senate.

I hereby certify that this Bill originated in the House and is known as House File 437, Fiftieth General Assembly.

(Signed) A. C. Gustafson
Chief Clerk of the House.

Approved April 15th, 1943.

(Signed) Bourke B. Hickenlooper
Governor.

The Compact as enacted by the State of Nebraska is identical in terms except that it is reciprocal with the names of the states reversed. Section 5 is changed slightly to take into account that Iowa has enacted its act and Sections 6 and 7 pertaining to local state formalities have been changed.

The Compact must be read in its entirety since it is a unified document. Section 5 of the Compact as enacted by the State of Iowa made specific mention that the law enacted by Nebraska must contain identical provisions to those contained for the cession to Iowa of all lands now in Nebraska but lying easterly of said boundary line described in Section 1 and also contain provisions identical with those contained in Sections 3 and 4 of the act but applying to lands ceded to Nebraska. Sections 3 and 4 were integral parts of the Compact and the Compact must not be construed in such a manner as to render them meaningless.

Section 1 fixes the boundary around Carter Lake, Iowa by metes and bounds in accordance with the decree of this court in the case of *Nebraska v. Iowa,* 143 U. S. 359, 145 U. S. 519 and provides that the remainder of the boundary shall be the middle of the main channel of the Missouri River which is further defined as the center line of the proposed stabilized channel of the Missouri River as established by the United States Engineers' Office, Omaha, Nebraska and shown on the alluvial plain maps of the Missouri River from Sioux City, Iowa to Rulo, Nebraska and identified by File Nos. AP-1 to 4 inclusive, dated Janu-

ary 30, 1940, and File Nos. AP-5 to 10 inclusive, dated March 29, 1940, which maps were then on file in the United States Engineer's Office in Omaha, Nebraska and copies of which maps were on file with the Secretary of State of Iowa and the Secretary of State of Nebraska. With regard to these provisions the court finds:

1. The AP maps or alluvial plain maps referred to in the Compact were dated approximately three years prior to the date when the Compact was adopted and below Omaha show the Missouri River confined to its designed channel. Above Omaha, much of the Missouri River is not yet confined to the designed channel and the designed channel at places bisects islands, bar area, and bank land.

2. A stamped notation appears on each of these maps indicating that the area covered by the Missouri River on the map was compiled from aerial photographs taken by the U. S. Army Air Corps and field surveys made in 1939. The area landward from the Missouri River was compiled from uncontrolled mosaics of aerial photographs taken by the United States Department of Agriculture in 1936, 1937, and 1938.

3. The overwhelming weight of the testimony is that these AP maps are analogous to a highway or road map and were prepared to facilitate the employees of the District Office and of the field office in driving to various locations along the river. They were primarily used for gaining access to various jobs which were under construction along the river and would be similar to a highway map. They were also described as "a glorified road map." They were not intended for any engineering results; they did not contain any distances, calls, angles or measure-

ments which would enable a surveyor to find the center of the designed channel on the ground. The information on the AP maps as to section lines and other information landward from the river is extremely inaccurate. There were areas where the features shown on the maps are at least one-quarter mile in error.

Several communications from the U. S. Army Corps of Engineers, Omaha District, have stated that the present state boundary between Iowa and Nebraska cannot be located throughout on the ground from the Alluvial Plain maps since they are too small a scale (1″ equal to 2,640′) and do not contain sufficient detail for a surveyor to accurately locate the boundary. At one time it was possible to locate the state boundary from their 1″ equal 400′ construction maps as the river alignment as shown on these maps conforms to the alignment as shown on the Alluvial Plain Maps. Since the present Boundary Compact was ratified, numerous channel realignments have been made and the basic 1″ equals 400′ tracings have been revised to show these realignments. Copies of 1″ equals 400′ maps which show the alignment in accordance with the alignment shown on the Alluvial Plain Maps were not retained and it is not possible to locate the boundary on the ground throughout from any maps on file in the Corps' office.

The Alluvial Plain Maps on file with the offices of the Secretary of State of Nebraska and Iowa are of the scale of 1″ equals 5,280′. Other Alluvial Plain Maps on file with the Corps of Engineers are of the scale of 1″ equals 2,640′. Some of these have had material added to the maps which did not appear on the original AP maps of the scale of 1″ equals 5,280′ as on file with the Secre-

taries of State. However, these maps have the same date as the AP maps referred to in the Compact although there is no indication on the maps of the date or dates that the additional material was added. This is not atypical of many of the Corps photographs and maps relating to the Missouri River which have been altered or changed over the years. The Nebraska State Surveyor testified that his office, which was the only office in Nebraska which carries official land survey records, had no information on file when he became State Surveyor in 1960 which would help determine the location of the center of the designed channel as shown on the Alluvial Plain Maps.

The evidence and the testimony lead to the inescapable conclusion that the Compact was prepared in general language and adopted or fixed the new boundary in general terms with no anticipation that either state would use it as a property line or require that it be located with the preciseness required for property surveys.

The State of Iowa contends that the boundary can be located with preciseness through the utilization of other data and maps available from the Corps of Engineers. However, the Corps communications negate this claim and the evidence further shows that Iowa's surveyors have used different and inconsistent methods in locating the Compact line on the ground. In the Nottleman Island area, three surveyors, two employed by the State of Iowa and the Nebraska State Surveyor, located the Compact boundary in three different places. This results from the fact that data which does not appear on the AP maps must be utilized and each surveyor used different data in making his determinations. There is no official supporting data

available. However, both Iowa's and Nebraska's expert surveyors who testified admit that approximately the westerly 50 feet of the land claimed by the State of Iowa in the case of *State of Iowa v. Babbit, et al* is presently in the State of Nebraska and is west of the center line of the proposed channel of the Missouri River as established by the alluvial plain maps referred to in the Iowa-Nebraska Boundary Compact. This land is not within the jurisdiction of the Courts of the State of Iowa, is not owned by the State of Iowa, is within the jurisdiction of the State of Nebraska, and Iowa's attempt to quiet title to this land constitutes an encroachment upon the sovereignty and territory of the State of Nebraska. Nebraska does not contend that this in and of itself is determinative of this case but has raised the point to illustrate the practical problems if the Compact line is to be used as a line to determine boundaries of proprietary claims of the States.

The State of Iowa contends that the construction maps by the Corps of Engineers which are of a scale of 1″ equals 400′ contain adequate data to locate the Compact line but the testimony and the communications from the Corps of Engineers indicate that such information adequate to locate the Compact line throughout is not available and has not been retained by the Corps. Testimony also indicated that it is frustrating to obtain information from the Corps of Engineers as concerns their previous projects and the situation of the river at the time of the Alluvial Plain Maps. Documents and information might be available at one time and not be available at another. Information has been destroyed or lost and there was no reason for the Corps to be particularly interested in keeping their old records.

Attempts to obtain information from the Corps are time consuming and consequently expensive.

Although the Corps of Engineers has also informed the State of Iowa and its officials that the 1943 state boundary between Iowa and Nebraska cannot be located throughout on the ground from the Alluvial Plain Maps and that the 1″ equals 400′ construction maps have not been retained and it is not possible to locate the boundary on the ground throughout from any maps on file in the office of the Corps of Engineers, the Iowa Conservation Commission and Attorney General's office have continued to assert that the boundary can be located from data obtained from the Corps of Engineers. Other branches of Iowa's government, such as Iowa's Governor's Advisory Committee on the Iowa-Nebraska Boundary have accepted this determination by the Corps of Engineers that it cannot be located from the construction maps.

Neither state contends that the gravamen of this action is the actual location of the Compact boundary at any particular point along the Missouri River. Nebraska has interjected the issue of the difficulty in finding the boundary as illustrative of the meaning and intent of the Compact as being indicative of the fact that neither state ever intended to conduct itself in such a manner that the location of the Compact boundary on the ground would be necessary to determine either State's property rights. The states assumed the boundary would be located in the middle of the Missouri without being concerned about its precise location there.

At the time the states entered into the Iowa-Nebraska Boundary Compact, it was generally believed that the Mis-

souri River had been stabilized in the designed channel or would be moved into the designed channel where the river would remain stabilized. During World War II, the activity by the Corps in maintaining the stabilization works was curtailed and the river escaped from the designed channel above Omaha and reverted to its wild natural state. This has resulted in a situation where both banks of the river are completely in Nebraska at the present time for approximately 21 miles between Omaha and Sioux City. Both banks of the river are entirely in Iowa for approximately 14 miles.

The present situation was described in the Iowa Governor's Advisory Committee Report dated December 1, 1964 as:

> ". . . industrial firms are faced with uncertain title and tax structures not knowing what state they are in, retarding the potential development of this area."

The record also makes reference to activity by both legislatures and recognition by the Iowa governor that the settlement of the Iowa-Nebraska Boundary dispute was recommended ". . . in order to settle long-pending questions of land ownership and to open up the Western Slope of Iowa to commercial, industrial and recreational development." The Court finds that a determination of the meaning and application of the Iowa-Nebraska Boundary Compact is of paramount interest to both states and is essential if the two states' boundary problems are ever to be solved.

In those places where the Missouri River might still have been the boundary in 1943, the Compact changed the boundary from the movable navigable channel or thalweg

to a fixed line. The change abrogated the application of the common law principle relating to a movable navigable stream as the boundary between the states. The testimony and navigation charts have established that the navigable channel tends to follow the outside of the bends and was not coincident with a line midway between the banks except at those places where it crossed from one curve to the other. Consequently, land within the bed of the Missouri River, was "ceded" along the entire boundary.

Section 2

Section 2 of the Compact provides:

> "The State of Iowa hereby cedes to the State of Nebraska and relinquishes jurisdiction over all lands now in Iowa but lying westerly of said boundary line and contiguous to lands in Nebraska.
>
> "The State of Nebraska hereby cedes to the State of Iowa and relinquishes jurisdiction over all lands now in Nebraska but lying easterly of said boundary line and contiguous to lands in Iowa."

It is clear from the evidence that the states did not know what specific land areas actually were in Iowa but were on the western side of the Missouri River and this general language was used to make it clear that the new state boundary was to become effective and Iowa was to have no further jurisdictional claim to any areas to the west or on the right side of that boundary. By the same token, the states did not know what specific areas lying on the left bank or eastern side of the new boundary had previously been within the jurisdiction of Nebraska. They both accepted the fact that any possible such areas were "ceded" to the other state by this general language.

The word "cede" as used in the Compact must be read as a part of the whole document. The following principle is applicable:

> "A writing is interpreted as a whole, and all writings that are part of the same transaction are interpreted together." Restatement of the Law Second, Contracts, Tentative Draft No. 5, §228(2), p. 68.
>
> "Meaning is inevitably dependent on context. A word changes meaning when it becomes part of a sentence, the sentence when it becomes part of a paragraph. A longer writing similarly affects the paragraph, other related writings affect the particular writing, and the circumstances affect the whole." Restatement of the Law Second, Contracts, Tentative Draft No. 5, §228(2), comment d, pp. 72, 73.

The cardinal rule of construction is that we seek to determine and to give effect to the intentions of the parties. In this case, it is clear as to what the parties had in mind. They intended to settle their differences and at that time the State of Iowa had raised no issue concerning its ownership of beds or abandoned beds of the Missouri River and the States clearly were desirous of avoiding expensive determinations as to where the river had previously moved by avulsion and as to the location of the pre-1943 boundary. They accepted the fact that it was not located in the river at many places and that it was almost impossible of determination.

> "Words and other conduct are interpreted in the light of all the circumstances, and *if the principal purpose of the parties is ascertainable it is given great weight.*" Restatement of the Law Second, Contracts, Tentative Draft No. 5, §228(1), p. 68. (Emphasis supplied.)

If effect can be given to the intention of the parties it should be done rather than exalt a "literal" reading of

the word "cede" as being applicable only to lands which it must be proven were in fact transferred, as the requirement of such proof was something which the States attempted to avoid and is inconsistent with the remainder of the Compact. A literal reading of the word "cede" in a restrictive manner would relegate the word to a higher status than the understanding and agreement of the parties themselves. Such a literal reading would result in the court's making a contract for the parties which they did not make. This possibility is explained by Professor Corbin:

> "The primary and ultimate purpose of the interpretation is to determine and make effective the *intention of the contracting parties.*" (Emphasis by the author.) • • •
>
> "No party to a contract should ever be bound by an interpretation that is determined exclusively by the linguistic education and experience of the judge. • • •
>
> "When a court enforces a contract in accordance with an interpretation that seems 'plain and clear' to the court and excludes relevant convincing evidence that the parties intended a different interpretation, it is 'making a contract for the parties', one that they did not make.
>
> "No word or group of words in any language has an 'objective' meaning separate from and independent of its actual use by some person to convey his thought to another person." 3 Corbin on Contracts, 1964 PP., §572B.

Sections 3 and 4

Sections 3 and 4 of the Compact as adopted by the Iowa legislature provide:

"Sec 3. Titles, mortgages, and other liens good in Nebraska shall be good in Iowa as to any lands Nebraska may cede to Iowa and any pending suits or actions concerning said lands may be prosecuted to final judgment in Nebraska and such judgments shall be accorded full force and effect in Iowa.

"Sec. 4. Taxes for the current year may be levied and collected by Nebraska or its authorized governmental subdivisions and agencies on lands ceded to Iowa and any liens or other rights accrued or accruing, including the right of collection, shall be fully recognized and the county treasurers of the counties affected shall act as agents in carrying out the provisions of this section: *Provided,* that all liens or other rights accrued or accruing, as aforesaid, shall be claimed or asserted within five years after this act becomes effective, and if not so claimed or asserted, shall be forever barred." (Emphasis theirs.)

These two sections must be considered in light of the conditions as they existed at the time of the Compact and the purpose and intent of the parties to the Compact.

The navigation charts and testimony have established that the navigable channel of the Missouri River in the designed channel tends to follow the outside of the bends or curves. This navigable channel, or what would be the "thalweg" or boundary if it should be assumed that there had been no prior avulsions, was not coincident with a line midway between the banks of the designed channel as established by Section 1 of the Compact as the Compact boundary, except at those places where the navigable channel crossed the center from one curve to another. Consequently, land within the bed of the Missouri River was "ceded" or transferred from one state to the other all along the entire boundary in addition to the land which

had been stranded on opposite sides of the river by the natural cut-offs and man-made canals or prior avulsions. The states had recognized that the river necessarily had to have been entirely in Iowa or entirely in Nebraska at many places. The states desired to avoid the expense of determining these specific places and the states took the easier course of attempting to accomplish the general purpose of settling and laying to rest all boundary and jurisdictional problems which existed between the states by agreement. The references to "titles, mortgages and other liens good in Nebraska" had to necessarily refer to all claims of title, mortgages, and other liens claimed to lands which were east of, or on the left bank side of, the Compact line as these were the same lands which the states were accepting as having been "ceded" or transferred.

There is no record of any determination of what suits or actions concerning said lands might be pending at the time of the Compact but the language authorizing them to be prosecuted to final judgment in Nebraska and requiring Iowa to afford such judgments full force and effect necessarily had to refer to any pending suits in the Nebraska courts which concerned lands which would be on the eastern or left bank side of the new Compact boundary. Any requirement which would impose a duty upon the individual claimants to establish which state the land was in prior to the Compact would be inconsistent with the intent and conduct of the states in avoiding that requirement.

Section 3 was intended to protect the rights of private property claimants against the claims by either state and is a broadly phrased clause which should be liberally construed to effect this purpose. As such, neither state should

be able to attack any private titles or claims emanating from the other state as of the date of the Compact.

The only parties to the Compact were the two states and individuals who were not parties to the Compact but who are effected by it should not be penalized by the State's conduct.

It was the intent of Section 3 to recognize and protect property rights which would necessarily be affected by the Compact by the mere determination of a fixed and definite boundary which, prior to the Compact had admittedly been vague, uncertain, indefinite, and almost impossible of determination.

Section 3 imposed an affirmative requirement upon the States and assurance to the other contracting state that titles, mortgages and other liens claimed under one state's jurisdiction would be recognized and good and valid under the jurisdiction of the state in which the property would lie after the Compact.

At the time of the Compact, the only conduct by either state which was affecting lands along the Missouri River was the taxation of these lands. The states recognized that there was a great deal of uncertainty in the taxation of the lands along the Missouri River, some areas being taxed in both states, some areas not being taxed in either state, and in several places lands being taxed by a state although they were located upon the opposite side of the Missouri River. Section 4 authorizes the state or its authorized governmental subdivisions or agencies to tax lands "ceded" for the current year and required that any liens or other rights accrued or accruing, including the right of collection, should be fully recognized and the

county treasurers of the counties affected were authorized to act as agents in carrying out the provisions of that section, provided that all liens or other rights accrued or accruing should be claimed or asserted within five years or be forever barred.

This section constituted a clear limitation upon claims by the State for tax purposes and these were the only claims which were being asserted by the states at that time. Since there was no determination of lands "ceded", this section obviously could only refer to areas against which taxes were levied at the time and constituted a recognition insofar as the states were concerned, that such areas on the opposite sides of the Missouri River which were being taxed by a state were considered as having been ceded as the term was used in the Compact. This is another recognition of the fact that all areas along the Missouri River, which after the Compact were definitely established as being located in one of the state's jurisdictions, were considered as having been ceded as that term was used in the general language of the Compact.

Section 4 provided a five year limitation for the assertion of rights of any liens or claims arising out of the taxation of the lands by the states or their authorized governmental subdivisions and agencies. This constituted a clear limitation upon such claims arising from the governmental authority of the states and complimented Section 3 which was a clear recognition of existing private claims. There is nothing in the Compact reserving the right of either state to make additional claims of title under any other doctrine of sovereignty. Nothing preserves to the states the right to make any further claims and, as the Compact

was intended to settle all problems along the border, it is to be construed to include all claims made by either state which might be asserted under any common law claim of sovereign ownership of beds or abandoned beds of the Missouri River, especially since Iowa had not claimed these areas theretofore.

The provisions of compacts become the law of the contracting states and state statutes or laws which conflict with an interstate compact are invalid and unenforceable. *Green v. Biddle,* 8 Wheat 1, *The Interstate Compact since* 1925 by Zimmerman and Wendell, p. 32; *U. S. v. Bekins,* 304 U. S. 27; *Poole v. Fleeger,* 11 Pet. 185, 209; *Rhode Island v. Massachusetts,* 12 Pet. 657, 725; *Hinderlider v. LaPlata River & C. C. Ditch Co.,* 304 U. S. 92.

In the construction of agreements or compacts the fundamental rule is to ascertain the substantial intent of the parties and, in making this inquiry, it is proper to examine into the state of things existing at the time and the circumstances under which the agreement was made. The history leading up to the Compact is relevant in determining the proper construction and the effect of the Compact as applicable to titles along the Missouri River. It is the substance of the agreement, as contradistinguished from its mere form, which is essential in order that a fair and just construction may be given to the agreement and the court must ascertain the substantial intent of the parties which is the fundamental rule in the construction of all agreements. *Chesapeake & Ohio Canal Co. v. Hill,* 15 Wall. 94. See also *In re Ross,* 140 U. S. 453.

As Mr. Justice Stone stated in *Massachusetts v. New York,* 271 U. S. 65, 87:

"In ascertaining that meaning, (of the Treaty of Hartford) not only must regard be had to the technical significance of the words used in the grants, but they must be interpreted 'with a view to public convenience, and the avoidance of controversy', and 'the great object, where it can be distinctly perceived, ought not to be defeated by those technical perplexities which may sometimes influence contracts between individuals.' Marshall, C. J., in *Handly's Lessee v. Anthony*, 5 Wheat. 374, 383-384. The applicable principles of English law then well understood, the object of the grant, contemporaneous construction of it, and usage under it for more than a century, all are to be given consideration and weight. *Martin v. Wadell*, supra."

All parts of a treaty are to receive a reasonable construction with a view of giving a fair operation to the whole. *Sullivan v. Kidd*, 254 U. S. 433, 439. Narrow and restricted interpretations are not favored and treaties are to be liberally construed so as to effect the apparent intention of the parties. See *Nielsen v. Johnson*, 279 U. S. 47, *Jordan v. Tashiro*, 278 U. S. 123 and *In re Ross*, 140 U. S. 453, 475.

It is not unusual for a country, in ceding territory, to stipulate for the property of its inhabitants. *U. S. v. Chaves*, 159 U. S. 452, 457.

Nebraska contends that the Iowa-Nebraska Boundary Compact was adopted in general terms with a view to public convenience and the avoidance of controversy and this great object should be effectuated. The language stipulating for the property of the inhabitants should be liberally construed so as to effect the apparent intention of the parties to secure the people along the Missouri River in their rights and to give them protection from the states

in whose respective jurisdictions the property would lie after the Compact insofar as claims emanating from such other state were concerned. The Compact intended to leave the individuals secure in their property rights as recognized immediately prior to its adoption. At that time Iowa was not contesting these property rights.

Any technical construction of the word "cede" in the Compact to require a land owner to now prove that his land was in fact transferred from one state to the other and which would also require this land owner to prove the location of the boundary prior to the adoption of the Compact is clearly inconsistent with the purpose, object and intent of the Compact and would be a restrictive reading which would destroy the purpose of the boundary compromise. It would be placing a burden upon the land owner which the states themselves refused to undertake in 1943 and agreed would not be necessary. The states would in effect be saying to the land owners, "we could not prove where the boundary was in 1943 but now, after we have waited 27 years, we are going to make you prove where it was at your expense even though we know it is impossible."

NEBRASKA AND IOWA COMMON LAW

Under Nebraska law, title to the beds of navigable streams is in the riparian owner subject to the public easement of navigation, each owner owning to the thread of the stream. The leading case is *Kinkead v. Turgeon,* 74 Neb. 580, 109 N. W. 744 (1906), reversing 74 Neb. 573, 104 N. W. 1061 (1905). The Nebraska rule is based upon the

equitable principles that, where a person is subject to having his property added to by gradual movement of the river, he also suffers the possible loss which might result. Under Nebraska law the Nebraska owner's right extends to islands, bar areas or beds which are on his side of the thread of the stream. However, the Nebraska owner's title to the bed is subject to the public easement of navigation.

The Iowa courts have followed the principle that the state owns title to the beds of all navigable streams within the State of Iowa to the high water mark and that any islands arising out of the beds of navigable streams in the state belong to the State of Iowa. The leading case is *McManus v. Carmichael*, 3 Ia. 1 (1856).

In 1956, just prior to the time the Conservation Commission commenced its activity investigating lands along the Missouri River, an article appeared in 42 Iowa Law Review 58 entitled DETERMINATION OF RIGHTS TO REAL PROPERTY ALONG THE MISSOURI RIVER IN CONNECTION WITH RIVER STABILIZATION which discussed prior treatment by the Iowa courts of Missouri River lands and stated that the Iowa courts had vascillated in determining whether sand bars were islands or accretions to the high bank. The article suggested that if such sand bars in the Missouri River are deemed islands, then there was reason to believe that the State of Iowa might lay claim to them as state property. However, there had been no determination by the courts that the State of Iowa would have a right to such sand bars or new lands added to the territorial domain of Iowa through the process of avulsion or by stabilizing work done by the Corps of Engineers. The article indicated such claims may develop on

account of the substantial amount of new land that would be added to Iowa by reason of such channel stabilization work and the determination of the state boundary along the center line of such stabilized channel. It was following this article that Iowa's activities and claims began and this article has been cited by the Iowa Supreme Court. See *State of Iowa v. Raymond,* 254 Iowa 828, 119 N. W. 2d 135.

The State of Iowa, in the preparation of Part 1 of the Missouri River Planning Report, January, 1961, and in the prosecuting of quiet title actions, has proceeded under the Iowa common law principle of state ownership to the bed of the Missouri River, in some cases in complete disregard of the provisions of the Iowa-Nebraska Boundary Compact. Iowa has utilized Section 1 of the Compact to establish that the land is in Iowa and then proceeded to apply her common law. She has done this in complete disregard of the provisions of Sections 3 and 4 of the Compact and without considering what the effect would have been had the Compact not been adopted.

CONDUCT OF THE STATE OF IOWA FOLLOWING THE COMPACT

Following the adoption of the Compact in 1943, individuals possessing land on the easterly or Iowa side of the Missouri River under Nebraska titles or claims continued in the peaceful use and enjoyment of their land without any claim of ownership by Iowa governmental authorities during the 1940's and 50's.

Much of this land had formerly been of little value,

consisting of scrub timber, willows, and heavy undergrowth and not immediately suited for farming or other productive use. A great deal of money and labor was spent by these owners in the clearing of this land and it has, through their efforts, become useful, productive land with values ranging from approximately $400 to $600 per acre.

Some lands were placed on the tax roles in the counties in Iowa adjacent to the Missouri River and taxes were assessed and collected on such lands.

In 1956, when the State of Iowa was joined as a defendant in an action to quiet title to land which included abandoned bed of the Missouri River as a result of an avulsion known to the State of Iowa, the State of Iowa acknowledged that it had no claim of ownership of the land which was an abandoned channel of the Missouri River located to the east of the Compact line.

The State of Iowa made no claim whatsoever to certain other lands which were abandoned channels of the Missouri River and the Iowa State Conservation Commission has even purchased land which was in abandoned channels from landowner claimants.

The Iowa State Conservation Commission first showed an interest in lands along the Missouri River when it was brought to their attention that people were occupying these lands in some instances and the decision was made by the Commission to find out what and where the public did "own" lands, based upon the Iowa doctrine of state ownership of beds or abandoned beds of the Missouri River. Generally all the activity by the Conservation Commission in connection with the Missouri River started about

1958. Mr. Lloyd Bailey, the Chief of the Land Acquisition Section of the Iowa Conservation Commission, testified that when he took that office in 1958 the records of state-claimed lands were very poor along the Missouri River and there was very little record of anything in that office. There was no other office where an outsider could go to determine what lands were claimed by the State. It was some time after he took office that the big investigation started to turn up lands that could be included as state-claimed lands in the 1961 Missouri River Planning Report.

A study was undertaken by the Iowa Conservation Commission and areas were selected and the decision to attempt to acquire title by quiet title proceedings was made in the Iowa Conservation Commission. People claiming such lands were not given an opportunity to be heard by the Commission in any official hearing.

Final decision as to whether or not the State Conservation Commission would claim areas selected as abandoned river channels or ox-bow lakes was to be with the Attorney General's office.

The determination of the ordinary high water mark by the State of Iowa to delineate the point from which its ownership of an abandoned channel or islands commenced was based on the location of the ordinary high water mark just prior to the diversion of the waters into the new channel by the Corps of Engineers. They made no investigation in going back of that for their present purposes. Consequently, any previous ordinary high water marks or abandoned channels of the Missouri River prior to this time were overlooked or ignored by the Commission.

Mr. Jerry Jauron testified that he was given special duty by the Conservation Commission as Missouri River Coordinator in 1958 and was assigned the task of making a survey and investigation of the entire stretch of the Missouri River which constitutes the western boundary of Iowa for the purpose of determining existence or non-existence of "state-owned lands." He would find areas and select them, research them primarily at the Corps of Engineers for their maps, pictures and photos and give this information to the Attorney General's office. This would then be discussed with the Attorney General's Office and representatives of the Commission and the effort culminated in the published Part 1 of the Missouri River Planning Report.

Four of the five areas south of Omaha claimed by the State of Iowa were extensively cleared and a portion of the fifth area had been cleared to a limited extent at the time the Iowa Conservation Commission published Part 1 of the Missouri River Planning Report in January, 1961.

Most of the areas north of Omaha resulted from work done on the river by the Corps of Engineers after 1943. Where the Corps had redesigned the channel following the Compact, Iowa claimed the area which had just come into existence as the Corps moved the river as "state-owned land". This was claimed as abandoned river channel. Iowa also claimed all of the new bed of the channel lying east of the Compact line. The State of Iowa in its investigation did not examine county records or, if any examination was made, it was very little or nothing to speak of.

The project by the Commission to find the so-called state lands was commenced because of the redesigning of

the Missouri River from Council Bluffs to Sioux City by the Corps of Engineers. If Mr. Jauron rejected any area as a state-claimed area it was never brought to the attention of the Attorney General's Office or the Iowa Conservation Commission and the State made no claim to it.

The representatives of the Attorney General's Office and Conservation Commission rejected three or four areas out of an original approximately 25 areas which had been selected by Mr. Jauron. If Mr. Jauron had recommended in Des Moines that they did not want an area for some reason or other, it would not have received any consideration.

Mr. Jauron testified that the State of Iowa did not claim all river beds of the Missouri River valley and he could not explain why some of them are ignored and some of them are claimed. The evidence fails to show any consistency or logic in the selection of areas Iowa claims. If certain areas were under water the first time Mr. Jauron saw them, he would have claimed them for the State of Iowa.

Consequently, the areas claimed depended in part upon whether they were under water within the memory of the witness and in part upon whether the specific documents examined by Mr. Jauron happened to indicate an abandoned channel. However, many of the documents offered by the Plaintiff show the river in various areas and abandoned channels which were not claimed by the State of Iowa.

Mr. Jauron testified that in his mind there was absolutely no doubt that certain areas were old river beds

but no exhibits or witnesses who might state that they were old river beds existed. Consequently, whether or not the State would claim areas depends in part upon the remaining available evidence as of the present date and whether the individual researching such areas had done an extensive investigation.

When asked whether Iowa claimed lands on the west side of the 1943 Compact line as abandoned channels, Mr. Jauron testified that at the time they started, the Attorney General in charge instructed them to claim no lands on the other side of the boundary compact line. However, this policy was changed in another Attorney General's administration. Mr. Jauron testified that his answer would have to change three or four times because they changed attorney generals three or four times. The evidence shows that Iowa's conduct was determined by particular attitudes by the various Attorney Generals and not by any rule of law concerning the meaning or effect of the Compact.

Mr. Jauron did not know of any discussions concerning whether or not the lands selected as property of the State of Iowa were on the tax rolls. During the meetings to determine areas which the State claimed, if individuals lived on the areas or were occupying these lands, the Iowa officials automatically assumed that they were trespassers.

In the determination of the boundaries of the areas Iowa claimed, in some instances the Attorney General's Office instructed the surveyors as to what to survey. In other instances the evidence indicated that the Conservation Commission officials instructed the surveyor where to place his line. In some of the areas which Iowa claimed, there were high bank lines further to the East from where

Iowa was making claim and in both the Nottleman and Schemmel areas the eastern line of Iowa's traverse, which normally would have followed the ordinary high water mark, followed no such geographical feature but crossed water area, cultivated fields, and along level land with no bank or physical feature visible.

In one instance, two islands were bisected by canals with portions of the upstream and downstream islands being placed on the right bank as a result of the work of the Corps and the portions of the two islands which were placed on the left bank as the result of the construction silted together and became one area. Iowa is claiming that area as abandoned channel in the Planning Report but Iowa did not, at that time, claim the portions of the two islands which were placed in Nebraska.

Iowa claims other areas where the river was completely in Nebraska in 1943 because of prior avulsions. In at least two instances, the river then escaped from its designed channel and moved back to the East. Then the Corps placed it in the designed channel by subsequent canals. Iowa is claiming the area where the river escaped following 1943 as abandoned channel because that land "is in Iowa" as the state-line is defined by the Compact of 1943. Had it not been for the Compact, the land would be in Nebraska.

At Decatur, Nebraska, the Missouri River moved outside of its designed channel to the East following 1943 and a bridge was built upon dry land over the designed channel. The Corps then moved the river back under the bridge by the digging of a canal and the State of Iowa has claimed the area where the river was to the East as well as the

portion of the present designed channel where the river is now located which is in Iowa. Iowa has not claimed ownership of the bridge and has not exacted any tribute for a pipeline which crosses the area Iowa claims at that point.

In most places where the Missouri River is confined to the designed channel as described in the AP maps, the State of Iowa claims ownership of all that portion of the channel which is presently East of the Iowa-Nebraska Compact line. Iowa makes this claim even in those areas where the river had been entirely in Nebraska as the result of the construction of canals or natural avulsions prior to 1943. Iowa contends that when the new state line was established, under Iowa common law the State immediately became the owner of any part of the channel of the Missouri River or any abandoned channels of the Missouri River which were to the East of that Compact line, notwithstanding the fact that such areas, were in Nebraska up until the date of the Compact. Nebraska contends that the Compact requires Iowa to recognize Nebraska titles and this includes the title to the bed of the river which in many places was entirely in Nebraska claimants. Nebraska also contends that the Compact could not deprive individual proprietors of their vested riparian rights which includes the right to accretion and to abandoned beds in the case of avulsion. Nebraska further contends that when the states agreed to a new boundary they, in stipulating to recognize all titles along the Missouri River without necessity of determining where the former boundary had been, necessarily changed Iowa's common law in such a manner that the State of Iowa must recognize it has no further claim of ownership to the bed of the Missouri River but only has an easement

for the use of the public such as exists in Nebraska. Otherwise, owners are penalized by having to establish where the boundary was prior to 1943 in order to protect their vested rights, a requirement which the states avoided and attempted to obviate by entering into the Compact and providing safeguards to protect individual property rights.

Riparian rights are vested property rights of which an owner cannot be deprived without the payment of just compensation. *New Orleans v. U. S.*, 10 Pet. 662; *County of St. Clair v. Lovingston*, 23 Wall. 46 at 68-69; *Manry v. Robison*, 56 S. W. 2d 438 (Tex. 1932). Under the Compact, these property rights must be protected and the property owners were not deprived of their riparian rights by the Compact. Consequently, in those situations where there was a Nebraska title to the bed of the Missouri River, Iowa is bound by the Compact to recognize that Nebraska title and Iowa has no ownership claim thereto. In addition, when the river following the Compact moves, the Nebraska riparian owner retains his rights to accretion to the bank or bed, whichever the case may be, and his title is not to be terminated at the fixed Compact line.

Iowa argues that the lands along the Missouri River which Iowa claims as beds or abandoned beds are trust lands and the State of Iowa has a duty to claim them. Iowa has no explanation for the fact that Iowa went for years without claiming these areas except that her officials may have been derelict or she is not responsible for the acts of her former public officials. Iowa has no explanation for the fact that Iowa has not claimed other abandoned channels along the Missouri River or why Iowa waited so long after the Compact to make her claim. The evidence

indicates that Iowa was not interested in these lands until they became valuable land with an economic potential or recreational potential to the state. It is neither fair nor equitable for Iowa to delay as long as she has in claiming these areas and to ignore other such areas of like character along the Missouri River and now allow the state to selectively claim certain areas against individual land owners and particularly those claiming through Nebraska titles.

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PART 1 OF THE MISSOURI RIVER PLANNING REPORT

The Iowa State Conservation Commission published a document dated January 1, 1961 entitled PART 1 OF THE MISSOURI RIVER PLANNING REPORT, and it is this document which first publicly disclosed a concerted effort on the part of the Iowa State Conservation Commission to assert claims of title to lands along the Missouri River under the doctrine of state ownership to the beds and abandoned beds of the Missouri River. This report listed 25 potential recreation areas, of which 21 were based upon claims by the State of Iowa under its "common law" to areas as beds or abandoned beds or islands arising in the bed of the Missouri River. Of the other four areas, one was obtained by the state by purchase and three are highway access areas. All of the 21 areas claimed were immediately adjacent to the Missouri River. This report recognized that:

> "In years past the Missouri has been a fast running river, subject to regular flooding and often carrying heavy silt loads.

"The uncontrolled river moved about freely, cutting new channels, abandoning old, always adding to and subtracting from the shoreline on both banks."

It also recognized that:

"The past violent fluctuations in river water levels have been so frequent that changes in channels, bank location, sand bars, etc., made it virtually impossible to describe the state boundary or to determine land ownership on the Iowa side. It hasn't been necessary to tie down the line between state and private ownership because development for recreation was not considered feasible because of constant change."

The report further recognized that project development was hampered by the cloudy title to lands on the Iowa side of the state boundary and "a lack of knowledge of exact ownership lines also prevents the State of Iowa from acquiring lands needed for access to water or for other shore line development."

It also recognized previous avulsions along the Missouri River:

"The 1943 compromise became necessary because by that time a great deal of channel stabilization has been completed. Because the new channel did not always follow the old river bed it became necessary to redefine the location of the state's boundary."

It suggested that development of the Missouri River for recreational use would be expedited to a large degree if the state boundary is set as the center of the new channel. It considered the 21 areas and in most of them recognized and recommended that a quiet title action must be necessary. It then used such language as "If state is granted title", "if title is granted to State of Iowa" or if the

state "gains title" certain recommended actions should be taken.

The Planning Report recognized the many uncertainties along the Missouri River and even recognized the occupancy of other individuals because of the necessity for quiet title proceedings. The report further recognized the ownership problems which the State of Iowa might have. This indicated an uncertainty in the status of the law and that Iowa's claims had not been determined prior to this time.

Part 1 of the Missouri River Planning Report represents the present policy of the State of Iowa concerning acquisition of or proof of interest in lands referred to in the report.

This activity by the Iowa Conservation Commission along the Missouri River and the resulting Part 1 of the Missouri River Planning Report and Iowa motives are explained by a letter from the Attorney General of Iowa to the Governor of Iowa in 1964 which stated:

> "For many years of Iowa's history, the state did not zealously protect its ownership of these islands, particularly islands forming in the Missouri River, because for many years islands in the Missouri River were considered transitory in nature, subject to excessive flooding and of little value.
>
> "In recent years, U. S. Army Corps of Engineers works in the Missouri River Basin have changed this picture entirely. Channel stabilization work has made it so that the islands are no longer transitory. Upstream impoundments have made it so that they are no longer subject to frequent flooding. These areas now have substantial value to the people of Iowa, both monetary and in some cases, recreational."

The court finds that Iowa's interest in the lands is motivated by the fact that they have now become valuable farm land and there was a monetary interest if the state could obtain title to these lands without having to make payment by way of condemnation. The funds for financing the quiet title actions by the state were provided by tax monies. The State of Iowa really had little to lose and everything to gain if it could successfully quiet title to these areas as against those in possession. The Missouri River Planning Report and the Iowa Attorney General's Office have indulged in the assumption that the areas were state owned although the record indicates that they did not consider these areas state owned prior to the late 1950's when they initiated the program to quiet title to lands along the Missouri River.

Iowa, in the program outlined by its Planning Report and its subsequent activity in filing actions to quiet title to lands along the Missouri River, utilized Section 1 of the Compact to establish the boundary but has ignored Sections 3 and 4. In doing this, she has violated the Compact.

THE CASE OF STATE OF IOWA v. BABBITT, ET AL.

On March 18, 1963 the State of Iowa filed a Petition in Equity in the District Court of Iowa in and for Mills County captioned "State of Iowa, Plaintiff vs. Darwin Merrit Babbit, et al., Equity No. 17433" attempting to quiet title to the Nottleman Island land in Mills County, Iowa. This petition alleged that the State of Iowa was the absolute and unqualified owner of the land and that all

claims of the defendant were "spurious and wholly without right." The petition further alleged that ". . . one or more of the defendants have stated or published remarks to the effect that any attempt by any agent or employees of plaintiff to view, inspect or survey the subject real estate of this case, such agents and employees would be physically and violently stopped and prevented from so doing." The Petition gave no grounds as the basis for Iowa's contentions, merely alleging that Iowa was the absolute and unqualified owner.

The landowner claimants testified that no one from the State of Iowa discussed Iowa's claim with them prior to the filing of this law suit.

The State of Iowa, in Answers to Interrogatories, claimed that its ownership was not based on any acts or instruments, taking the position that the land area formed as accretion to the state-owned bed of the river. Iowa made no investigation concerning exactly who was in possession of the disputed area adversely to them and Iowa claimed that she should not be required to make an investigation concerning possession. The state also claimed that the matter of possession is irrelevant and immaterial. Iowa further claimed that defendants' possession was irrelevant as the land was in the public domain and not subject to being adversely possessed by private parties or persons. Iowa had no information as to how long the various tracts in the area had been cultivated or by whom this had been done. Iowa had never filed anything in the office of the Mills County Recorder of Deeds asserting its claim.

Iowa stated that the State Conservation Commission was not a party in interest in any capacity in the litigation

but also stated that the Iowa State Conservation Commission was the political subdivision or department of the state possessing the power, authority and duty of managing and controlling the area involved in the litigation "if it be determined that same is owned by plaintiff."

Iowa denied that the land was at any time in the State of Nebraska and denied that the State Conservation Commission had ever relinquished claim to the land. She further denied that the land was subject to the provisions of the 1943 Boundary Compact. Iowa asserted that the collection of taxes was irrelevant and immaterial "because any taxes which any of the defendants (landowners) may have paid to plaintiff (Iowa) on the land involved in this case were infinitesimal". Iowa said the matter only became material if the defendants elected to plead some affirmative defense based thereon and that it was an illegal, improper and unauthorized attempt by the landowners to shift the burden of proof from themselves to the state on an issue which was not then an issue in the case and which, if it became an issue, placed the burden of proof on the landowners. Iowa further took the position that the State should not be subjected to the burden of researching, investigating and proving the facts concerning taxation unless and until some burden was cast upon the state by pleading and proof offered by the landowners. The only persons which Iowa listed as having information or knowledge concerning the formation of the land were R. L. Huber, formerly of the U. S. Army Corps of Engineers, by reason of having studied books, records, maps and photographs; Gerald J. Jauron, employee of the plaintiff who had studied maps and records; and Ivan Windenberg,

an employee of the State of Iowa, who surveyed the area. Iowa presumed there were residents who had some information but did not interview the persons prior to their filing of the suit.

Iowa also took the position that the instruments through which the defendants claimed title were "spurious, fictitious instruments" and of no force or effect in Iowa.

Although the evidence is that in 1946 the Iowa Attorney General's office had knowledge of a law suit against the officials of Mills County to have the landowners' Nebraska titles placed on record in Iowa, Iowa took the position in 1963 it was not a party to the action and "had no notice or knowledge thereof."

The evidence has established that at the time Iowa filed the law suit against the owners of Nottleman Island, the state officials disregarded all matters of record concerning the land, all matters of possession by the landowners, the payment of taxes by the landowners upon the land, and all eye witness knowledge concerning formation of the land. They took the position that the State was not required to make any further investigation into these matters and that the instruments of record were "spurious and fictitious" instruments.

The extent of Iowa's knowledge or investigation appeared to be the mere study of certain selected records, maps, and documents from the Corps and an examination of the records of Mills County, Iowa to obtain names of possible parties defendant, with some limited investigation into the records of the Secretary of State in Des Moines and the Mills County ASC office and in the Mills County

Courthouse. The Nebraska records were completely ignored and when the Nebraska titles were raised, Iowa arbitrarily took the position that they were invalid. As in the Schemmel case, this is another situation where Iowa merely filed a quiet title action against the landowners without investigation of their titles and where Iowa has attempted to shift the tremendous burden of tracing and proving the past history of this land to the individual farmers, ignoring everything that has happened in connection with the land except certain assumed facts or conclusions by a few officials or employees of the State of Iowa concerning its formation.

Mr. Babbitt first received notice that Iowa might be claiming his land when a friend called him from Council Bluffs, Iowa and told him about an article in the Council Bluffs newspaper of February 19, 1961 entitled "Missouri River Could Become A 'Playground' ". This article referred to the areas mentioned in the Missouri River Planning Report. The very fact that Iowa announced that they were claiming the title to the land made it impossible for Babbitt to borrow money on his land in order to finance his agricultural operations. He was twice refused loans because in the opinion of the financial institutions or their counsel, the State of Iowa's claim clouded the title. When Mr. Babbitt spoke with the Assistant Attorney General of Iowa concerning their claims and their plans he received a letter dated November 22, 1961 which stated that it was impossible to give him an absolute definite answer to his questions at that time but that he might assume for the present that the State of Iowa through the State Conservation Commission did in fact claim title to so much of the

property as was physically located within the State of Iowa.

The mere claim of title by the State of Iowa constitutes a hardship upon the farmer as he can no longer borrow funds or use his land as he might if his title were good. The State of Iowa by merely making a claim to the land clouds the title and is in violation of Section 3 of the Compact requiring it to recognize titles which had been good in Nebraska.

Nebraska Exercises of Jurisdiction Prior to the Compact

The Nottleman Island or Babbitt Island area was surveyed by the Cass County, Nebraska surveyor as a separate island on August 18-25, 1933 and the survey was filed in the office of the Register of Deeds of Cass County, Nebraska as well as the office of the Cass County Surveyor. The tax records of Cass County, Nebraska show that the island area was surveyed and reported to the County Assessor for assessment on September 7, 1933. The island was taxed in Nebraska as a part of Rock Bluff Precinct, Nebraska from 1933 up until the adoption of the Compact. In 1952 the property was removed from the Nebraska tax records by the Board of County Commissioners of Cass County, Nebraska for and after the year 1943 upon recommendation of the Cass County Attorney who at that time stated that his independent investigation revealed that under the Nebraska-Iowa Compact of 1943, this island became a part of the State of Iowa and was then taxed in the State of Iowa.

A considerable volume of evidence was introduced by plaintiff showing that individuals who lived on Nottleman's Island in the 1930's filed personal property tax returns in the State of Nebraska, registered their motor vehicles in the State of Nebraska, and sent their children to school in the State of Nebraska as Nebraska residents and without the payment of tuition. Testimony indicated that parents of two of these children inquired in Iowa whether they should send their children there but were informed that they could not. The school records of Cass County kept pursuant to Nebraska statute showed the children from families which lived on the island in attendance at the Rock Bluff school during the years 1935 through 1938. Three children attended school in Nebraska, two from the family of Ernest L. Shipley and one from the family of Cleo Baker. A child of the Ernest Shipleys was born on the island in 1936 and the birth certificate was filed with the State of Nebraska, Department of Health, Division of Vital Statistics and there was a Certificate of Death filed with the Division of Vital Statistics of the Nebraska Department of Health showing the death of a daughter of Ernest Shipley in 1935 while the Shipleys lived on Nottleman Island. One of these witnesses, Mrs. Ruth Dooley, first stayed on Nottleman Island in 1929 when she spent the whole summer there with her uncle and grandparents. The evidence shows that from 1929 until the adoption of the Iowa-Nebraska Boundary Compact of 1943, Nebraska residents were farming the island and during most of that period Nebraska residents lived upon the island. The two witnesses who had lived upon the island testified that they considered themselves citizens of Nebraska and the other people on the island considered that they were residents of

Nebraska; this was common knowledge in the Rock Bluff area that these people were considered Nebraska citizens. This was fairly common knowledge in the whole Rock Bluff and Plattsmouth vicinity.

There is in evidence a considerable volume of records substantiating these facts which again illustrates the tremendous amount of research, effort and expense in the collection of this type of data from old records in order to establish a factual situation which was well recognized between 30 and 40 years ago. The passage of time, death of witnesses, and loss or destruction of any of these records would obviously prejudice the landowner claimants in an action of this nature brought by the State of Iowa.

None of the witnesses who testified concerning the actual formation of Nottleman Island or the movements of the Missouri River in that area testified that it was Iowa land or considered to be in the State of Iowa prior to the Compact whereas several witnesses from Nebraska indicated that Nottleman Island was considered to be a part of the State of Nebraska prior to the Compact.

The records of the office of the Register of Deeds of Cass County, Nebraska show deeds as having been recorded in the 1930's conveying portions of the island in Nebraska. One of these deeds carried the recitation that it was to supplement a conveyance made in November, 1928, which conveyance was in writing and properly signed, witnessed and acknowledged but never filed for record.

The Nebraska courts also exercised jurisdiction over Nottleman Island.

In 1940 an action to quiet title to the north half of Nottleman Island was filed in the District Court of Cass County, Nebraska captioned *Harvey Shipley, et al, v. Frank G. Hull, et al.* This was a quiet title action with publication of notice in a legal newspaper in Nebraska which was contested by a Nebraska riparian owner who alleged that the lands were accretion to his lands and were attached to his lands as accretions until the government engineers changed the channel in the Missouri River so that the channel cut off a large portion of said accretion. The court entered two decrees in the case, one quieting title as against certain defendants on August 1, 1940 and the other quieting title to the remaining defendants on June 19, 1941. The court found that the plaintiffs had been in actual, uninterrupted, continuous, notorious, peaceable, adverse and exclusive possession of the land for more than 10 years and quieted title in the plaintiffs. A finding in the decree indicated that the island had been in private possession since 1926. This case was tried in the District Court of Cass County, Nebraska which is a court of general jurisdiction in Nebraska.

The south half of Nottleman's Island was included within the property of the Estate of John H. Nottleman, deceased which was probated in the County Court of Cass County, Nebraska, the Nebraska Court of probate jurisdiction. The County Court records show that John Nottleman died on March 31, 1940 and this part of Cass County, Nebraska was described by Nebraska description in the inventory as being property of the estate. The estate rented this island land to Mr. D. M. Babbitt. The administrator then filed a Petition in the District Court of Cass County,

Nebraska for a license to sell the real estate, alleging that the deceased had died "seized and possessed" of the land on Nottleman's Island and praying for authority to sell it. The District Court entered an Order to Show Cause ordering that all persons interested in the Estate of John Nottleman appear to show cause, if any, why license should not be granted to sell the real estate and there was publication for three successive weeks in the Plattsmouth Journal, a Nebraska legal newspaper, in 1940. There is also a Notice of Sale published for three consecutive weeks in January of 1941 and the land was sold to J. L. Jones and D. M. Babbitt. The sale was confirmed and the executor was ordered by the court to deliver a deed to the purchasers. An Administrator's Deed from the administrator to J. L. Jones and D. M. Babbitt was filed on February 13, 1941 in the office of the Register of Deeds of Cass County, Nebraska conveying the south half of Nottleman's Island by Nebraska description as Nebraska land.

There were many Nebraska public records offered and a large volume of testimony which established that at the time of the Iowa-Nebraska Boundary Compact and for a considerable period prior thereto, the State of Nebraska exercised jurisdiction over Nottleman Island and there were no exercises by the State of Iowa of jurisdiction over the island. Had the two states investigated the status of Nottleman Island at that time they could have come to no other conclusion than that it was considered to be a part of the State of Nebraska and following the change in channel by the Corps of Engineers was considered as being within the category of "ceded" lands or lands transferred to Iowa by the Compact.

Ownership and Possession of Nottleman Island

Individuals have exercised all the rights and obligations of ownership and possession of Nottleman Island from 1929 to the present, a period of over 40 years and there is evidence that there was an individual in possession of the island from 1926 to 1929. Consequently, there were individuals in possession of the land for at least 35 years before the State of Iowa filed a quiet title action in the District Court of Mills County, Iowa making claim to the land.

Mr. D. M. Babbitt obtained his claim of record to the property through his purchase along with a Mr. Jones of the property through the administrator's sale in the District Court of Cass County, Nebraska. On February 13, 1941, the same date as his deed, Mr. Babbitt filed a mortgage to J. L. Jones with the Register of Deeds of Cass County, Nebraska. This mortgage was outstanding at the time of the Iowa-Nebraska Boundary Compact and was satisfied by Mr. Babbitt in 1949. It was a mortgage entitled to be recognized by the State of Iowa under the terms of Section 3 of the Compact.

The owners of the north one-half of the island all claimed their record title through the quiet title proceedings in the District Court of Cass County, Nebraska in the case of *Shipley v. Hull;* and Margaret T. O'Brien claimed through the Treasurer's Deed from the County Treasurer of Cass County, Nebraska which was filed on January 3, 1945 and through a subsequent warranty deed from Katherine Julia O'Brien, one of the plaintiffs in the case of *Shipley v. Hull.*

William and Mason Watts had obtained a deed in 1937 to the northeast portion of the island and were parties to

the quiet title action of *Shipley v. Hull.* Harvey Shipley conveyed the lower portion of the north one-half of the island to George Troop who later conveyed it to Lee A. Sargent and it has been in the Sargent family since 1953.

There was considerable testimony to illustrate the open, public and notorious occupation and use of the land by the landowners. People lived on the island, it was fenced, had houses upon it, had been cleared extensively, had general farming facilities such as feed lots, loading chutes, hog pastures, and was sowed with crops such as alfalfa, soy beans and corn. There was a farm sale on the island in 1956 advertised in Nebraska and Iowa newspapers. The land was taxed in Nebraska up to the time of the Compact and was taxed in Iowa following a lawsuit brought by the individuals in 1946. There were articles in the Omaha Sunday World Herald in 1954 and 1955 with photographs of the Babbitts with reference made to either the clearing of the island or the crops taken from the island. Mr. Babbitt testified that he put every dollar he ever made after his living expenses into this farm to make a good farm of it. He also put an Inland steel bin on the island which was mortgaged to the Commodity Credit Corporation. He obtained a storage bin loan and in his dealings with the United States Department of Agriculture, Agricultural Stabilization and Conservation Service and with the Commodity Credit Corporation, those governmental agencies raised no question as to his title. The farm was leased for part of the time and Mr. Babbitt had the property surveyed and the survey filed of record in Mills County. The individuals had filed affidavits of possession in Iowa pursuant to the advice of their attorneys. Mr. Babbitt's land presently has about 620 acres of crop land.

Over 400 acres were cleared between 1944 and 1957 at a cost of at least $100 an acre, not including the burning and reburning and discing. The Babbitts hired 20 or 25 people at one time or another to assist with the clearing. The land was posted with "no trespassing" signs by Babbitt and by the Deputy Sheriff or Sheriff. The State of Iowa Conservation Commission or any agency of the State of Iowa never posted any signs around Nottleman Island designating it as Iowa state land.

The Troop land which was approximately 370 acres had about 70 acres cleared in 1945 and Troop farmed there. In 1953 he sold the land to Lee Sargent who died in 1957 and since then the land has been farmed by Sargent's sons. The Sargents farm around 355 acres on Nottleman Island and there is some land which they have not cleared as yet.

When the Sargents obtained the property there was approximately 80 acres cleared and in the three year period from 1953 to 1956 they cleared about 300 acres. They have had crops on the island every year since 1953 barring 1967 when everything was lost in a summer flood. The land was mortgaged by the Sargents to the Travelers Insurance Company who accepted the Sargents' title. Steel grain bins have been built on the property. In Mr. Merrill Sargent's opinion, the land would bring $600 or $700 an acre for most of the 350 acres. There is an additional 40 acres which has not been cleared which is worth $200 or $300 per acre.

The northwest corner of the island is owned by Mrs. Margaret T. O'Brien, the widow of an attorney. This property was conveyed in 1939 to Katherine Julia O'Brien, her sister-in-law. Mrs. O'Brien had received a tax deed from the County Treasurer of Cass County, Nebraska in 1945

and testified that her husband, who was an attorney, had represented her. The O'Briens have claimed land on Nottleman's Island from shortly after the deed in 1939. 200 acres have been cleared at a cost of at least $10,000, according to her records. This was done by a corporation from Des Moines, Iowa and some by an individual from the area. The land is presently farmed and has been leased since about 1950 or 1952. Her share of the crop for one of the years prior to her testimony amounted to about $8,000 under the crop sharing arrangement.

The northwest corner was originally acquired by Albert Mason Watts and William Watts who purchased it from Harvey Shipley in 1937 in Cass County, Nebraska. They paid taxes on this land in Nebraska for several years and then were participants in the suit in Iowa to have the land transferred and placed on the Iowa tax books. William Watts passed away and the property passed to Mason Watts. It was appraised by the Iowa State Inheritance Tax appraisers and an inheritance tax was paid to the State of Iowa. The land has been fenced and posted against trespassers. There are 238 or 240 acres which belonged to the Watts with about 79 acres cleared. It is farmed by a tenant who has been renting it for two or three years. The previous year, Mr. Watts' share of the crops was a little better than $2,000.

There is no question from the evidence but that the individuals were exercising all of the incidents of ownership and possession of the property without interference from the State of Iowa and are presently still in complete control of the land. This was a matter of public notoriety in both Cass County, Nebraska and Mills County, Iowa and was accepted by the local Iowa officials. It was also

accepted by the Io
wa State Inheritance Tax authorities
and the officials of
the Iowa Conservation Commission in
1951.

All of the indiv
duals paid taxes in Iowa continuously
from 1947 until the
present date, which total taxes over
the years through 1
966 were in excess of $27,000. Those
taxes have been incr
eased in recent years since 1966. Even
while the State was
attempting to quiet title to the land,
the County officials
of Mills County were collecting taxes
under the threat of
tax sale if they were not paid.

The area is no l
onger an island but can be reached by
a road leading to th
island across the abandoned channel
on the east. An app
raiser testified that in his opinion the
Nottleman Island
racts had a value of $607,900 as
of December 29, 196
7 and since that time the trend with
regard to values of l
nd of this character had been upward.
He appraised some
of the land as being worth approxi-
mately $500 per acre

The State of Io
wa paid no attention to the land until
it had been made v
luable farm land by the occupants.
Iowa made no claim t
the area in 1943 and at no time until
indication in the Pla
ning Report of 1961 that they intend-
ed to file a quiet title
action to the land. The Iowa Attorney
General's office had
notice of the status of the land in 1946
and 1951 and the
owa Conservation Commission dis-
claimed any claim to
the island and accepted the fact that
it was the private pr
perty of the occupants in 1951.

**Conduct of the Sta
e of Iowa Following the Compact;
Recognition of
he Titles to Nottleman Island**

On March 22, 19
46 Mrs. O'Brien attempted to file a
deed, conveying a por
tion of Nottleman Island to her, with

the Mills County, Iowa, Recorder's Office. The Recorder's records show the deed was not recorded and was returned to the O'Briens.

Mr. Lewis S. Robinson, County Auditor of Mills County, Iowa in March of 1946, testified that the Recorder did not have any place to record the O'Brien deed and the Recorder returned it to the Auditor's Office because she had no record books in which she had this area designated. The description on the deed carried section, range, and township designations which were not Iowa descriptions but which were Nebraska descriptions. Mr. Robinson then contacted the Mills County Attorney and the two of them made a detailed study of how the matter should be handled. They first went to the Clerk's Office in Cass County, Nebraska and found that this same piece of land was carried on their real estate rolls. They then visited the area Corps of Engineers Office in Omaha to see how the land was described and from there went to other Iowa river county officials and found that these officials had the same problems and had found no solution for them. The Mills County Attorney then wrote a request to the Attorney General of the State of Iowa requesting an opinion and Mr. Robinson and the Mills County Attorney went in person to Des Moines and talked to a Deputy Attorney General of Iowa and left the question with him. The witness never heard of any answer to that question. He substantiated that there was a great deal of confusion concerning treatment of these lands along the river.

Mr. Robinson then wrote the General Land Office in Washington by letter dated April 25, 1946 and explained that due to the change brought about by the 1943 state

legislatures, Mills County, Iowa had acquired a certain area of land of approximately 1,500 acres which was formerly of Cass County, Nebraska and was known as "Nottleman's Island." His letter commenced with the following:

> "In 1943 the Legislatures of the two States of Iowa and Nebraska passed an act establishing the center of the channel of the Missouri River as the boundary line between the two states. This was done because the river had changed its course in previous years putting lands of each state on either side of the river adjoining lands of the other state."

His letter pointed out that Nebraska township and section lines will not join with Iowa lines when projected, and he inquired as to how the land should be identified. His letter also stated that counties other than his had similar difficulties but none they had contacted had arrived at any satisfactory solution. The reply from the Department of the Interior General Land Office recognized that the Compact transferred the jurisdiction from Nebraska to Iowa but did not affect the ownership of the land and suggested that the land descriptions used in disposing of the lands would be appropriate for the purpose of assessment and taxation.

In 1946 some of the owners of the land on Nottleman Island contacted Mr. Whitney Gillilland because they wanted the official records of Mills County, Iowa to show their title and ownership. They had sought to record their title papers with the Mills County officials and had been refused the right to have them recorded. Mr. Gillilland was an experienced Iowa attorney, having previously to 1946 served for a period of time on the District Bench in southwestern Iowa, a court of general jurisdiction in Iowa. In 1946 he would have been in the general practice of law at Glenwood,

Iowa for a period of about 17 years. He has been a member of the Civil Aeronautics Board since 1959 and has had other governmental positions such as Chairman of the Foreign Claims Settlement Commission of the United States, Chairman of the War Claims Commission and Assistant to the Secretary of Agriculture. Mr. Gillilland made a personal examination of the tract books in the County Auditor's office and determined that there were no descriptions for the area. He prepared a lawsuit filed in the District Court of Mills County, Iowa with the Watts, Shipley, O'Brien, Babbitt, and Troops as plaintiffs and the County Auditor, County Recorder, and Mills County, Iowa as defendants. The petition was filed in November, 1946 and alleged the facts concerning the derivation of the titles of the various plaintiffs through the Nebraska quiet title action, administrator's sale and county treasurer's tax deed. The petition alleged that prior to the Boundary Compact the tracts were located in Cass County, Nebraska and were transferred to and became a part of Mills County, Iowa by the statutes which created the Compact. It alleged that uncertainty had arisen as to the manner and method of indexing the lands and that the owners were entitled to have these instruments recorded in the office of the County Recorder. An answer was filed by the County Attorney for Mills County, Iowa which admitted the Compact and that the land was acquired by the change of boundary and further alleged that on May 6, 1946 the County Attorney had written to the Attorney General of the State of Iowa for an opinion as to the proper procedure in correctly describing this additional land for taxation purposes and in setting up the necessary plats and transfer and he had not received any opinion. The decree was filed on January 6, 1947 in

which the court found the allegations and statements of the Petition were true and the plaintiffs were entitled to the relief prayed for. The court further found ownership of the land in the plaintiffs and ordered the Clerk of the Court to file a copy of the plat in the Plat Book and Index Book and other books referred to under the applicable statutes of the Code of Iowa. Mr. Gillilland testified that the landowners were actually physically in possession of the land in 1946 and it was open and notorious and neither the landowners nor he, as their attorney, had any idea that the State of Iowa had any claim to Nottleman's Island in 1946.

In 1950 an Iowa State Conservation Commission employee living in Glenwood, Iowa, came to see him and told him that the Conservation Commission had an application before it to purchase the land. The employee had searched the records and the county officers had referred him to Mr. Gillilland. A few days later Mr. Gillilland was in Des Moines and talked to the Iowa Attorney General, Robert Larson, who is presently a member of the Iowa Supreme Court, about the matter. The Iowa Attorney General suggested that Mr. Gillilland write the Iowa Conservation Commission concerning the matter and Mr. Gillilland did so by letter of March 20, 1950.

Mr. Ray W. Beckman, Chief of the Fish and Game Division of the Iowa Conservation Commission testified that he remembered this letter and he answered it on April 19, 1950 stating:

> "Please be advised that the island you referred to is not State property. The information we have is that this island belongs to four parties as follows:

Wm. Watts	M. Babbitt
Margaret O'Brien	Jones & Babbitt''

Mr. Beckman testified that as Chief of the Fish and Game Division he was responsible among other things for all the lands that were under the supervision of the Fish and Game Department. He remembered being handed the letter by the Director of the Iowa Conservation Commission and testified that he was instructed to make that answer by the Director. The office of Director is a statutory office under the Iowa Code.

This answer was then related to the owners and they relied upon it pursuant to the advice of their attorney, Mr. Gillilland.

The Babbitt land was subject of another lawsuit filed in the District Court of Iowa in and for Mills County on June 8, 1961 when Mr. Babbitt brought suit against the members of the County Board of Review of Mills County, Iowa and the County Assessor of Mills County, Iowa, alleging that he was the owner of real estate on the island which had been assessed for taxation but that the assessment was unjust and excessive and that his taxes should be lowered. The Mills County Attorney filed an answer admitting the ownership by Mr. Babbitt and the court entered a judgment and decree on November 30, 1961 in which it found that the assessment was not illegal, excessive, unfair, unjust or inequitable and was not contrary to law.

When Lee Sargent died in 1957, the Nottleman Island land was included within his estate and the Iowa State Tax Commission assessed an inheritance tax upon the estate including the valuation of this land, and an inheritance tax

was paid to the State of Iowa. William Watts died in the 1960's and the land was included within his estate and assessed for Inheritance Tax purposes and a tax was paid to the Iowa State Tax Commission on the estate.

Mr. Watts further testified that at one time Mr. Stiles, head of the Conservation Department, was visiting them and the Watts brothers tried to sell the land to Iowa for practically nothing or give it to Iowa if they would make a game preserve out of it, but Stiles refused to have any part of it and wanted nothing to do with it.

The record clearly indicates a complete acceptance by the local officials of Mills County, Iowa and recognition by the Iowa Attorney General's office and Conservation Commission in the late 1940's and early 1950's that Iowa had no claim to the land and that there were titles good in Nebraska which were good in Iowa pursuant to Section 3 of the Compact. It is neither fair nor equitable for Iowa to now change its position and claim title in light of these past recognitions and the continuous period of taxation of the land by the Iowa officials. (See *United States Gypsum Co. v. Greif Bros. Cooperage Corp.*,, 389 F. (2d) 252 (8th Cir. 1968).

Regardless of how land along navigable rivers may have formed, there is another well established principle applicable to the boundary between states. The land may become a part of a state as a result of long and continuous exercise by that state of sovereignty and jurisdiction over the land with the acquiescence of the other state. The principle of prescription and acquiescence has as its primary object and underlying basis "the creation of stability of order" and "there is no controversy in which this great

principle may be applied with greater justice and propriety than in the case of disputed boundary." *Arkansas v. Tennessee,* 310 U. S. 563. See also *Indiana v. Kentucky,* 136 U. S. 479, *Rhode Island v. Massachusetts,* 4 How. 591, *Michigan v. Wisconsin,* 270 U. S. 295, *Maryland v. West Virginia,* 217 U. S. 1, *Virginia v. Tennessee,* 148 U. S. 503, and *Louisiana v. Mississippi,* 202 U. S. 1.

Another significant concept in the consideration of cases involving boundary disputes is the recognition by public officials and inhabitants of the location of the boundary. See *Minnesota v. Wisconsin,* 252 U. S. 273, *Handly's Lessee v. Anthony,* 5 Wheat. 374.

The history of taxation by two states in respect to a disputed area is also of substantial weight in indicating acquiescence by one of the states in the boundary line restricting her jurisdiction. *Vermont v. New Hampshire,* 289 U. S. 593.

The exercises of jurisdiction by the State of Nebraska over the Nottleman Island area by having surveyed the land, taxed the realty, taxed the personal property of the inhabitants, registered births and deaths, quieted title and conveyed title through estate proceedings and the issuance of a license to sell real estate issued through the District Court, and the fact that the inhabitants in the area all considered it to be in Nebraska, coupled with a complete lack of exercise of any jurisdiction over the area by the State of Iowa would seem to be conclusive that this was in Nebraska prior to the Compact. Iowa's acquiescence for an additional 20 years following the Compact and Iowa's taxation of the land supports this conclusion.

Nebraska contends that Iowa disregarded all of this evidence and that Iowa should not be able to bring an action

requiring the landowner to establish his title by making this showing. The individual defense of such a case by a landowner places a tremendous expense upon him. This includes the difficulties of searching out records and land marks which may have been destroyed by the passage of time and of obtaining witnesses to facts or occurrences in years long past. As the court said in *Rhode Island v. Massachusetts*, 4 How. 591, 639:

> "No human transactions are unaffected by time. Its influence is seen on all things subject to change. And this is peculiarly the case in regard to matters which rest in memory and which consequently fade with the lapse of time, and fall with the lives of individuals. For the security of rights, whether of states or individuals, long possession under a claim of title is protected. And there is no controversy in which this great principle may be involved with greater justice and propriety than in a case of disputed boundary."

This statment has been cited several times in boundary cases. If there is to be any stability of order along the Missouri River, the Compact must be construed in such manner as to prevent the State of Iowa from contesting the title of landowners such as in the Babbitt and Schemmel cases and all other areas which were in existence at the time of the Compact. This is certainly consistent with the intent of the Compact and effectuates its purpose.

History of the Movements of the River in the Nottleman Island Area and Formation of the Land

Although the court has found that the recognition testimony and the conduct of the states is determinative of the fact that the Nottleman Island or Babbitt Island area

must be recognized by the State of Iowa as having had a title good in Nebraska at the time of the Iowa-Nebraska Boundary Compact and the State of Iowa must recognize that title regardless of how the land actually formed or in what jurisdiction it formed, the court makes the following findings of fact concerning formation of the land in the event that it should finally be held that the burden does lie upon the landowner to prove how his land formed and that the land was actually in Nebraska prior to the Compact:

The evidence shows that when Nebraska was admitted into the Union the Missouri River was originally in approximately the same position which it presently occupies in the Nottleman Island area but that, from the time the two states were admitted into the Union, the river commenced to work easterly and cut away land on the Iowa side. Behind this movement, an island originally platted as Nebraska land which was immediately north of the area involved and referred to on early Corps' maps as Tobacco Island, began to enlarge both to the east and downstream on the Nebraska side of the river.

A study of the original government surveys and maps from the U. S. Army Corps of Engineers and Missouri River Commission document this eastward movement. It is further substantiated by an 1895 survey by the County Surveyor of Mills County and a 1920 Soil Survey.

Several witnesses who lived along the Missouri River on the Iowa side and were familiar with it testified concerning the movements of the river to the east at various times commencing shortly after 1900. Some of them had

to move away from the river because it was cutting toward them and houses and farms were cut into the river on the Iowa side.

Records dated September 25, 1922 in the Mills County, Iowa Auditor's office indicate that from 1851 to 1895 the river carried away about 1,140 acres of land in Mills County and that since 1895 there had been 1,296 acres more taken making a total of 2,436 acres taken by the river by September 25, 1922. As a result of the concern on the Iowa side, a river protection district was established pursuant to the Iowa statutes and retards were constructed on the Iowa side commencing in about 1922 or 1923 to attempt to halt this cutting of the river. According to a comparison of the 1922 map prepared in connection with this Missouri River Protection District and a 1923 Corps of Engineer map, between 1922 and 1923 the river cut through the accretion area which had been on the Nebraska side and following 1923 the various maps indicate a distinct island with water on both sides.

Testimony by Mr. Harry Weakly, Nebraska's tree expert or dendrochronologist, verified that trees which commenced growing on what was the Nebraska accretion area remained on the island after a channel of the Missouri River had cut back to the west upstream between 1922 and 1923 leaving the island as a substantial land area. Mr. Weakly testified that one tree on the island commenced to grow in 1900. This tree was located to the west of the 1890 thalweg which appears on the Missouri River Commission and Corps of Engineer's maps. Even one of Iowa's experts who testified as to the age of the trees on the island, though differing in count from Mr. Weakly, stated

that two of the trees commenced to grow on the island prior to 1923.

Witnesses who lived in the Rock Bluff area on the Nebraska side also testified concerning how the river had cut to the east and how, at various times the river bank was considerably to the east of its original location with chutes on the Nebraska side which at times would be dry. People could wade to the Nottleman Island area across some of the shallow water at times. Captain Otto Neuhauser of Kansas City testified that he had been on boats on the Missouri River ever since 1910 and made his first trip as far as the Rock Bluff area in a river boat in 1915. He was a pilot on the Missouri River from 1913 until 1957 and the first time that he came up the Missouri River he described the water on the west side of Nottleman Island as quite wide and shallow and he could not bring his boat up it. Consequently, he had to go around the east or left bank side of the Nottleman Island area where the main channel flowed. He verified that the main channel was also on that east side when he worked for a construction company in 1921 placing retards and again in 1931 when working for the Corps the main navigable channel was on the left or east side of Nottleman Island. Workers for the Corps of Engineers including a steersman on one of the Corps boats, who was also a boat pilot, testified that before the Corps of Engineers commenced their river work, the main channel was on the east side.

Witnesses called by the State of Iowa to attempt to counter this mass of evidence indicated a lack of familiarity with the Missouri River in the Rock Bluff vicinity and only casual acquaintance with the situation there. Some

of the witnesses called by Iowa recognized the river had moved considerably to the east and also were somewhat familiar with the cutting of the river towards the east into Iowa. No witnesses, however, testified that the island formed in Iowa or was considered as in Iowa prior to the Compact.

The evidence shows that from the time of the original Nebraska survey in 1857, the Missouri River had moved to the east in the Rock Bluff area more than one mile and the island formed in Nebraska. The Corps of Engineers' channel stabilization work placed the main channel to the west of the island, and the Iowa-Nebraska boundary at the time of the Compact was in the abandoned channel approximately a mile east of the Compact line.

Movement of the Missouri River by the Corps of Engineers Into the Designed Channel

Commencing in about 1934 the U. S. Army Corps of Engineers began work in the Nottleman Island area. Testimony of several knowledgeable witnesses familiar with the vicinity or who worked for the Corps of Engineers established that the main channel was on the east of Nottleman Island with a subsidiary channel to the west of Nottleman Island. The Corps commenced work at Plattsmouth and came downstream, shutting off the channel on the west side of the island to the north of Nottleman Island. The designed channel was to come under the Plattsmouth Bridge and then go around the east side of the island north of Nottleman Island, swing back and come around the west side of Nottleman Island, and then start around the east side of an island immediately downstream which was bisected by a canal and the river was then brought back to

the west and continued in its design of sinuous reverse curves. In that whole stretch of river the maps showed divergent channels on the east and west sides of various islands and the Corps at Nottleman Island reversed the main channel from what it previously had been.

The Corps commenced driving the dikes on the east side at the upstream end of Nottleman Island in order to divert the channel to the west. The Corps had some difficulty in holding these dikes and in the spring of 1935 the river came down the west side of the upstream island and cut through the old channel on the east of Nottleman Island, washing out the dikes, with 25 to 30 feet of water going through. The channel was finally successfully transferred from the east side to the west side of Nottleman's Island in around 1938. During this river work by the Corps Nottleman's Island remained as an island and did not disappear. Even in 1938 there was testimony by workers from the Corps that they had to place rock along the dikes on the east side and even at that time, although the dikes were in place, there was more water running along the east side of Nottleman Island than on the west side which was the designed channel. The Corps maps from 1937 to 1941 called the island "Noddleman Island".

The court finds that the Corps of Engineers moved the main navigable channel of the Missouri River from the east side of Nottleman Island to the west side into the designed channel, thereby creating an avulsion. The Iowa-Nebraska Boundary immediately prior to the adoption of the Iowa-Nebraska Boundary Compact of 1943 remained in the east abandoned channel of the Missouri River and the thread of that channel constituted the boundary be-

tween Iowa and Nebraska prior to the Compact. At that time, the entire Missouri River was located in the State of Nebraska with both the right and left bank a part of Nebraska and title to the bed of the Missouri River in that place was in the Nebraska riparian owners subject to the public easement of navigation under Nebraska law. The east abandoned channel carried flowing water for several years and eventually ceased to flow and presently the island can be reached by road leading into the island from the east.

Iowa's traverse of Nottleman Island in addition to being admittedly by the State of Iowa in error on the western side in that it extends approximately 50 feet into Nebraska across the Compact Boundary between the two states, also had no basis in fact along the eastern side of Nottleman Island and, as in the Schemmel case, it followed no geographical feature marking the left bank ordinary high water mark as contended by the State of Iowa. The traverse goes through water, low swamp, and brush and across flat land. It is another indication of the lack of precision in the work of the State of Iowa, inadequate investigation and the arbitrary approach of her officials.

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THE SCHEMMEL ISLAND AREA

Nebraska Exercises of Jurisdiction Prior to Compact

Commencing in 1895, Nebraska assumed jurisdiction of all of the land in the Schemmel area and exercised jurisdiction continuously until the Iowa-Nebraska Boundary Compact of 1943.

In 1895 the Otoe County Commissioners ordered lands added to the tax rolls of Otoe County, Nebraska which included the Schemmel area as accretions to Nebraska surveyed by the Otoe County Surveyor. Generally, the land was taxed in Nebraska continuously from 1895 through 1943, a period of 49 tax years. A few discrepancies in the records were explained by the testimony. The tax records for each year taken from the records of the Otoe County Treasurer's office offered by Plaintiff illustrate the tremendous amount of work and difficulty in tracing the tax history of land along the Missouri River. This is obviously a tremendous burden and is expensive and time consuming.

In 1908 a Treasurer's Deed from the County Treasurer of Otoe County, Nebraska was filed for record in the office of the Register of Deeds of Otoe County which was issued pursuant to public sale of the real estate under a decree of the District Court of Otoe County, Nebraska in a State tax suit for the year 1905. The Schemmels at the time of the Compact had a direct chain of title tracing back to this Treasurer's Deed.

Over the years there were some Nebraska quiet title actions in the District Court of Otoe County, Nebraska quieting title to some of the land which is included within the description of the Schemmel land. There were also some conveyances of the land recorded with the Register of Deeds of Otoe County, Nebraska.

Henry Schemmel's initial claim to the land arose from a tax sale certificate in Otoe County and from three deeds dated January 11, 1938. These deeds completed a chain of title to the Schemmels tracing back to the 1908 Treas-

urer's Deed. Mr. Schemmel originally acquired the land in partnership with a Dan Hill, but the Schemmels later acquired the Hill interest. These deeds were recorded with the Register of Deeds of Otoe County, Nebraska in 1938 and were filed of record with the Recorder of Fremont County, Iowa in 1939. Consequently, record notice was given in both states prior to the Compact of the conveyance of this land as Nebraska land and of the Nebraska title.

Mr. Henry Schemmel is and has been a Nebraska resident in the Nebraska City area since 1934.

At about the same time that Mr. Schemmel filed his deeds in Iowa, he wrote a letter in 1939 to the Fremont County, Iowa officials advising them that some of his land was now on the Iowa side of the canal dredged by the Corps of Engineers in Otoe Bend. This letter was recorded with the Fremont County, Iowa Recorder on August 22, 1939 and the letter stated that the Federal Government Improvement Program from 1933 to 1939 had changed the Missouri River by levees and dikes so that this land would be on the Iowa side of the river but was Otoe County land.

There were two quiet title actions in the Otoe County, Nebraska District Court, which is a court of general jurisdiction in Nebraska, quieting title to a large portion of the Schemmel land and the quiet title decrees were entered on May 28, 1941. After these decrees were entered, Mr. Schemmel notified the Fremont County, Iowa officials of that fact by a letter originally sent on June 5 or 6, 1941 and returned without recording. Mr. Schemmel later recorded the letter on March 1, 1956 in the Fremont County Recorder's Office. The letter stated that due to the chang-

ing of the Missouri River by the construction of pile dikes, dredging and revetment works by the United States Government Corps of Engineers, a large part of what is presently called Schemmel Island would be on the Iowa side of the main channel of the Missouri River. One of the quiet title decrees was filed by Mr. Schemmel with the office of the County Recorder of Fremont County, Iowa on August 25, 1941.

At the time of the Iowa-Nebraska Boundary Compact, there was a title to the Schemmel land which was good in Nebraska as recognized by the Nebraska court decrees and notice of this Nebraska title was on record in Fremont County, Iowa with Iowa's proper recording officials.

The Schemmel land was bisected by the Otoe Canal dug by the Corps of Engineers in 1938, and Mr. Schemmel's title to the land which remained on the right bank or Nebraska bank of the Missouri River following the Compact has subsequently been recognized in Nebraska by private individuals and by the Nebraska courts. Mr. Schemmel's claim of title to the land on both sides of the Missouri River, some of which became located in Iowa as a result of the Compact, emanated from the same Nebraska deeds, actions, and indicia of ownership. Some of this land is to the east of the land Iowa claims, but Iowa has made no claim to this area.

No witness testified that the Schemmel Island area had been in Iowa prior to the Compact whereas several of the Nebraska witnesses testified as to how the land was severed from Nebraska by the canal dug in Nebraska and the Nebraska witnesses recognized this area as originally being in Nebraska.

Conduct of State of Iowa Prior to Compact With Reference to Schemmel Island

The records of the County officials of Fremont County, Iowa substantiate that the Missouri River moved easterly up until immediately prior to 1905 and that the geographical feature known in the area as the "Iowa Chute" marks the abandoned channel of the Missouri River. In the Schemmel area, the Iowa chute is located approximately two miles east in some places of where the designed channel of the Missouri River is today. Records from the Fremont County Treasurer's office and the Journal of Board of Supervisors of Fremont County, Iowa which were offered by Plaintiff for years between 1866 and 1905 show a progressive history of removal of portions of what previously had been Iowa land in the Schemmel area from the Iowa tax rolls as the river moved to the east into the location of the Iowa chute. The tax records of Fremont County, Iowa reflect that in 1899 and 1901 the Missouri River was located in the Iowa chute. This was confirmed by plaintiff's eye witnesses.

The Fremont County records establishing the Knox Drainage District in 1909 found in the Fremont County Courthouse establish the boundary of the district as a levee along the east bank of the Missouri River, which coincides with the location of the Iowa chute.

An Iowa State Highway Commission Official Map of Fremont County, Iowa filed on February 14, 1914 in the office of the Fremont County Auditor also shows the Missouri River with the left or Iowa bank being located in the general configuration and location of the Iowa chute. This constituted another recognition by Iowa officials that

the river had been located there and that the left or east bank represented the limits of Fremont County, Iowa.

Other records on file with the Auditor of Fremont County recognized the bank along the Iowa chute as being the high bank of the Missouri River and as the abandoned Missouri River bank and the limits of the drainage districts. These records are dated 1920, 1922, 1923 and 1931. Even in 1931 the Fremont County officials recognized the Iowa chute as being the abandoned Missouri River bank. The major portion of Schemmel Island is described as section 15-67-43 in Iowa and the Iowa tax records indicate that no part of Section 15 is found on the Iowa tax rolls after 1880. During most of these years no tax books were found but the tax records indicate that there was no listing of this section in 1881, 1882, 1884, 1885, 1887, and in 1934, 1935, and 1936, which records were available. Consequently, the Iowa tax records did not show taxation of the Schemmel land at and prior to the Iowa-Nebraska Boundary Compact and Iowa was exercising no incidents of jurisdiction over that area at and immediately prior to the Compact.

None of the Schemmel Island area was on the Iowa tax rolls in the 1930's or 1940's up until the time of the Iowa-Nebraska Boundary Compact.

The evidence does show that some of the area east of Schemmel Island and west of the Iowa Chute did appear on the Iowa tax rolls commencing in approximately 1934 and from 1934 to 1943 this area was on the tax rolls of both states. However, the Iowa records failed to show the systematic taxation and exercise of jurisdiction over the area to the east of the Schemmel land between it and the Iowa

chute as is shown by an examination of the Nebraska records, and the Iowa records show no taxation or exercise of jurisdiction by Iowa over the Schemmel land.

Testimony of witnesses called by Iowa and residing on the Iowa side of the river recognized that the Iowa Chute was abandoned bed of the Missouri River.

It was generally recognized by the residents in the vicinity that the Iowa Chute marked the abandoned main thread of the Missouri River.

At the time of the Iowa-Nebraska Boundary Compact of 1943 the State of Iowa, its subdivisions and instrumentalities, were exercising no incidents of jurisdiction over Schemmel Island. The State of Iowa was making no ownership claims to Schemmel Island and the State of Iowa was exercising no incidents of possession of Schemmel Island.

Ownership and Possession of Schemmel Island

The Schemmel family (reference to the Schemmel family includes Dan Hill who initially purchased the land with Henry Schemmel but whose interest was subsequently conveyed to the Schemmels) have exercised all the rights and obligations of ownership and possession of the land from 1938 to the present, a period of approximately 33 years to the present date and approximately 25 years before the State of Iowa filed a quiet title action in the District Court of Fremont County, Iowa making claim to the land.

The Schemmels acquired the first Nebraska deeds to the land in 1938 which trace back to the 1905 court sale

and 1908 Otoe County Treasurer's Deed and approximately a year previously had purchased a tax sale certificate in Nebraska to the land. In 1939 "no trespassing" signs were posted and much of the land was seeded to grass.

Mr. Schemmel made his Nebraska title of record in Iowa in 1939 by recording various documents including deeds and by notifying county officials of Fremont County, Iowa by letter stating ownership to this Nebraska land which had been placed on the east side of the Missouri River by the work of the Corps of Engineers.

In 1941 Mr. Schemmel and the Schemmel family had their title quieted by two Nebraska quiet title actions, and a Nebraska quiet title decree to some of the land was filed of record in Fremont County, Iowa and Mr. Schemmel again notified the Fremont County officials by letter of his ownership and that the land was in Nebraska. The Iowa officials took no action to counter this claim that it was Nebraska land.

Fremont County, Iowa officials were on record notice at and prior to the Compact of 1943 that there was a good Nebraska title claimed to the Schemmel area. There was no record claim whatsoever by the State of Iowa to the Schemmel land.

The Schemmels paid taxes in Nebraska from 1938 through the adoption of the Iowa-Nebraska Boundary Compact of 1943 and were paying taxes in Nebraska when the Compact was adopted. No such taxes were being levied at that time in Iowa.

In 1939 none of the land on the Iowa side was under cultivation but in the years previously, someone had been

farming the land on the Nebraska side of the area which Henry Schemmel acquired and which remained in Nebraska after the dredging of the Otoe Bend Canal. From 1939 until 1943 the Schemmels seeded the island to grass and south of that put down a well and put in a tent which washed away in the first flood. In 1943 Mr. Schemmel went into the service and his partner took care of the real estate; and when Mr. Schemmel returned he found that the land on the left side of the present channel was in the State of Iowa by virtue of the 1943 Boundary Compact. He asked the Auditor of Fremont County in Sidney to place the property on the tax records so that the Schemmels could pay taxes in Iowa. Sometime after January of 1947, the County Auditor and County Treasurer of Fremont County, Iowa came to the Otoe County, Nebraska Courthouse to consider the transfer of the land and told Mr. Schemmel that there had been a court action in Mills County, Iowa and that they were required to put the land on the tax books. Mr. Schemmel, who at that time was Otoe County Treasurer, referred them to the Clerk's office to check the plats and verify the location of the land. After that, the land was placed on the Iowa tax records and Mr. Schemmel and Mr. Hill commenced paying taxes in Iowa in 1949.

The land was placed on the Iowa tax rolls under Iowa description. Consequently, following the Compact, the Fremont County, Iowa officials recognized after investigation that the land had been ceded to Iowa from Nebraska.

The Schemmels continued to post the land with no trespassing signs in the 1940's and also continued the seeding of the area with grass. Since placing the first "no trespassing" signs in 1939, the Schemmels have continu-

ously excluded trespassers and no one other than the Schemmels or their tenants have ever been in possession. The Iowa Conservation Commission has never put up signs around the land.

The Schemmels contacted a contractor in 1948 concerning the clearing of trees and vegetation from the island so that it could be farmed but the east channel was still quite active at that time and a decision was made to wait.

Because the Auditor of Fremont County, Iowa had given the land a different description from the Nebraska surveys and because Mr. Schemmel wanted to obtain title with an Iowa description for the same land in order to clarify and establish the rightful ownership in case he should decide to sell or mortgage the property, he allowed the land to be sold at Iowa tax sale on advice of his counsel. He then purchased the land at tax sale and assigned the tax certificate to his daughter and tax deeds were issued to her. Three tax deeds are in evidence dated November 2, 1955 from the Fremont County Treasurer to Mary Leah Persons conveying the greater portion of Schemmel Island. These deeds were issued by the treasurer by virtue of the authority in him vested by law and indicated that the land had been sold at regular sale at public sale. This sale was made pursuant to Iowa statutes which provide that the title conveyed includes "all the right, title, interest, and claim of the state and county thereto." (Sec. 448.3, Code of Iowa).

Mr. Schemmel had a garden on the island in approximately 1954 and the first clearing of the island was done in 1955 to 1956. The first crop was grown on the island

in 1956. The land has now been almost completely cleared, leveled and a levee constructed, making it valuable and highly productive farm land.

From 1957 to approximately 1965 the land was rented out by the Schemmels to various tenants and since approximately 1965 the Schemmels have farmed it themselves. On the main island today there is presently around 400 to 450 acres in cultivation. In 1968 the corn yield averaged 105 bushels to the acre of corn and 40 bushels to the acre of beans. The Schemmels have had the land in the government farm program since 1957 with the exception of one year.

The Schemmels started building corn cribs in 1957 on the land immediately to the east of the island on the protected side of the levee and from then until about 1962 they were either building cribs, quonsets, or round bins. The Schemmels have stored and sealed grain in those cribs since commencing in 1957.

The Schemmels have paid real estate taxes on the land since 1949 in Iowa. Iowa has also taxed and assessed the Schemmel buildings.

The Schemmels spent approximately $50,000 to $60,000 in clearing the land. Their 1968 taxes to the State of Iowa were approximately $1,200.

The area is no longer an island but the Schemmels have a crossing across what was the old channel so that they can drive to the island.

The clearing, picking up of sticks, girdling of trees and discing the land to get it ready for production would

cost approximately $200 an acre. This land is now valuable and productive farmland with some of it worth approximately $400 per acre or more and the Schemmel land was appraised at $180,500 as of December 1, 1967. Some of the witnesses also testified to their opinion of the value of the land which was higher than the appraiser's.

The State of Iowa paid no attention to the land until it had been made valuable farm land by the Schemmels. Iowa had been placed on notice by filings in her Recorder's office in 1939, four years prior to the Compact, of the Schemmel family claim under a Nebraska title to the land. Iowa made no claim to the area in 1943 and at no time until indication in the Planning Report of 1961 that they intended to file a quiet title action to the land. Then in 1963 Iowa filed an action to quiet title to the land in the District Court of Fremont County, Iowa, almost 20 years following the Compact. From 1949 up to the present, the Schemmels have paid real estate taxes in Iowa and are paying them at the present time even though Iowa is making a claim that Iowa is the owner of this land.

Iowa acquiesced in the Schemmels' claim of title by making no claim on behalf of the state within a reasonable period of time following the Compact, and by her taxation of the land and the general recognition of the Schemmel possession and title. It is unjust and inequitable to allow Iowa to accept taxes on the land for such a period of time and then claim that the land has always belonged to the State of Iowa in this type of situation. (See *United States Gypsum Co. v. Greif Bros. Cooperage Corp.*, 389 F. (2d) 253 (8th Cir., 1968).

The Case of the State of Iowa v. Henry E. Schemmel, et al.

On March 26, 1963 the State of Iowa filed a petition in the District Court of Iowa in and for Fremont County, captioned "*State of Iowa v. Henry E. Schemmel, et al.*, defendants, Equity No. 19765." This petition merely alleged that Iowa was the absolute and unqualified owner in fee simple of the real estate described consisting of approximately 660.944 acres and that all other claims to the real estate were wholly without merit or right. There was nothing else in the petition to indicate the theory under which the State of Iowa was claiming the land.

Prior to the filing of this quiet title action no official from the State of Iowa had discussed the claim with the Schemmels and no one had inquired of the Schemmels as to what the basis of their claim to the property was. When the defendants claimed that the State of Iowa was in violation of the Iowa-Nebraska Boundary Compact of 1943 in failing to recognize the Schemmels' title and rights to the land under Nebraska law, the State of Iowa denied that the land in controversy was ever located within the State of Nebraska. Iowa then alleged that the land formed in Iowa and has been in Iowa continuously since it came into existence and alleged that the common law of Nebraska is irrelevant and immaterial to any issue in the case. Trial was commenced and Iowa called only two witnesses, the surveyor who made the traverse around the Schemmel area for the State of Iowa and Mr. Raymond Huber, a former employee of the Corps of Engineers. Iowa only traced the history of the river back into the 1920's, ignored all previous history of the river, and relied upon the presumption concerning avulsions and that all previous movements of the river had been gradual or by accretion. Iowa

placed the burden of proving an avulsion upon the defendants or land owners and had no proof, "except incidental proof that there was no avulsion in the first instance, being our intention to rely on the presumption in the first instance, at least."

Consequently, Iowa put in only a minimum of evidence and placed the entire burden of showing the history of the land upon the defendants. Iowa did this apparently knowing that the Corps of Engineers had dug a canal in Nebraska during the time that the Corps was moving the channel into its design in the Otoe Bend area.

Iowa took the position that she had physical possession of the land. Iowa interviewed no persons concerning the formation of the land prior to the filing of the suit. She had no discussions concerning formation of the land with any of the defendants named in the action. The only persons having knowledge of the relevant facts concerning the formation of the land where members of the Attorney General's office, Mr. Huber and Mr. Gerald Jauron, a Conservation Commission employee. Iowa had not pursued any investigation with any individuals who purported to have some recollection of the Otoe Bend or Schemmel Island area running back to the 1930's because it was the state's opinion that relevant facts were "all fully, clearly and indisputedly established by the available records, maps, plats and photographs inspected with investigation and study of the area itself. Any other evidence based on human recollection as to the matter would be clearly cumulative, or if in conflict with the documentary proof would be unworthy of belief."

Iowa made no investigation into the records of the Register of Deeds of Otoe County, Nebraska or the records

of the District Court of Otoe County, Nebraska prior to the filing of its case against the Schemmels. Her officials did investigate the records of Fremont County, Iowa to obtain names of possible parties defendant and their only other investigation was in maps, plats and photographs of the Corps of Engineers office in Omaha and the Secretary of State's office in Des Moines and the Fremont County A.S.C. Office and the Fremont County Courthouse. The mass of evidence offered in this case concerning Nebraska titles and exercise of jurisdiction prior to the Compact was ignored, as was Iowa's taxation of the land and the general recognition in the area of the Schemmel title. As in the Babbitt case, Iowa utilized Section 1 of the Compact to establish that the land was in Iowa, but she completely ignored Section 3 of the Compact regarding private titles.

The same principles of acquiescence, prescription, and general recognition of boundary applicable to the Babbitt land and the Nottleman Island area are also applicable to the Schemmel land. The exercises of jurisdiction by the State of Nebraska by having surveyed the land, taxed the realty, quieted title, Nebraska conveyances and the fact that the inhabitants of the area all considered it to be in Nebraska, coupled with a complete lack of exercise of any jurisdiction over the area by the State of Iowa together with concurrent removal of the land from the tax rolls from the State of Iowa and recognition by the State of Iowa of the abandoned Missouri River channel in the Iowa chute to the east of the Schemmel property, would seem to be conclusive that this was Nebraska land prior to the Compact. The taxation of the land by the State of Iowa, issuance of Treasurer's tax deeds, and recognition by the county officials and Iowa inhabitants following the Com-

pact substantiate the fact that it was Nebraska land ceded to Iowa under the terms of the Compact. Just as in the Babbitt case, the State of Nebraska asserts that the burden placed upon the Schemmels to have to establish this history is unconscionable and they should not be subjected to this type of attack by the State of Iowa. The tremendous mass of evidence substantiating these exercises of jurisdiction and recognition over the years was obviously extremely difficult to obtain, expensive, and time consuming because of the long passage of time. Obviously, it is extremely difficult in 1969 to find eye witnesses who can place the location of the Missouri River in 1900. Iowa should not be allowed to make claims which place this burden on an individual landowner in this type of situation.

History of the Movements of the River in the Schemmel Island Area and Formation of the Land

Although the court has found that the recognition testimony and the conduct of the states is determinative of the fact that the Schemmel area must be recognized by the State of Iowa as having had a title good in Nebraska at the time of the Iowa-Nebraska Boundary Compact and the State of Iowa must recognize that title regardless of how or where the land actually formed, the court makes the following findings of fact concerning formation of the land in the event that it should finally be held that the burden does lie upon the landowner to prove how his land formed and that the land was actually in Nebraska prior to the Compact:

The evidence shows that when Nebraska was admitted into the Union, the Missouri River was originally in ap-

proximately the same position which it presently occupies in the Schemmel Island area but that, from the time the two states were admitted into the Union, the river commenced to work easterly and cut away land on the Iowa side. The evidence consisting of many old maps, surveys, Corps of Engineer records and the county records in Otoe County, Nebraska and Fremont County, Iowa all substantiate that the river developed a pronounced easterly bend following admission of the two states into the Union. In the development of this bend the land was cut away on the Iowa side and accretions were added to the Nebraska right bank. By the turn of the century, the river had moved easterly to a location later called the Iowa Chute by the area residents, approximately two miles east in some places of where the river was originally and where the designed channel is today.

Between 1900 and 1905 the Missouri River cut through the bend or point bar, leaving Nebraska land on the left bank of the Missouri River located between the Iowa Chute and the 1905 location of the Missouri River. This movement constituted an avulsion, leaving the Iowa-Nebraska State Boundary in the abandoned channel described as the Iowa Chute until 1943.

Physical evidence in support of this avulsion can be found by the location of a tree which Nebraska's expert testified commenced to grow in the year 1895. The location of this tree was on the Nebraska or right bank according to the 1895 Pierce Survey by the Otoe County Surveyor pursuant to direction by the Otoe County, Nebraska Board of Supervisors. This was a cottonwood tree growing on the Nebraska bank while the river was to the east, the

tree survived the movement of the river to the west which shows the land in the bend was cut off. Had the lateral migration of the river been gradual, the soil supporting the roots of the tree would have been eroded and the tree would have been washed away. Instead, the tree remained strong and growing up until the time of this lawsuit when it was cut down in 1965. Iowa's expert witness, Ruhe, stated that the river could have moved across the place where this tree was located without destroying the tree. There is some dispute among the experts, as Iowa's tree experts testified that the tree commenced to grow in approximately 1903, but even this merely narrows the period of time in which the avulsion occurred to between 1903 and 1905.

This movement of the Missouri River across the bend was described by Nebraska's expert geologist, Dr. William Gilliland, an eminent and well qualified expert in the field of geology, as typical of a meandering stream. Dr. Gilliland explained that the Missouri River in this particular area moved in the same fashion that typical meandering streams moved, basically by erosion on the outer portion of the meander causing a shifting of the meander towards the outside with simultaneous deposition on the inside of the bend on the point bar. Dr. Gilliland used several maps and comparisons to demonstrate the movement of the river and testified that the only possible way that it could have come back from its 1895 position to the position in 1905 was through an avulsive change by means of a neck cut-off or chute cut-off. He knew of no other manner by which the river could have moved from its indicated 1895 location to its indicated 1905 location other than by an avulsive change.

Dr. Gilliland explained how when the river goes around a bend, the distance between the top of the bend and the bottom of the bend is shorter across the bend although the elevation is the same so there would be a steeper path across the bend than around the bend. Because of the steeper path the water would flow more rapidly and more rapidly flowing water erodes more easily. Consequently, in a time of high water it is not unusual to find the water flowing through the shorter path across the neck of the bend or along a chute through the bend. Such water tends to flow more rapidly and erode away a new channel. The 1905 channel flowed through a natural chute or slough across the accretion area or point bar as observed on the 1890 map.

Dr. Gilliland's testimony was based upon a two-fold analysis:

(1) A succession of maps showing a succession of positions of the river and

(2) Confirmation by the experimental and other empirical data typifying this as a typical meander consistent with the movement of meanders in other areas.

The avulsive change caused the river to flow in an area considerably west of the maximum eastward location of the river, leaving part of the land which had been built up on the Nebraska point bar, or accreted to the point bar, exposed. The 1895 tree was growing on this area. In all subsequent maps, the river has not extended as far east as it did in the most easterly position prior to 1905. It also did not extend as far east as the 1895 tree. Schemmel Island is located in the area that was a point bar in Nebraska prior to the avulsive action.

Although Iowa had expert testimony tending to attempt to establish that the river moved gradually to the west from its position in the Iowa Chute, the evidence completely discredited this position.

Dr. Gilliland's explanation is consistent with the theory utilized by the Corps of Engineers in their construction works along the river and is consistent with basic geological data submitted. His expert testimony is entitled to great weight. This avulsion, leaving the boundary in the abandoned channel of the Iowa Chute, has a remarkable similarity to the "Ike Chute" and the classic example of an avulsion described in the case of *Arkansas v. Tennessee*, 397 U. S. 88, Decree at 26 L. Ed. 2d 537.

The Iowa Chute was generally recognized as abandoned channel of the Missouri River both by witnesses and records in the Fremont County, Iowa courthouse.

There was also eye witness testimony that in 1911 or 1912 the river made a natural jump to the west in the Schemmel area, leaving an area three miles long and a mile wide. This constituted another avulsion consistent with the principles explained by Dr. Gilliland, placing the entire river further into Nebraska.

The Iowa Chute marks the thread of the abandoned channel of the Missouri River which marked the boundary between Iowa and Nebraska immediately prior to the adoption of the Iowa-Nebraska Boundary Compact of 1943.

It should also be noted that most of the land between the Schemmel area and the Iowa Chute has been cleared of trees and the 1895 tree discovered by the plaintiff is the only tree in that vicinity and was located on a fence

line or property line. Otherwise, it, too, might have been destroyed and the physical evidence helpful to the establishment of the Schemmels' claim might easily have been destroyed merely because of the passage of time.

Movement of the Missouri River by the Corps of Engineers and the Otoe Bend Canal

An avulsion of the Missouri River to the west occurred in the Schemmel area as a result of the construction work by the Corps of Engineers between the years 1934 and 1938.

In 1934, the Corps of Engineers commenced work in the Schemmel area to place the river in a designed channel of 700 feet. Immediately prior to commencement of the work the principal flow of water or the main thrust of the water and the path which the boats used was along the east or left bank. Pile dikes were driven from the east bank across water and then across land and bar area. The Corps experienced some difficulty in diverting the water due to an easterly tendency of the flow. Because of this difficulty, the Corps was required to dig the Otoe Bend Canal in 1938 in order to place the river in the designed location. This canal was dug through Nebraska bank and bar land and was approximately one mile long. The State of Iowa admits that the canal was dug entirely in Nebraska.

The evidence shows that the river was placed considerably to the west of its 1934 location and around a substantial piece of land with vegetation upon it. This is substantiated not only by the testimony but also by ground level photographs taken in 1938 by the Corps of Engineers. It is further substantiated by the findings of Mr. Weakly,

Nebraska's dendrochronologist. Even Iowa's tree expert recognized that trees had commenced to grow on some of the land prior to the dredging of the canal and these trees were not destroyed by the movement of the river to the west around that land area. One of the surveyors who helped to lay out the canal said that they walked to the area from the Nebraska side and did not cross any water.

Some of Nebraska's witnesses were highly familiar with the area and had worked on the site for the Corps of Engineers, both in the construction of the dikes and in the dredging of the canal. Nebraska's witnesses lived close to the area and were familiar with the river. Iowa's witnesses were more casual witnesses and not as familiar with the river and the river work as were those of Nebraska.

By 1939 all structures were completed and the river has remained in the designed channel continuously to the present day. Following the completion of the work a channel flowed around the east side of Schemmel Island along the former left bank and this is the last place that water continued to flow. I find that, had the boundary not already been located in the Iowa Chute as the result of a prior avulsion, and had the river been the boundary at the time the Corps of Engineers commenced their work, this construction activity of the Corps and the dredging of the canal constituted an avulsion which would have left the boundary between Iowa and Nebraska in this abandoned channel to the east of Schemmel Island.

It should be noted that there is some Schemmel land to the east of this abandoned channel which is owned by the Schemmels as the result of their Nebraska titles and

the same indicia of ownership through which they claim the island, and the State of Iowa does not now claim and has never claimed this land. The Schemmels are in peaceful possession of the land to the east of Schemmel Island. Iowa has never claimed abandoned bed in the Iowa chute or between Schemmel Island and the Iowa Chute.

The court finds that the Corps of Engineers moved the main navigable channel of the Missouri River from the east side of Schemmel Island to the west side into the designed channel, thereby creating an avulsion. If it should be determined that the Iowa Chute was not the boundary between Iowa and Nebraska, then the Iowa-Nebraska Boundary immediately prior to the adoption of the Iowa-Nebraska Boundary Compact of 1943 would have remained in the east abandoned channel of the Missouri River and the thread of that channel constituted the boundary between Iowa and Nebraska prior to the Compact. At that time, the entire Missouri River was located in the State of Nebraska with both the right and left bank a part of Nebraska and title to the bed of the Missouri River in that place was in the Nebraska riparian owners subject to the public easement of navigation under Nebraska law. The abandoned channel on the east side of Schemmel Island carried flowing water for several years and eventually ceased to flow and presently the island can be reached by road leading into the island from the east.

Iowa's traverse of Schemmel Island had no basis in fact along the eastern side of Schemmel Island. It followed no geographical feature marking the left bank ordinary high water mark as alleged by the State of Iowa. The traverse goes through an alfalfa field, across flat open

ground, crossing a high bank at right angles, and across land with no depressions or banks. Just as in the *Babbitt* case, the eastern line is apparently an arbitrary determination by Iowa's surveyor without justification in fact. It is another indication of the lack of precision in the work of the State of Iowa, inadequate investigation and the arbitrary approach of her officials.

THE OTHER AREAS SOUTH OF OMAHA

The evidence has established that the Missouri River was located in the designed channel south of Omaha in 1943 and the Missouri River has remained in the designed channel ever since that time. All of the areas listed in Part 1 of the Missouri River Planning Report south of Omaha were in existence at the time of the Compact and no evidence has been introduced establishing that Iowa was claiming any of these areas at the time of the Compact and up until the Planning Report of 1961.

Most of these areas had been cleared by 1961 and were in the possession of private individuals. These are large and valuable areas.

The evidence has established that one of these areas is the combination of two separate islands which were bisected by canals dug by the Corps of Engineers in 1937 and 1938 and the two islands grew together until they now appear as one contiguous area. Iowa is only claiming the portion of those two islands which were placed in Iowa by the Compact. Iowa has made no claim to the portions

of the two islands which remained in Nebraska following the Compact.

The evidence has further established two early avulsions prior to 1900 south of Omaha where Iowa has never made any claim to the abandoned channels of the Missouri River and where Iowa has purchased land from individual claimants in such areas. The State of Iowa purchased part of Lake Manawa from the Nebraska owner by deed filed January 23, 1932 which was prior to the Compact. The other purchase by the State of Iowa was of land in the abandoned river bed around Nebraska City Island.

Following 1943 Iowa knew where the state line was located and yet Iowa failed to make any claim to these areas south of Omaha until the Missouri River Planning Report of 1961. She waited until many of these areas were made rich and valuable farm lands before making any claim. It is neither fair nor equitable to allow Iowa to make any claim to any of these areas south of Omaha, whether listed in the Missouri River Planning Report or not, under the circumstances of this case.

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THE AREAS NORTH OF OMAHA AND MOVEMENTS OF THE RIVER FOLLOWING THE COMPACT

Considerable evidence has been offered concerning other areas along the Missouri River. Generally, the areas which Iowa claims north of Omaha, Nebraska are claimed as a result of natural movements of the Missouri River in escaping the designed channel following 1943 and river

work by the Corps of Engineers in either moving the designed channel or placing the river back into the designed channel. Since 1943 the Corps of Engineers has redesigned much of the channel north of Omaha and from maps offered by the Plaintiff, it appears that both banks of the Missouri River of 1965 were wholly out of the 1943 designed channel and within the State of Nebraska for approximately 21 miles and both banks were completely out of the 1943 designed channel and in the State of Iowa for approximately 14 miles. In addition, there are places north of Omaha where just a portion of the Missouri River, but not both banks, is located outside of the confines of the 1943 designed channel.

The evidence shows the situation north of Omaha resulting from prior movements of the Missouri River to be even more indefinite and confusing than south of Omaha. There are many abandoned channels and ox-bow lakes and other physical features indicating locations of the river in the past and the maps in evidence and comparisons of various channels show many movements of the river. Iowa was making no claim to these abandoned channels at and prior to the adoption of the Compact. As late as 1956, Iowa disclaimed any interest in what was abandoned river bed in a quiet title action brought by individual landowners in an Iowa court. Even at the present date, Iowa has been selective as to which abandoned channels or areas she is claiming.

Iowa contends that upon the adoption of the Iowa-Nebraska Boundary Compact, Iowa's common law concerning title of the state to beds and abandoned beds of the Missouri River immediately came into operation to

establish Iowa title to the bed of the Missouri River to the east of the Compact line. Iowa takes this position regardless of whether that bed had been in Iowa or Nebraska prior to the adoption of the Compact.

The evidence has established two situations, Winnebago and California Bends, where, because of previous natural avulsions or the dredging of canals by the U. S. Army Corps of Engineers prior to 1943, the entire bed of the Missouri River was moved into the State of Nebraska by avulsions. Nebraska contends that this entire bed and both banks of the Missouri River were in Nebraska immediately prior to adoption of the Compact and, when Iowa agreed to recognize Nebraska titles in the Compact, she was bound to recognize private ownership of the bed and both banks of the Missouri River and Iowa did not acquire title by the moving of the boundary to the Compact line in the designed channel. In these two instances, the river following the Compact moved out of the 1943 designed channel and into Iowa but did not reach the pre-1943 location or abandoned channel, and after this movement the Corps of Engineers again dredged canals in the location of the 1943 designed channel and placed the river back into the 1943 designed channel, again by avulsive action. Iowa is claiming, by virtue of its sovereign right, all of the area to the east of the 1943 Compact line which was covered by waters of the Missouri River following the Compact including those areas inundated as the river moved to the east. However, in both of these areas Iowa has not and is not claiming the abandoned beds of the Missouri River as a result of the avulsions prior to 1943. In Winnebago Bend, in 1937, Iowa was aware of abandoned

channel because the State of Iowa appeared and intervened in the case of *United States of America, Trustee and Guardian for the Winnebago Tribe of Indians, Plaintiff v. Wilbur Flower, et. al.*, in the United States District Court, District of Nebraska, Omaha Division. At that time Iowa only intervened ". . . in order to protect its rights as a sovereign in and over a territory belonging to it, and to save and protect its rights to assess and collect taxes on said lands . . ." Iowa then withdrew, but the case established an avulsion which necessarily placed a portion of the Missouri River entirely in the State of Nebraska, leaving abandoned channel on the left bank side of the Missouri River. Iowa made no claim to that abandoned channel prior to the Compact and when some of that abandoned channel became the subject of a quiet title action in Iowa in 1956 in the case of *Kirk v. Wilcox*, in the District Court of Iowa, the State of Iowa admitted that the individuals were the owners of the real estate as accretion land.

In California Bend, an action to quiet title to land in the abandoned channel was filed in 1959 and the State of Iowa failed to assert any claim by the state as sovereign to this area. An official of the Iowa Conservation Commission testified that Iowa might have a claim to other abandoned channels in the California Bend area, but so far they have not made any such claim.

Nebraska contends that the river was entirely in Nebraska at the time of the Compact in these places and the title to the bed was in the Nebraska riparian owners on both sides. This was a vested riparian right which the Compact could not take away from the landowners merely by the transfer of jurisdiction. Nebraska contends that

following the Compact the riparian owners continued to own the bed of the Missouri River subject only to the public easement for navigation and use under Nebraska law. Iowa had no claim to such bed and could not assert any claim to that bed or to future beds of the Missouri River in that area since they all belong to the riparian owners. Had it not been for the Compact, the entire bed of the Missouri River would have been entirely in Nebraska at both these places. Iowa cannot by the Compact and the mere changing of the jurisdictional line obtain a title from the Nebraska property owners.

In both of these areas, the pre-1943 boundary was obviously and knowingly considerably to the east of the 1943 Compact line and the Missouri flowed entirely in Nebraska. However, Iowa disregarded completely the pre-1943 line and the Nebraska titles and riparian rights in order to make a claim under her common law. Iowa's claim is dependent upon the fact the land is "in Iowa", but it overlooks the fact that the only reason the land is in Iowa is because the Compact placed it there. Had there been no Compact, Iowa could have made no claim because the land would have been in Nebraska.

The Compact was intended to protect property owners from such an attack yet Iowa boldly asserts her claim of title in situations where she knew that at the time of the Compact the land was entirely in Nebraska. Such an unfair situation cannot continue.

In another situation considered in the evidence, the parties are in substantial agreement as to the facts. In the Tyson Bend area north of Omaha, prior to 1946 the main and only channel of the river was the designed chan-

nel which was west of the area in dispute. The Iowa-Nebraska Boundary was the center of said channel by reason of the 1943 Compact. In 1946, 1947 and 1948 the main channel left its designed channel and gradually moved southeasterly, washing away all of the land then existing in the disputed area. In 1947 or 1948, two small sandbars appeared in the disputed area behind this southeasterly movement of the main channel, with the main channel flowing to the east of them with water still flowing to the west of them in the designed channel. Vegetation appeared on the sandbars in 1948 indicating that they were above ordinary high water mark and had attained the status of islands. Later in 1948, the Corps of Engineers repaired some of their dikes in the area so as to again place the main channel in its designed channel to the west of the islands. The islands were not destroyed by this movement.

In the spring of 1949 the main channel again escaped from the designed channel and moved to the channel east of the islands. This movement of the main channel in the spring of 1949 was also accomplished without destroying the islands.

The main channel continued to flow through the channel east of the islands until about 1959 when the Corps of Engineers repaired their dikes so as to again place it in the designed channel. The 1959 movement was also accomplished without destroying the islands.

In this situation, Iowa has taken the position that Iowa law concerning state ownership of the bed of the Missouri River applies to all of that area which is east of the 1943 Compact line. Iowa further has taken the position that the Nebraska riparian owner in this type of situation can-

not accrete across the state line and that his title terminates at the state line. Iowa contends that as a matter of law there cannot be accretion across a fixed State boundary line from Nebraska into Iowa.

Nebraska contends that this is a situation where had it not been for the Boundary Compact establishing a fixed line between Nebraska and Iowa the result would necessarily be that when the river moved out of the channel towards the south and east or into Iowa, the boundary would have moved with the river and the islands or riverbed forming behind this movement would have been on the Nebraska side of the main channel of the river and part of the Nebraska riparian owners' lands. Then when the river was placed back to the northwest in the designed channel without washing away those lands, there would have been an avulsion leaving the islands or land area in Nebraska although on the left bank of the river. These islands would have remained the property of the Nebraska riparian owner.

The State of Iowa is using the fixed Compact line as the commencement of its ownership, ignoring the fact that the Nebraska riparian owner owns the bed to the middle of the main channel and owns any islands or bar areas in that bed.

Iowa cannot by the subterfuge of contending that because the land is in Iowa, Iowa common law applies, deprive the riparian owner of his property rights whenever the river moves to the east of the Compact line. To so hold would result in the deprivation of vested property rights of the Nebraska owners. It does not follow that because both banks of the Missouri River are now in Iowa, that

Iowa owns the entire bed. The Compact was not intended to deprive property owners of such rights and could not do so without violating their rights without due process of law.

In another instance, in Middle Decatur Bend or the Riley J. Williams case, following the Compact, the river moved out of the designed channel to the east and into Iowa. The United States Army Corps of Engineers condemned land for a perpetual easement in which to maintain channel improvement works and the State of Iowa made claim to the proceeds of this condemnation of the land from the state line to the right bank of the Missouri River which was then located in Iowa. Consequently, Iowa is claiming from the state line, which was the 1943 Boundary, to the right bank of the Missouri River. Iowa claims that the Nebraska riparian owner cannot accrete across the state line into Iowa. In this situation, Iowa is using the Compact line to terminate the riparian right of the Nebraska owner and to commence Iowa's claim of title to land described by Iowa counsel as accretion. This accretion had to be to the Nebraska riparian owner's land as it is on the right bank of the Missouri River. Iowa is again using the Compact to deprive the Nebraska riparian owner of a vested property right and to take his property without compensation. If the Compact had never been enacted, Iowa would obviously have had no claim because this land would have been in Nebraska.

In this situation, the compensation which Iowa is claiming from the Corps of Engineers and against the Nebraska riparian owner amounts to only $2,070 and Iowa counsel informed the district court in that condemnation

case which is presently pending, that they had sufficient evidence to present to take between two and three weeks for trial of the case. The attorney for the landowner testified that the landowner could not afford to try the case because under any circumstances, if the landowner won he would still lose from a monetary standpoint because of attorneys' fees, surveyors' fees, and expense which would be more than the amount of the award. Iowa also took the position that, although there was only a small amount involved, the decision in the Riley Williams case would probably, as a practical matter, determine ownership of considerably more land which the State of Iowa claims to own both above and below this particular tract. This is a clear illustration of how Iowa can afford to use its economic resources against small landowners to obtain a legal precedent to enable her to further violate the Compact.

This evidence illustrates the unfairness precipitated by a mere decision by the State of Iowa to attack a landowner's title in the Iowa courts. The assumption that the defense of such an action will generally assure ample vindication of the landowner's rights guaranteed by the Compact is inadequate in these cases.

All of the evidence has shown that it is practically impossible to locate the pre-1943 boundary between Nebraska and Iowa except at Carter Lake, Iowa where the line was definitely determined by decree of the United States Supreme Court. This is the only line that was specifically identified in the Compact because it was the one area where a binding determination had been made upon both states. The State of Iowa recognized prior to the Compact

that the Missouri River had by avulsion abandoned its channel and formed a new channel at numerous places throughout its course, which is a common characteristic of the river. The court is satisfied that, except at Carter Lake, neither state knew where the boundary was at the time of the Compact and both states intended to enter into an agreement which recognized that situation and would avoid any requirement of finding that pre-1943 boundary. Otherwise, they could have entered into an original action in the Supreme Court of the United States to make such a finding but this would have been extremely time consuming and expensive. The Compact was adopted with a clear intent to recognize Nebraska owners' riparian titles and rights.

In those places where the river was in fact entirely in Nebraska prior to the Compact, Iowa had no claim whatsoever to the bed of the Missouri River. It could not acquire such title by the movement of the State line by agreement between the states. Since neither state knew where the river was entirely in Nebraska, but accepted the fact that this was so in numerous places, and since the burden and expense of having to prove such condition should not be placed upon the landowner because the states and not the landowners entered into the Compact of 1943, the only fair and equitable manner in which the Nebraska riparian owner can be protected is to hold that Iowa cannot make any claim to the beds or abandoned beds of the Missouri River or the present bed of the Missouri River under its common law. This also follows because the former state boundary and the Compact boundary were different for almost the entire length along the border between Iowa and Nebraska.

Under Nebraska law, when a riparian owner owns property along a navigable stream his title extends to the thread or middle of the main channel of that stream and this principle is applicable under the common law to Nebraska riparian owners along the Missouri River. Iowa contends that by changing the boundary between the states to a fixed line, that this changed private property boundaries and limited the Nebraska riparian owner's title to the state line. Nebraska contends that private property boundaries could not have been changed from a movable boundary to the fixed state line by the Compact without compensation to the landowners. Any such change would deprive them of their property without due process of law. Nebraska contends that the boundary of the private property owners continues to extend to the thread of the main channel of the Missouri River regardless of whether it coincided with the state boundary and the proprietary boundary would continue to move as the thread moved. The court finds that the private property boundaries were not changed by the Compact and the Nebraska riparian owners rights are not limited or cut off by the Compact line. The Nebraska riparian owner's property boundary has continued to remain a movable boundary in spite of the fact that the states have changed their boundary from the movable boundary to a fixed line. A Nebraska riparian owner can accrete into Iowa and he retains his ownership of the river bed and any accretions to that bed even though such bed may now be in Iowa.

In any situation where the river had moved previously by avulsion from Iowa into Nebraska or in any situation following the Compact where the river moved into Iowa,

the most area which Iowa would be entitled to claim would be only that portion of the abandoned channel which is to the east or left bank side of the former thalweg and Iowa under no circumstances would be entitled to claim the entire abandoned bed. The evidence shows that there are situations where Iowa has claimed all of the abandoned bed east of the Compact line and there is no justification for this type of claim.

Following the Compact, when the river moves into Nebraska, Iowa can make no sovereign claim to any area on the Nebraska side of the Compact line. See *New Mexico v. Texas*, 275 U. S. 279.

GENERAL

The issues which Iowa is attempting to interject today concerning how land formed at various places were settled by the Compact entered into over 27 years ago. Iowa should not now be able to raise those questions of where the pre-1943 boundary was as, by entering into the Compact, she elected to settle any rights dependent upon such question by the recognition of private titles and the adoption of a new boundary which both states would thereafter recognize as the jurisdictional line.

Iowa recognized the fact that they could not find the pre-1943 state boundary when she entered into the Compact and she also recognized that neither state ever intended to find it. Iowa cannot make a claim to any area along the Missouri River without having previously established where the pre-1943 boundary was, but this is a pre-

requisite which is inconsistent with the intent of the States in entering into the Compact. Iowa contracted away any claims which hinge upon the location of the pre-Compact boundary.

The Compact negated any presumption that the state line was in the 1943 Missouri River channel or that the river had moved gradually by normal processes of accretion and reliction into that position. The Compact recognized the fact that the boundary was not located in the Missouri River at numerous places and that neither state knew exactly where the boundary was. Had the presumption been true and the Missouri River moved gradually into the 1943 location, there would have been no need for Sections 3 and 4 of the Compact and no need for the Compact itself.

Iowa has violated the Compact in numerous situations by claiming land where Nebraska has proved that such land was in fact ceded or transferred by Nebraska to Iowa. Iowa should not be allowed to continue in such violation and Iowa also should not be allowed to take advantage of the passage of time, death of witnesses, and destruction of evidence in order to claim other areas where it may be in fact impossible to prove the pre-1943 boundary. Iowa under the Compact should not at this time be able to question whether land formed in Nebraska or Iowa. Any requirement imposed by the State of Iowa which would make it necessary for a landowner to prove the pre-1943 boundary in order to protect his title deprives the landowner of the benefits of Sections 3 and 4 of the Compact and constitutes a violation of the Compact by the State of Iowa.

The evidence shows that Iowa is claiming all river bed area to the east of the Compact line resulting from natural movements of the river to the east following 1943 or by construction works along the river by the Corps of Engineers. Iowa claims both the actual bed of the river and any abandoned river beds. In order to do this, Iowa has had to rely upon the Iowa common law and the fact that the land was "in Iowa." This disregards the question of where the land would have been if the states had not entered into the Compact.

The State of Nebraska contends that the Compact is a contract and as such is binding upon the Iowa legislative, executive and judicial branches. Nebraska contends that one branch of Iowa government such as the Attorney General's office and the Iowa Conservation Commission cannot institute actions in Iowa's courts to determine whether the Compact applied to any particular area and whether the protections of Sections 3 and 4 were applicable to such area. Nebraska argues that Iowa cannot be judge in its own case to determine what the Compact means.

The Compact bound the State of Iowa to recognize the titles which have been good in Nebraska and Iowa could not attack these titles under the terms of the Compact. Iowa could not attack these titles under the terms of the Compact when it was adopted and certainly she cannot do so after failing to act so long a time since the Compact.

Iowa, in its preparation of Part 1 of the Missouri River Planning Report, January, 1961, and claiming lands described therein under its common law, utilized Section 1 of the Compact to determine that the land areas were in

Iowa and violated the Iowa-Nebraska Compact by disregarding the provisions of Sections 3 and 4. Iowa also violated the Iowa-Nebraska Boundary Compact in filing the actions of *State of Iowa v. Babbitt* and *State of Iowa v. Schemmel.* The exercises of jurisdiction prior to the Compact by Nebraska over Nottleman Island and the Schemmel land, together with Iowa's recognition that the land was ceded by exercising governmental authority and control over the land in a sovereign capacity following the Compact and by Iowa's failure to exercise proprietary incidents of ownership, are conclusive that the land was within the category of lands ceded by Nebraska to Iowa by the Compact. Iowa has no right to attack these titles and is in violation of the Compact by doing so. Iowa is ordered to dismiss both of these actions with prejudice and to make no further claim by virtue of Iowa's common law to those areas. Iowa has no claim to any areas south of Omaha which were in existence at the time of the Compact but which Iowa failed to claim until the Planning Report.

All of the areas downstream from Omaha, Nebraska listed in Part 1 of the Missouri River Planning Report of 1961, and any areas in existence in 1943 that Iowa subsequently may claim, come within the category of lands ceded by Nebraska to Iowa as Iowa had expressed or made no claim to such lands for at least 17 years following the Iowa-Nebraska Compact although the lands were in existence at the time the Compact was entered into. Iowa now has no right to attack any of these titles.

Although the Compact made a fixed state line for the boundary between Iowa and Nebraska, it did not change private ownership boundaries. The Nebraska riparian

owner, owning title to the bed of the Missouri River, was not deprived of this title by the Compact and when the river moves gradually and imperceptibly or by accretion, the boundary of the Nebraska riparian owner still moves with the thalweg or main navigable channel, regardless of which state the movement is in. The Nebraska riparian owner's title is not cut off or limited by the fixed state line between Iowa and Nebraska but his title can extend into Iowa. Iowa cannot, under its common law, claim title to the bed or abandoned bed or islands arising in the bed of the Missouri River adjacent to or between the thalweg and the Nebraska title or claim, whether such claim extends from the right or left bank.

The evidence has established at least 14 canals dredged or dug by the Corps of Engineers in their river work along the Missouri River and there is in evidence a recognition of numerous cut-offs by natural movements of the Missouri River prior to the Compact. However, the evidence has also established the extremely difficult problem of locating the canals as the Corps records may or may not have been kept showing the location of the canals and many of these maps have been destroyed. The historical documents in evidence recognizing numerous natural cut-offs or avulsions along the Missouri River also do not always locate where these avulsions occurred. Nebraska contends that since these facts were known to the states when the Compact was negotiated and since the states acceped the numerous cut-offs or avulsions and contracted in such manner that neither state desired to have such avulsions located, no party should now be required to establish where these avulsions in fact occurred. The evidence has conclusively established that neither state knew where the

boundary was and neither state intended to locate the pre-Compact boundary.

Iowa has argued that the digging of canals may have not constituted an avulsion because there was not a "substantial area" of land cut off by the canal or because canals may have been dug completely in Iowa. However, under Iowa's argument, a factual determination would now be necessary as to where the location of the pre-1943 boundary was located or the facts concerning the amount of land severed and the states contracted away this right by entering into the Compact.

Any position by the State of Iowa which requires a finding of fact as to the pre-1943 boundary or a finding of fact concerning whether or not there had been an avulsion in any particular area places the landowner in an almost impossible situation because of the difficulties of proof in large part created by Iowa's delay and the passage of time.

Either the Compact must be read in such manner as to give Iowa the means to claim thousands and thousands of acres of land along the Missouri River which Iowa previously had made no claim to or it precludes Iowa from making any such claims. Because the Compact was intended to settle all problems along the Nebraska-Iowa border and to protect the private titles of individuals, it must be read in such manner as to preclude Iowa from making such claims or attacking such titles.

The evidence has established several avulsions either by natural movements of the Missouri River or by the digging of canals by the Corps of Engineers, leaving the river

entirely in Nebraska prior to 1943. In those situations the entire bed of the river being in Nebraska at the time of the Compact, the east half of the bed of the river as well as land on the left bank was "ceded" to Iowa by the Compact. Iowa has no claim whatsoever to the title to the bed of the river in those places and Iowa has no claim to additional bed or new beds resulting from the movements of the Missouri River following the Compact in those places. Iowa must recognize the Nebraska landowner's common law title to the bed of the stream in those places.

The Compact must be read in such a manner that the landowners along the Missouri River are protected in their titles and claims. By entering into the Compact, Iowa foreclosed herself from raising the claim that the land was never in Nebraska or was not in Nebraska at the time the alleged title or Nebraska claim came into existence.

If the Court should determine that Iowa can claim lands along the Missouri River, then before Iowa can make any claim to lands along the Missouri River based upon any common law claim, the burden is upon Iowa to conclusively establish and prove the following:

(1) That there have been no avulsions of the Missouri River or canals dug in the vicinity. This is an affirmative burden which Iowa must bear, and Iowa cannot rely upon any presumption that prior movements of the Missouri River were gradual.

(2) That there were no Nebraska titles or Nebraska claims of title to the land as of 1943 when the Compact was entered into. If a landowner's claim allegedly flows from a Nebraska title or a possessory right commencing in

Nebraska prior to the date of the Compact, Iowa must accept that title. Iowa must recognize that there may not be any record of that title but that the claim could flow from an adverse possession commenced by a Nebraskan prior to 1943 under the Nebraska common law test and without any requirement of "color of title" under Iowa law.

(3) That the records of the Nebraska county offices show that the land was not carried upon the tax rolls in the Nebraska county prior to the Compact, no court actions affecting or purporting to affect the land were of record in Nebraska, that there were no Nebraska deeds or conveyances of the land, and that there is no evidence indicating exercise of jurisdiction over the land by the Nebraska county or the State of Nebraska prior to the Compact.

(4) That Iowa had not taxed such land or the Iowa counties have not taxed such land following the Compact and that the State of Iowa and its officials have not recognized private ownership or titles to such land. If there were any law suits in the State of Iowa in which the Iowa courts have recognized individual titles, Iowa is precluded from attacking the titles to those lands.

(5) As to lands existent in 1943, that the legal description of the land appeared on the Iowa official records available to the public at the time of the Compact, such as the Iowa General Land Office, as state-owned land, and that the Iowa Conservation Commission had marked the boundaries of the land to identify Iowa's claim to the public. Iowa cannot rely upon the nebulous claim that she always "owned" the land because it was an island or abandoned bed of the Missouri River or that she was in posses-

sion of it by the fact that the land was in the public domain, without objective evidence that the specific area had been identified and public claim made by the state so that it was public knowledge in the area that the State was claiming to own the land to the exclusion of all other claimants and anyone searching the public records would discover the land claimed by Iowa identified by its legal description.

In any action by the State of Iowa claiming the common law right to beds or abandoned beds of the Missouri River, Iowa cannot as a prerequisite to its claim, require any other individual to establish the location of the Iowa-Nebraska Boundary prior to the adoption of the Compact in 1943. There is no presumption the pre-1943 boundary location was within the 1943 bed of the Missouri River or that prior movements of the Missouri River had been gradual and imperceptible.

The evidence has proven that the mere attack of a landowner's title by Iowa clouds this title and prevents the landowner from utilizing that land as he would if he had a good title. The evidence has further proven that Iowa, in using state funds to attack the titles, can disregard the value of the land involved and spend more money on attorney's fees and investigation and expert witnesses than the value of the land, in order to obtain a legal precedent to assist Iowa in claiming title to other lands. The costs to the landowner in defending such an action may be more than the value of the land itself so Iowa can use the threat of a quiet title action as a lever to either induce a settlement by the landowner at a much lower value than the land is worth or force an abandonment of the lands by

the landowner because it is not economically feasible for him to defend the action. In order to adequately protect the landowner claiming title to land to which there was a Nebraska title which Iowa agreed to recognize in the Compact, Iowa must indemnify the landowner for all of his attorney's fees, costs of the action, and damages as a result of Iowa's wrongful claim, if Iowa fails to meet these burdens.

Respectfully submitted,

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